



GENDER SECTION NEWSLETTER



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GREETINGS FROM THE CHAIRPERSON



As we publish this issue of our Gender Section Newsletter, we are sharing the unfortunate common experience of managing our personal and professional lives amidst the challenges created by the global pandemic.

I hope that you and your families are healthy and that you are safely able to fulfill your judicial duties.

I suspect, like me, you recognize your good fortune each day. Our education and our vocation have allowed us to continue to work, albeit in different ways and circumstances. However, at least in that respect we have some normalcy in our daily lives.

This pandemic has raised awareness of domestic violence and, in

particular, its impact on women and children.

We report on the portal created by the Commonwealth Secretariat and the No More Foundation, which is "dedicated to ending domestic violence and sexual assault by increasing awareness, inspiring action and fuelling culture change". The new portal launched in September 2020, COMMONWEALTH SAY NO MORE, contains tools, resources and helplines that can be accessed by victims of domestic violence and sexual assault and organizations.

We also report on discussions relating to the impact of customary and informal justice systems on access to justice, the rule of law and human rights, particularly in relation to women and girls, that formed part of the 2020 International Commission of Justice's Annual Forum for Judges and Lawyers. The highlights from the report of the International Development Law Organisation are very valuable.

Plan International's report on online harassment is also thought provoking.

I hope that you will find the reforms to Canadian divorce law interesting. For the first time courts will be obliged to consider the impact of family violence when making parenting orders.

We are pleased to include an article on the domestic abuse legislation being introduced in England and Wales, another example of increased awareness of domestic violence and its impact on victims and their families.

Lastly, we conclude with developments in the field of gender and human rights from around the Commonwealth.

We look forward to keeping in touch and as always welcome contributions to our newsletter.

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We are always pleased to learn of initiatives being undertaken throughout the Commonwealth. We offer our congratulations to Margaret McMurdo, former president of Queensland Court of Appeal, on her appointment to lead a task force advising the state government on criminalising coercive control as a form of domestic violence. No doubt we will be reporting on the work of that task force in future editions of our newsletter.

As we go to print, we support the International Association of Women Judges' (IAWJ) Declaration condemning the assassination of Judge Qadria Yasini and Judge Zakia Herawi from Afghanistan. We believe, as the IAWJ has indicated: *"Women judges courageously undertake their judicial duties under dangerous conditions every day in countries around the world. But being a judge should not be a death sentence. Judges Zakia Herawi and Qadria Yasini were murdered in broad daylight while they were in an official car en route to their work at the Supreme Court. These killings must be thoroughly and immediately investigated and prosecuted in a public and transparent manner. The perpetrators must be brought to justice."* The full statement is available at:

<http://www.iawj.org/statement-on-the-killings-of-women-judges-in-afghanistan/>

COMMONWEALTH SAY NO MORE PORTAL



The Chairperson of the Gender Section and the CMJA Secretary General attended the virtual launch of the portal on SAY NO MORE to Domestic Violence in September 2020.

Baroness Scotland, Commonwealth Secretary General, in her introduction

reported that 1 in 3 women were affected by Domestic Violence globally and 1 in 6 men. Over 750 Million young women and girls were married before their 18th birthday and the cost of Domestic Violence was around US\$ 1.5 Trillion (2016 figures). It is a human rights violation, but most incidents remained largely unreported. Domestic and Sexual Violence continued to be an obstacle to the empowerment of women and to equality. The SDGs could not be accomplished without putting an end to violence against girls. COVID 19 had seen an increase in DV across the world and it was reported that calls to helplines had increased 300 % since the beginning of the pandemic.

At the last Women's Affairs Ministers Meeting it had been agreed that something had to be done and the portal was a way to achieve the mandate and tackle to pandemic of violence. The Commonwealth Secretariat had come together with the No More Foundation:

<https://nomore.org/> to create the portal whose aim was to provide Commonwealth citizens and especially women and girls with all the information they required within their jurisdiction. It was aimed at sharing experiences and to provide support for government efforts to assist survivors of Domestic Violence.

The Commonwealth SAYS NO MORE portal offers countries and civil society organizations easy-to-use tools and resources to boost their efforts in helping victims and those at risk and educating communities. The partnership between the NO MORE Foundation and the Commonwealth Secretariat is designed to help member countries record accurate data on the prevalence of violence, deliver grassroots projects, train community leaders, educate bystanders' responses, and provide awareness resources.

The No More Foundation spoke about the fact that it was only in the

1970s that shelters for women were opened, the first having been opened in Chiswick in London. UK. Today there are shelters in most countries in the world. However, Domestic and Sexual Violence remain a scourge across the global and perpetrators must be made accountable for their action. It was important to ensure that everyone in society was educated and trained in this area. The launch also included moving presentations by two young women who had been the victims of Domestic and Sexual Assault from Nigeria and Samoa.

The portal had taken 2 years to develop and the portal includes resources and tools as well as the helplines available in each country so that people can get help and share experiences. It also provides victims with access to critical information, including local hotlines, shelters, safety guidance, and legal aid – a service particularly important in communities where the pandemic has disrupted such support.

To access the portal and resources go to <https://commonwealthsaysnomore.org/>

WOMEN IN CUSTOMARY JUSTICE AND INFORMAL JUSTICE SYSTEMS

In December 2020, Dr Karen Brewer Secretary General and Justice Patrick Kiage, Regional Vice President for East Central and Southern Africa participated virtually in the International Commission of Justice's (ICJ) Annual Forum for Judges and Lawyers.

The topic focussed on the **Role of Indigenous and other Traditional or Customary Justice Systems in Access to Justice, the Rule of Law and Human Rights**. This topic has been discussed at previous Fora organised by the ICJ. A number of participants

in the 2020 Forum raised the issue of the vulnerability of indigenous women. Whilst constitutional and legislative provisions protecting women in many countries, the reality on the ground is that women in many societies and especially in traditional indigenous societies are considered as “children” with little or no rights. They are rarely involved in decision making and inheritance laws that favour patriarchy are still prevalent. Even if the laws allow for equality of property rights, the execution of these rights is more often than not difficult to implement in traditionally led societies.

In September 2020, the International Development Law Organisation (IDLO) published a report entitled: **Women and Customary and Informal Justice Systems** as part of its series on Navigating Complex Pathways to Justice.

Globally, disputes are usually resolved outside the formal court system and customary and informal justice systems are favoured more especially by those vulnerable and disadvantaged groups and women in particular face difficulties when accessing justice. Informal Justice systems often deal with inheritance, family, divorce, property rights, land disputes and even gender-based violence and is usually dominated by men. Women are also hesitant to use any justice system as there is fear of reprisals, stigma and financial constraints with women not necessarily having funds of their own.

Despite the increase in laws that provide for equality of treatment, access to justice for women continues to be problematic. It is only recently that the international community has turned its attention to customary and informal justice systems to bring them in line with the legal and constitutional protections afforded to women. General Recommendation 33 of 2015 to the CEDAW Convention provides that violence against women should not be referred to ADR. Recommendation

35 allows for the non-mandatory choice in using ADR for such cases as women use these informal mechanisms because:

- These processes are more accessible geographically, being situated locally;
- They are less costly;
- Issues may be resolved more quickly;
- They use local languages- this is especially important for women with no formal education;
- They are seen to fit in with local customary norms and focus on reconciliation and compensation rather than being confrontational;
- They offer flexible solutions as well as flexibility in the interpretation of the laws.



Of course, there are concerns raised about Customary of Informal Justice (CIJ) systems, many of which treat women and other vulnerable members of society in an appalling manner, using discriminatory customs and being slow to adapt to the current internationally recognised rights of women and girls. The challenges faced by women and girls include:

- Social pressure not to report disputes;
- Hearings are often held in public and thus there is no anonymity, and this can increase stigmatisation, especially in cases of sexual violence;
- Enforcement of rights is problematic as the focus is on reconciliation and compensation;
- The lack of knowledge and understanding of rights may make women more reluctant to take cases before any judicial system;
- The limitation in accessing communication systems means limitation in accessing law enforcement or remedies;
- The lack of penalties for gender-based violence;

- Legislative gaps that still remain (e.g.: marital rape, domestic violence or sexual violence may not be recognised);
- The discord between protecting customary /religious traditions and constitutional and legislative rights (especially when it comes to family law and land rights);
- Financial limitations, including limited access to credit or employment;
- The lack of recognition of women’s in the informal justice systems (in some cases they aren’t allowed to be present in court or participate, as decision makers, in the procedures).

The IDLO report outlines methods that can be used to enhance knowledge and understanding by women of their rights, increasing knowledge and awareness programmes as well as how justice can be accessed. It also points to examples of how women can be part of decision making and how to increase the capacity of women’s organisations to deal with such issues. The IDLO report also stresses the need to address gaps in the legislation to take account of discriminatory processes and customary norms as well as building the capacity of the customary and informal justice systems to integrate internationally accepted norms. The IDLO Report recommends the following:

1. Ensure that women’s human rights are recognized as central and indispensable to engagement with CIJ systems;
2. Focus on empowering women to make informed decisions when seeking justice and to participate in and benefit from CIJ decision-making processes;
3. Deepen efforts to support CIJ systems that are committed to improving women’s rights and their access to justice;

4. Facilitate safe environments for women to enjoy their rights and pursue justice;
5. Ensure that women's voices at local, national, regional and international levels are heard and constitute a critical part of reform strategies;
6. Strengthen investment in participatory and collaborative research that informs policy and programming on CIJ.
7. Explore partnerships and strengthen alliances to build momentum for transformative change for justice for women and girls.

The full report is available at [idlo-issu-brief-women-cij-final-web.pdf](https://www.idlo-issu-brief-women-cij-final-web.pdf)

ONLINE HARRASSMENT

In 2020, Plan International published its Report **“Free to Be Online- Girls and Young Women’s Experience of Online Harassment”**.

With most countries experiencing some form of lockdown due to COVID 19, society has had to move more and more to online platforms. Over 700 Million girls worldwide are having to attend school online and social media has become an essential tool for keeping in touch with friends and family, combating isolation as well as providing essential access to educational tools. However, girls are being targeted unfairly to online harassment and abuse which is affecting their equal rights.

Online gender-based harassment is defined as: “action by one or more people that harms others based on their sexual or gender identity or by enforcing harmful gender norms. This action is carried out using the internet and/or mobile technology and includes stalking, bullying, sex-

based harassment, defamation, hate speech, exploitation and gender trolling.” (International Centre for Research on Women- <https://www.icrw.org/publications/technology-facilitated-gender-based-violence-what-is-it-and-how-do-we-measure-it/>)

In its report, Plan International pointed that out of 14,000 girls surveyed across 31 countries worldwide, more than 50% indicated that they had been the object of online abuse or harassment and if they were not, they knew of a friend or relative who had suffered the same. Online abuse is seen as a method of keeping the girls “in line”. It can be extremely violent and is as frightening physically and emotionally as in person harassment. However, in most cases the perpetrators of such abuse cannot be traced due to anonymity and this harassment remains unchallenged and without suffering any consequences of their actions.

There have been numerous surveys of online abuse including by the World Web Foundation and the World Association of Girl Guides and Girl Scouts who found that the abuse ranged from sexual harassment, sharing of photos without consent, threatening messages, inappropriate racial and gender-based comments to threats of physical or sexual violence and stalking (cyber or in person) which can be extremely frightening to those targeted.



Plan International’s report focusses on the affect such online abuse has on human rights and how it has created a barrier to gender equality. Harassment can take different forms:

1. You are harassed online for just being a woman or a girl – girls are targeted for the way they dress, or what make up they are

wearing. Photos are shared with strangers without permission. Women and girls may be targeted because of their race, disability or gender. 42% of girls who identified as LGBTIQ, 14% of girls with disabilities and 37% of girls from ethnic minorities have experienced harassment online in some form or other.

2. You are harassed because you have expressed an opinion as a girl or women on a topic. This is especially prevalent when the topic relates to a gender equality issue. Perpetrators of such abuse feel that it is their right to demean women and girls online for whatever reason be it cultural norms or because they know they will not suffer any sanction for such harassment. Whilst the perpetrators cannot always be identified online due to anonymity, 76% of those who responded to the survey felt that it was likely to be men or boys who were the abusers. 46% thought they could identify who was harassing them.

Harassment has long lasting effects on those who have been victims of such abuse ranging from low self-esteem to mental and emotional stress and anxiety, to having problems with interactions at school or within the family context. Most feels vulnerable as well as afraid. This contributes in turn to disempowering girls and women.

However, girls and women are fighting back. There is an increase in the reporting of abuse, they think more about security online than previously, they might take a break from social media or block access to their social media pages etc.

The Plan International Report also points to the links between “Street” harassment and “Online” harassment but decries the inability of the law and police to combat online abuse effectively not to mention the social media platforms.

The report also focusses on what needs to be changed to ensure better human rights protections for girls and women faced online. These include:

- education and awareness raising which are essential tools to changing societal attitudes;
- empowering girls and young women and strengthening their self-esteem;
- tackling how girls and women are depicted and how stereotyping has led to misogyny;
- changing the gender norms that pervade society and how women and girls continue to be perceived;
- establishing and enforcing laws relating to online abuse more effectively;
- harnessing technology and strengthening reporting mechanisms

The full report is available at:

<https://plan-international.org/publications/freeto-beonline>

MODERNISING DIVORCE LEGISLATION IN CANADA

The following article was produced by Justice Lynne Leitch, Chairperson of the Gender Section

In Canada, federal laws govern the divorce of married couples. These laws are being updated for the first time in decades with amendments to take effect March 1, 2021. The amendments have four key objectives:

- promote the best interests of the child;
- address family violence;
- help to reduce child poverty; and
- make Canada's family justice system more accessible and efficient.

One of the significant changes in the amendments is to move away from any terminology that might suggest there is a "winner" or "loser" on marital breakdown. The new legislation will introduce terms such as "parenting orders," "parental decision-making responsibilities," and "parenting time" to replace terms such as "custody" and "access."

Other reforms of significance are the imposition of a duty on parents and lawyers to act in the child's best interests and to protect them from conflict related to divorce proceedings, in addition to the encouragement of resolution of parenting disputes outside of court proceedings where appropriate.

The new legislation also introduces the concept of a "contact order" in favour of a person, other than a parent, who has an important role in the life of a child.

Significantly, the amendments require courts to take into account family violence when considering the child's best interests. In addition, a court making a parenting, contact, or support order must consider any other proceedings or orders involving any of the parties, including any order made in a criminal proceeding.

Family violence will be defined as any conduct that is:

- violent;
- threatening;
- a pattern of coercive and controlling behaviour;
- causes a family member to fear for their safety or the safety of another person; and/or
- directly or indirectly exposes a child to such conduct.

It is notable that this definition of family violence specifically includes conduct that would not necessarily constitute a criminal offence and states that, in the case of a child, family violence includes direct or indirect exposure to such conduct.

The definition sets out a non-exhaustive list of examples of conduct that constitutes family violence such as physical abuse, sexual abuse, threats of harm, harassment, psychological abuse, financial abuse, threats to kill or harm an animal or damage property, and the killing or harming of an animal and the destruction of property.

The background to the new legislation published by the Department of Justice <https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/03.html#secB1> explains why these reforms were necessary:

In 2014, 4% of people living in Canadian provinces with a current or former spouse or common-law partner (approximately 760,000 people) reported having been physically or sexually abused by their spouse during the preceding five years. In fact, separation and divorce can exacerbate an already violent relationship and the period following separation is the highest time of risk. From 2007 to 2011, a woman's risk of being killed by a spouse from whom she was separated was nearly six times higher than the risk of being killed by a spouse with whom she was living.

While overall rates of family violence may not differ greatly between men and women, there are significant gender differences in the severity of the violence. In 2014, women were twice as likely as men to report being sexually assaulted, beaten, choked or threatened with a gun or knife. In contrast, men were three and a half times more likely to report being kicked, bitten or hit with something.

Some forms of family violence are clearly criminal in nature, such as assault or sexual assault. In contrast, other forms of family violence, such as psychological

abuse, such as ridiculing, constantly criticizing, or threatening deportation, are abusive in nature and are often a precursor to physical or sexual violence, but do not constitute criminal behaviour.

All of these forms of family violence, however, are highly relevant to the family law context, and, in the context of the Divorce Act, they are particularly relevant to a determination about parenting and contact.

As knowledge about the scope of family violence has expanded, so has the understanding that not all violence is the same. Experts have identified at least four types of intimate partner violence:

1. coercive and controlling violence: violence that forms “a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners.”
2. violent resistance: violence in response to coercive and controlling violence. The violence is generally a response to an assault and the objective is to protect oneself or another person.
3. situational (or common) couple violence: violence that is not associated with a general desire to control one’s partner, but to a particular incident or situation. It is generally a result of an inability to manage conflict or anger.
4. separation-instigated violence: violence that generally occurs around the time of separation with a small number of incidents. It can range from minor to quite severe.

These distinctions are particularly important in the context of parenting determinations because, depending on the type of violence,

different parenting arrangements may be in the best interests of the child.

While all violence is of concern, the most serious type of violence in the family law context is coercive and controlling violence. This is because it is part of an ongoing pattern, involves more danger, and is more likely to be associated with compromised parenting.

Family violence can have a profound effect on children.

Children who are exposed to violence are at risk for emotional and behavioural problems throughout their lifespan, and these impacts are similar to those of direct abuse. Some of these consequences include post-traumatic stress disorder, depression, low educational achievement, difficulties regulating emotions and chronic physical diseases. In Canada in 2014, 51% of parents who reported experiencing spousal violence also reported that their children may have heard or seen assaults on them. About 72% of individuals with children who experienced violence after separation indicated that a child had seen or heard the violence.

Research also indicates that, in families where intimate partner violence occurs, direct child abuse also often occurs. In 2014, 70% of adults who reported having witnessed spousal violence as children also reported being a victim of childhood physical and/or sexual abuse. Children who witnessed spousal violence were also more than twice as likely to experience the most severe forms of physical abuse as those who had not witnessed violence.

Despite all that is known about family violence, including the heightened risk after separation and its potential impacts on parenting,

the Divorce Act was silent on this important issue.

As a result of these reforms, when determining what is in the best interests of the child, courts are mandated to consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child and the appropriateness of making an order requiring persons to cooperate on issues affecting the child in the context of family violence.

The new legislation sets out specific factors for the courts to consider in assessing the impact of the family violence and its effect on parenting, including:

- the nature, seriousness and frequency of the violence and when it occurred;
- whether there is a pattern of coercive and controlling behaviour in relation to a family member;
- whether the violence was directed toward the child;
- the physical, emotional and psychological harm or risk of harm to the child;
- any compromise to the safety of the child or other family member;
- whether the violence causes the child or another family member to fear for their safety or that of another family member; and
- whether the person engaging in the violence has taken any steps to prevent further violence and improve their parenting.

Further, in considering all of the factors relevant to the determination of a child’s best interests, the protection of the child’s “physical, emotional and psychological safety, security and well-being” is the “primary consideration.”

As these reforms recognize, the occurrence of family violence and an

assessment of its impact on children is a key factor in determining what parenting order is in a child's best interests.

LANDMARK DOMESTIC ABUSE LEGISLATION IN ENGLAND AND WALES

The following article was written by the Gender Section Representative of the Atlantic and Mediterranean Region. Mrs Brigid Shaw

The long-awaited Domestic Abuse Bill is nearing the end of its passage through the Houses of Parliament leading to Royal Assent and commencement of the Domestic Abuse Act later this year https://publications.parliament.uk/pa/bills/lbill/58-01/124/5801124_en_1.html.

The Act is introduced as landmark legislation that will help transform the response to domestic abuse, prevent offending, protect victims and ensure victims are given the support they need.

The Act is designed to raise awareness and understanding about the devastating impact of domestic abuse on victims and their families; further improve the effectiveness of the justice system in providing protection for victims of domestic abuse and bringing perpetrators to justice and strengthen the support statutory agencies must provide for victims of abuse.

Importantly, an Independent Commissioner for Domestic Abuse will drive the domestic abuse agenda and hold national and local government to account.

The Act will provide:

A common definition of domestic abuse across government

There will be a statutory definition of domestic abuse, emphasising that domestic abuse is not just physical violence, but can also be emotional, coercive or controlling, and economic abuse.

Domestic Abuse Commissioner

A Domestic Abuse Commissioner (Designate) has already been appointed who will provide public leadership on domestic abuse issues and play a key role in overseeing and monitoring the provision of domestic abuse services in England and Wales. The Commissioner will encourage good practice in preventing domestic abuse and improve the protection and provision of support to people affected by domestic abuse. The Commissioner will have the power to publish reports and lay them before Parliament; these reports will hold local commissioners, statutory agencies and national government to account and make recommendations on how they can improve their response.

New Protection Orders

The Act will introduce a new civil Domestic Abuse Protection Notice (DAPN) to provide immediate protection following a domestic abuse incident, and a new civil Domestic Abuse Protection Order (DAPO) to provide flexible, longer-term protection for victims. Breach of a DAPO will be a criminal offence. Police will make applications for a DAPO to a magistrates' court. However, victims and specified third parties will be able to apply for a DAPO directly to the family court. Criminal, family, and civil courts will be able to make a DAPO of their own volition during existing court proceedings, which do not have to be domestic abuse-related.

Disclosure

The right to disclosure of an individual's violent or abusive past will be put on a statutory footing. The Act will set common standards for

circumstances in which a person may ask police whether a current or ex-partner has a violent or abusive past. There will be corresponding standards for circumstances in which the police will provide such information, either in response to such a request or of their own volition.

Extraterritorial Jurisdiction

The jurisdiction of UK courts will be extended to relevant offences committed outside the UK by UK nationals or non – nationals who are habitually resident in the relevant part of the UK.

Cross Examination in the Family Court

The Act will prevent victims being re-traumatised by being cross examined in person by their abuser in court. Perpetrators and alleged perpetrators of abuse will be prohibited from cross-examining their victims in person in the family court proceedings (and vice versa) in England and Wales.

The family court will have the power to appoint a public-funded advocate to carry out the cross-examination where necessary.

Special Measures in Criminal, Civil and Family Courts

Courts already have powers to order that special measures be taken to ensure that a witness can give their best evidence (such as giving evidence by video link). These will become more widely available under the new legislation. In some cases, witnesses will be eligible automatically for special measures, rather than having to persuade a court that they qualify.

Safe Accommodation

Local Authorities will be required to offer support to victims of domestic abuse and their children within refuges or other safe accommodation.

Housing

People who are homeless because they have fled domestic abuse will be given priority need status for accommodation secured by the local authority.

Local authorities will be required to grant new lifetime tenancies to those who have left housing where they previously held similar rights.

Consent to serious harm is not a defence.

The statute will restate the position at common law (not limited domestic abuse) that consent is no defence to inflicting serious harm for sexual gratification (R v Brown [1994] 1AC 212).

‘No death or other serious injury – whatever the circumstances – should be defended as ‘rough sex gone wrong’ which is why we are making it absolutely clear that this is never acceptable. Perpetrators of these crimes should be under no illusions – their actions will never be justifiable in any way, and they will be pursued rigorously through the courts to seek justice for victims and their families.’

Justice Minister Alex Chalk

The Bill may be subject to further changes before clearing all Parliamentary stages. In particular, the Domestic Violence Commissioner (Designate) is arguing for further protection for victims of abuse, for example from financial control exerted long after the relationship has ended and for more protection for migrant women.

This Act will have far reaching effects. It enshrines in legislation a recognition of the real harm caused by domestic abuse, not only to the immediate victim, but to families and society as a whole. It seeks to ensure that action will be taken at all levels of government and public services to implement and embed good practice and it provides the courts of England and Wales with enhanced powers to

ensure fair and effective proceedings in these challenging cases.

NEWS FROM AROUND THE COMMONWEALTH

The following are summaries of various reports that the CMJA has gathered from around the Commonwealth that outline some of the developments in the field of gender and human rights.

BANGLADESH

In October, Bangladesh changed its law to bring in the death penalty for rape. This followed a number of high profile rape cases. In October 2020, the Women and Children Repression Prevention (Amendment) Ordinance 2020 was passed and later enacted by the Parliament as the Women and Children Repression Prevention (Amendment) Act 2020. The Amendment has also brought in provisions which include medical test of both the victim and the accused. In addition, there is a provision made for mandatory DNA test of the accused irrespective of their consent. Some parts of the amendment have been criticised as not everyone feels that capital punishment would be an effective deterrent for rape and there are some shortcomings in using DNA evidence in rape trials. In October 2020, it was reported that the High Court has questioned the ban on prosecutions for marital rape. There has been a long campaign for the recognition of rape within a marriage especially since the Bangladesh Bureau of Statistics found, in 2015, that around twenty-seven percent of the 20,000 married women surveyed had experienced sexual violence by their husbands. A writ petition was filed by the Bangladesh Legal Aid and Services Trust or BLAST, BRAC, Naripokkho and Manusher Jonno Foundation. The petitioners challenged sections 375

and 376 of the Bangladesh Penal Code and section 9 (1) of the Women and Children Repression Prevention Act.

BOTSWANA

At the end of November 2020, it was reported that Botswana had launched 25 gender violence courts following the increase in domestic and gender-based violence in the country due since lockdowns had been imposed due to the coronavirus pandemic. It is hoped these courts will be able to reduce delays in cases being dealt and reduce the fear of victims to report cases to the police due to fear of reprisals or stigma.

ENGLAND AND WALES

In January 2021, it was reported in the news that the government were to close a loophole in the Domestic Violence legislation by introducing a new law that will make non-fatal strangulation a crime with perpetrators of this offence facing up to 7 years in prison. According to campaigners, 20,000 women a year suffer from strangulation or attempted strangulation.

From 1 January 2020, the government stopped charging tax (VAT) on period products. However, the government has not indicated, so far, how they will be replacing the funds in the Tampon Tax Fund which received funding from tax on period products and which were then distributed to charities assisting vulnerable girls and women.

The Law Commission are currently considering a proposal that “misogyny” should become a hate crime under English law. It is hoped that making it a crime will reduce the incidences of sexual harassment and assault. Unlike other hate crime categories such as race, sexual orientation or religion, the police do not currently record offences that come under hatred of women.

KENYA

In August 2020, the Law Society of Kenya petitioned the Chief Justice, Justice David Maraga to write to the President in relation to the provision of the Constitution that provides for gender parity in decision making. Article 27 states that neither gender should hold more than two-thirds of public officers, whether elected or appointed.

The gender audit which was undertaken by the National Gender and Equality Commission with the assistance of International Women Judges Association-Kenya and the support of the International Development Law Organisation (IDLO) of the Judiciary and which was released in August 2020 revealed gender inequality at the administration of justice.

In September 2020, the Chief Justice, having received 5 similar petitions, advised the President of the Republic to dissolve Parliament as it had failed to implement the gender parity provisions under the Constitution in line with Schedule 5 which provides for a five year adaptation period.

The advice was strongly objected to by MPs and the Speaker of the Assembly suggested appealing the issue through the High Court. The case is ongoing.

INDIA

On 19 January 2021, the Indian High Court came under criticism when Justice Ganediwala of the Bombay High Court overturned a decision of the sessions court which had found an Indian man guilty of sexual assault for touching a girl and attempting to remove her underwear. Justice Ganediwala stated, in her judgement, that as that "groping without skin to skin" contact did not constitute sexual assault under the Protection of Children from Sexual Offences (POCSO) Act which carries a sentence

of three years in prison. She indicated in her judgement that physical contact needed to be "skin to skin contact". The man was found guilty of outraging a woman under the Indian Penal Code which only carries a sentence of one year. This has caused outrage in India and the National Commission for Women said was going to mount a legal challenge to the judgment which it foresees will have a "cascading effect on various provisions involving safety and security of women." It is anticipated that other courts may follow suite, and this just increases the impunity of those who carry out crimes against women and girls. Currently only 22/2% of crimes against women result in a conviction.

MALAWI

In October 2019, the Malawi Women Lawyers Association took action in a case where 18 girls and women were sexually assaulted and raped by members of the police in an apparent retaliation for the death of a police officer during a political protest. In August 2020, Justice Kenyatta Nyirenda found that there was evidence that the girls were indeed raped by the police and that the police force had not complied with their duties to investigate the complaint made by the girls or that the perpetrators had failed to arrest the perpetrators.

In his judgement, Justice Nyirenda found that the state had not complied with its responsibilities to remedy human rights violations. The full judgment is available at [Sv Inspector General of Police and Others; Ex-parte MM and Others \(Judicial Review Cause Number 7 of 2020\) \[2020\] MWHC 24 \(13 August 2020\)](#).

Despite the fact that child marriages were banned in 2015 in September 2020 it was reported that there had been an increase of child marriages during the lockdown period due to COVID 19. There have also been an

increase in the number of pregnancies amongst young girls.

Maggie Kathewera Banda, executive director for Women's Legal Resource Centre, a charity, said girls' educational rights were being jeopardised. She stated that "*Obviously, it's a concern to us because it means that rights to education of the girl-children are being infringed upon,*". A study of the reasons for the increase has now been commissioned. In the meantime, Senior traditional Chief Theresa Kachindamoto ordered village chiefs to dissolve all marriages that took place during the lockdown so that the girls can return to their schools.

In the meantime, it was reported in September 2020 that the government was to set up a fund to deal with the economic and social fallout experienced by child marriage survivors and provide them with assistance with their education to avoid them falling into poverty again. This is being undertaken with the support of UN Women.

NIGERIA

In early 2020, controversy has arisen in relation to the appointment of Chief Judge in Gombe State. Justice Beatrice Lazarus Illya was appointed Acting Chief Judge of Gombe State following her predecessor's retirement, in line with the requirements that the next most senior judge be appointed. However, instead of confirming the appointment after the 3 months probationary period, in line with constitutional provisions for succession with the post and the recommendations made by the Judicial Services Commission (JSC), the Governor decided to appoint Justice Muazu Pindiga (who currently heads the JSC) was appointed in her stead. This is not the first time that a female Chief Judge has been pushed

aside in favour of a male chief judge in Nigeria and it appears that equality within the judiciary of Nigeria is being reversed.

In September 2020, Kaduna State passed legislation which introduces stricter penalties for rape, including castration for the rape of a child and the dealt penalty. However, these measures have been criticised by some who feel this won't deter anyone from committing the offences.

PAKISTAN

In January 2021, the Lahore High Court banned virginity testing as part of the investigations in rape allegations. The ruling will stop the invasive two finger test of virginity which the judge considered to be humiliating and of no forensic or medical value. Some doctors believe that the demeaning test can determine if a woman has been previously sexually active before rape. However, the World Health Organisation (WHO) has previously condemned the practice as having no scientific basis and being a human rights violation. Whilst this ban only applies in the Punjab, the precedent may be applied in other parts of Pakistan in due course.

SEYCHELLES

In October 2020, the Chief Justice Martha Twomey, who has been profiled in this newsletter previously retired as Chief Justice. One of her final judgements as Chief Justice was to call for reforms of the Penal Code and for the modernisation of the provisions relating to "sexual consent". She stated that "Submission by a victim is not permission and must not be viewed as such" she declared. She has previously campaigned for reforms of the penal code in this area calling for reforms of the definition of the absence of consent in the penal code.

A copy of the judgement is available at:

[R v DL \(CR 24/2020\) \[2020\] SCSC 674 \(21 September 2020\); | Seychelles Legal Information Institute \(seylii.org\)](#)

SOUTH AFRICA

The controversial Traditional Courts Bill which we have previously reported on in this newsletter, is once again causing concern especially as all indications are that this will soon become law. This bill which was first mooted in 2003 and introduced in 2008 is the only bill in South Africa to have been initially rejected been a majority of provinces despite sustained pressure from the government (in 2014) although the Provincial Assembly has recently passed the Bill. The bill as it now stands would effectively disenfranchise 18 Million people (especially women who form the majority of the rural population) in South Africa who will no longer have the choice of court and will be obliged, in rural areas, to take their cases before traditional courts presided over by traditional leaders. As previously reported, the traditional courts are patriarchal in nature and in some cases do not provide for access by women. According to some Section 30 and 31 of the Constitution provides that citizens have the right to participate in the cultural life of their choosing but this bill will take away such rights as there is no opt out of the right.

In December 2020, the Supreme Court upheld a decision by the High Court of Cape Town when it stated that the government had failed to recognise the status of Muslim marriages which were excluded from the Customary Marriages Act. In its judgement the Court indicated that:

"The importance of recognising Muslim marriages in our constitutional democracy cannot be gainsaid. In South Africa, Muslim women and children are a vulnerable

group in a pluralistic society such as ours. The non-recognition of Muslim marriages is a travesty and a violation of the constitutional rights of women and children in particular, their right to dignity, to be free from unfair discrimination, they right to equality and access to court".

UGANDA

In August 2020, the Ugandan Constitutional Court found that the government had underfunded maternal healthcare to such an extent that it was unconstitutional following a long process in court after the death of two women in labour in 2009 and 2010. Whilst the Constitutional Court rejected the petition in 2012, in 2015 the Supreme Court instructed the Constitutional Court to re-examine the case and in the judgement of August 2020, the Constitutional Court found that basic services had not been provided to the women who died. See full second judgement at:

[Center for Health, Human Rights and Development \(CEHURD\) & 3 Others v Attorney General \(CONSTITUTIONAL PETITION NO. 16 OF 2011\) \[2020\] UGCC 12 \(19 August 2020\); | Uganda Legal Information Institute \(ulii.org\)](#)

GENDER SECTION REPRESENTATIVES

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*Mrs. Justice Lynne Leitch,
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Mrs. Bridget Shaw, Jersey

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*Justice Carolita Bethell,
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*Mrs. Linda
Bradford-Morgan,
Australia*

West Africa

*Justice Sedina Agbemava,
Ghana*

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) Institutionalized 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.

CONTRIBUTIONS AND COMMENTS



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!!

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