



# GENDER SECTION NEWSLETTER



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## GREETINGS FROM THE CHAIRPERSON



As we publish this next edition of our newsletter, the world continues to struggle with the consequences of Covid. Women and children have been particularly impacted by the pandemic.

These struggles are highlighted in the reports on the webinar, Equality and Justice Under Covid 19, organised by the Commonwealth Foundation and the call to action on gender equality by the CEDAW Commission.

On a more positive note, we include an article on developments in Fiji to combat gender stereotypes in sexual violence cases contributed by Justice Rangajeeva Wimalasena and a report on the launch by Human Dignity Trust of a new digital tool to support the

report of outdated and discriminatory sexual offence laws.

We also include news from around the Commonwealth drawing attention to legislative reforms and jurisprudence improving the rights of women and children. We offer our congratulations to former Chief Justice Dr. Mathilda Twomey on a recent award for her work on the defence of sexual abuse victims.

We also extend congratulations to Justice Martha Koome, who was sworn in as the Chief Justice of Kenya on May 21, 2021. She is the first female to serve in this role which she assumes after a distinguished career with more than 33 years in private legal practice and as a member of the judiciary.

These encouraging reports and developments stand in stark contrast to the dangers currently faced by the women judges in Afghan. We commend the International Association of Women Judges for their [Statement](#) of concern for the safety of these women and their families.

We also draw to your attention the [Statement for the Protection of Judges, particularly Women Judges in Afghanistan](#) from the Advisory Board of the Global Judicial Integrity Network, on which I serve representing the CMJA.

Lastly, we note the passing of Justice Irene Mambilima, who was appointed the first female Chief Justice of Zambia in February 2015. In the tributes paid to her, it was noted that she wanted to be remembered as a hands-on person who had a passion for access to justice.

I look forward to continuing our discussions together (virtually) at the Gender Section meeting Sunday September 12, 2021. We are honoured to have Dr. Peter Jaffe, an internationally recognized expert on domestic violence, the impact of domestic violence on children, homicide prevention and the role of the criminal and family justice systems, as our featured speaker.

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## EQUALITY AND JUSTICE UNDER COVID 19

Since 2020, the Commonwealth Foundation has run a Critical Conversation Series online. On 23 February it organised a webinar on “*Equality and Justice in COVID 19 responses*” and panelists from the Cameroon, the Gambia, Ghana, Nigeria, and Sierra Leone spoke about the situation in these jurisdictions.

They firstly considered the economic and social and economic impact of COVID 19 on women and other vulnerable members of society.

The pandemic had exacerbated pre-existing conditions in Nigeria and in particular the long-standing gaps and inequalities in different multilingual, multiethnic groups. The information overload from the USA, China, and the World Health Organisation (WHO) had increased the sense of hopelessness. Whilst ECOWAS (the Economic Community of West African) set down several protocols for the safety and security of the public, many of these had grave implications on social and economic sectors of society. With quarantine, isolation, social distancing, and the closing of borders Nigeria saw another 17% of the population fall into poverty, creating another severe recession. Nigeria also saw a 60% loss in earnings due to the dwindling demand and lower prices for oil. Women were more severely affected as the recession hit the informal economy comprised of 90%. Only those with registered jobs were able to take advantage of government interventions.

In Ghana, there was an increase in the gap of those in poverty and those who were rich. Women again suffered more as the economy slowed down and with schools having been shut, women were required to

teach the children at school, run a busy household with family members being at home. They have had to face a bigger burden with increased health care requirements. With social gatherings (weddings, parties etc..) being curtailed, those connected with the catering business had suffered more. Women don't all have access to technology and therefore remote working was out of the question.



In Sierra Leone, fear and misinformation as well as the structural challenges Sierra Leone faced, had prevented women from accessing health care facilities. The lack of access to water had affected the important healthcare measures of handwashing. While social distancing was imposed but was problematic in marketplaces and when it came to transport especially when mixing with crowds returning home before the curfew deadlines. Women had found it difficult to keep jobs, as many companies favoured men over women. The rural women suffered more as handwashing facilities were not available and the price of masks skyrocketed. Child support and maintenance were affected because the systems to deal with these issues were interrupted.

In the Gambia all reproductive health services had been closed and the hospital's units were converted for COVID 19 patients. The Gambia had also seen an increase in Gender based violence had increased due to families being forced to co-exist and social welfare facilities were not available for this. All resources were diverted to deal with the pandemic Social welfare for custody was not available. No resources had been put aside to deal with any emergency issues of this kind there was a need to have some emergency fund to ensure that the government could deal with such crisis in the future. Food had been scarce and like in other jurisdictions, there was hoarding of food.

In Cameroon, both the disabled and women were disadvantaged in accessing services even before the pandemic. Whilst maintaining social distancing for some was evident, to a blind person, the calculation of a distance of one metre was difficult and it was therefore important to communicate the messages in the correct way and provide some way of assisting those who were unable to access a handwashing point.

Whilst governments had put plans in place, these plans did not consider the marginalised people who don't have any access to the internet to

## GENDER SECTION MEETING

The next Gender Section Meeting will take place virtually on **12 September 2021** from **13hrs-15hrs (BST- British Summer Time)**, during the CMJA's Virtual Conference – registration still open. The Speaker for the Meeting will be **Prof Emeritus Dr Peter Jaffe**, Director Centre for Research and Education on Violence Against Women and Children, Canada

make their points understood. Social distancing was a pipe dream in some circumstances, so masks were important and in Sierra Leone masks were given to the market women and disabled for free. Community based clinics were upgraded, and women led households were provided with support to grow food to be delivered to quarantined homes. Rainwater harvesting systems were provided by the government. In schools in the Cameroon, wells had been built to provide water for handwashing.

Girls were in danger of being married off as they stayed home from school and this trend was concerning.

Even in Sierra Leone, which had experienced the Ebola epidemic, there was a need for emergency Planning and to build on existing policies.

The full webinar can be viewed on the Commonwealth Foundation's Facebook page at: <https://www.facebook.com/commonwealthorg/videos/equality-and-justice-in-covid-19-responses/230634568779546/>

## ACTION ON GENDER EQUALITY

In March 2021, during the CEDAW Commission's session, women's rights and women-led organisations have urged Member States to take action on the Commonwealth's [Four Priorities on Gender Equality](#) in light of the devastating impact of the Covid-19 pandemic as the gender gap has increased during the pandemic.

The Commission expressed its concern that:

*"...the coronavirus disease (COVID-19) pandemic is having a disproportionate impact on women and girls and is deepening pre-existing inequalities that perpetuate multiple and intersecting forms of discrimination, as well as racism, stigmatization and xenophobia, and*

*that it has further exacerbated vulnerabilities in their social and economic situations, including their access to essential health-care services and access to education, especially of girls who have been particularly at risk of dropping out of and not returning to schools, as well as their safety, well-being and livelihood. It further expresses deep concern over the increased demand for unpaid care and domestic work and the reported surge of all forms of violence, including sexual and gender-based violence, during confinement, as well as harmful practices, such as, child, early and forced marriage and female genital mutilation. It further expresses deep concern that these disproportionate impacts compound existing obstacles to women's full and effective participation and decision-making in public life. "*

## GENDER STEREOTYPING IN SEXUAL VIOLENCE CASES IN FIJI

The following presentation was delivered by **Mr Justice Rangajeeva Wimalasena** at a workshop organised by the Fiji Women Lawyers Association and the Fiji Women's Rights Movement.

*"Some may believe women are either weak or emotional and they are generally manipulative or devious. This is why the common law has introduced law of corroboration in sexual offences. Because judges believed that women naturally lie as they are inherently untruthful".*

Gender stereotyping is considered as one of the biggest obstacles to equality before the law.

### What is Gender Stereotyping?

Gender stereotyping has various definitions.

The Office of the High Commissioner for UN Human Rights defined gender stereotype as:

*"A generalized view of what characteristics ought to be possessed by someone of a certain gender or about the roles and behaviors that should be performed by someone of a certain gender".*

The Gender Equality Commission of the Council of Europe defines gender stereotypes as:

*"Preconceived ideas whereby females and males are arbitrarily assigned characteristics and roles determined and limited by their gender."*

Gender stereotyping brings about harmful results more often than not, especially in the administration of justice process. Our preconceived ideas and generalization of attributes influence our decisions, judgments, and responses wittingly or unwittingly.

I thought it would be useful if we first have a clear understanding of gender stereotyping in the bigger picture, before we discuss about gender stereotypes in sexual violence cases in Fiji.

International human rights law requires states to address issues pertaining to harmful and wrongful gender stereotyping. There are mainly two international instruments which impose express obligations on state parties to eliminate gender stereotyping.

Article 5(a) of the **Convention on the Elimination of All Forms of Discrimination against Women** (CEDAW) provides that State parties take all appropriate measures:

*"To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either*

of the sexes or on **stereotyped** roles for men and women;”

Article 8(1)(b) of the **Convention on the Rights of the Persons with Disabilities** provides that: “States Parties undertake to adopt immediate, effective and appropriate measures to combat **stereotypes**, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.”

Fiji has ratified CEDAW in 1995 and the Convention on the Rights of the Persons with Disabilities in 2017. Therefore, we have a special obligation to combat gender stereotyping not only in sexual violence cases but in other areas too.

As far as gender stereotypes in sexual violence cases are concerned, one of the most celebrated cases which is frequently referred to is **Vertido case**<sup>1</sup>. I consider it as the most significant discussion on gender stereotypes in sexual violence cases. This decision was made under the optional protocol to the CEDAW.

The incident relating to this decision happened in 1996 in the Philippines. A lady by the name of **Karen Tayag Vertido**, alleged that she was raped by a man after an evening business meeting. She was an executive director, and the man was the President of the same organization that she was employed. She alleged that this man took her to a nearby motel instead of dropping her at home, as promised. He dragged her to a room, but she was able to go inside a bathroom and lock herself in. Later she came out of the bathroom thinking that he had left. However, this man was still there, and he

forcibly pinned her to the bed. In the process she lost consciousness and when she regained consciousness, he was already having sexual intercourse with her. Her pleas to stop were ignored and she finally freed herself after she was raped. Afterwards she had a wash and got dressed. Finally, she was able to leave the motel. The next day she underwent a medical examination and reported the incident to police within 48 hours.

Initially the public prosecutors in the Philippines dismissed the complaint due to lack of probable cause during the preliminary investigation. However, following an appeal, the man was eventually charged for rape. A female judge heard the case and after eight years the accused was acquitted.

Vertido did not give up. She alleged that the judgment amounts to violation of CEDAW as it was based on myths rooted in gender stereotypes. She submitted a communication to the CEDAW committee under the Optional Protocol.

As a result of this lady’s tireless efforts, CEDAW committee made a landmark decision on gender stereotyping. A majority of the CEDAW committee affirmed that CEDAW requires States Parties to ‘take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women’. It further stressed that: “stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what

they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general”.

However, I must note that Fiji has not ratified the Optional Protocol to CEDAW and therefore acceptance of individual complaints procedure is not available to the persons in Fiji.

Be that as it may, in Vertido’s case seven gender stereotypes were raised. In view of Vertido’s case we can identify some common gender stereotypes which are relevant in sexual violence cases in Fiji as well:

- “- women should physically resist sexual assault at every opportunity, which implies that failure to take advantage of perceived opportunities to escape from an alleged attacker is evidence that the woman was not raped.
- women are inherently untruthful and thus likely to fabricate allegations of rape, which implies that rape allegations made by women should automatically be viewed with suspicion.
- older men lack sexual prowess, which implies that an allegation of rape made against an older man must be unfounded because his age means he is not capable of committing rape<sup>2</sup>.”

### **Gender Stereotypes in Fiji**

Just like in any other country we often see various myths and gender stereotypes in respect of sexual violence cases in Fiji as well. In our administration of justice system, the chances for these gender stereotypes

<sup>1</sup> Karen Tayag Vertido v The Philippines (18/08), CEDAW/C/46/D/18/2008 (2010). [online] Available at: [http://www.bayefsky.com/pdf/philippine\\_s\\_t5\\_cedaw\\_18\\_2008.pdf](http://www.bayefsky.com/pdf/philippine_s_t5_cedaw_18_2008.pdf) [Accessed 31 January 2021]

<sup>2</sup> Cusack, S. and Timmer, A., 2011. Gender Stereotyping in Rape Cases: The CEDAW Committee’s Decision in Vertido v The Philippines. *Human Rights Law Review*, 11(2), pp.329-342.

<sup>3</sup> UN Women, 2011. *Ending Violence Against Women and Girls - Evidence*,

*Data and Knowledge in Pacific Island Countries*. [online] UN Women | Asia and the Pacific. Available at: <https://asiapacific.unwomen.org/en/digital-library/publications/2011/7/ending-violence-against-women-and-girls> [Accessed 2 February 2021].

to influence and negate right to access to justice cannot be ruled out. Law enforcement officers, Prosecutors, Defence Counsel, judicial officers and most importantly assessors, who represent the community may invariably wear gender stereotype lenses while carrying out their duties.

Our cultural, ethnic, and religious beliefs are inextricably linked to gender stereotypes. Those can often shroud our opinions regardless of what gender you belong to or what role you play.

It is reported that the most common cause of violence against women in Fiji is refusal of women to have sexual relations with their husbands or partners. Figures from Fiji Women's Crisis Centre show that 74% of female survivors did not report violence to the police. A reason for this may be the pressure of keeping the family together and the belief that such family matters must be kept discrete. In many cases, when some women reported domestic abuse to religious leaders, family members or other non-legal bodies, they are encouraged to reconcile with their partner of the acts of violence as "part of marriage"<sup>3</sup>.

According to a study conducted by the Fiji Women's Crisis Centre in 2010-2011, 64 % of women in Fiji, who had been in an intimate relationship, had experienced physical or sexual violence from their partners. About one-third of women (34%) reported the experience of sexual violence over their lifetime. The main triggers for violence, reported by women include jealousy, the need of men to demonstrate that they are "in control," and drunkenness. The findings of the

FWCC survey indicate how gender stereotypes are entrenched in the society. When women were asked whether violence against women is justified under certain circumstances, 43% of women agreed with at least one justification<sup>4</sup>.

I will now briefly discuss about a few areas of our law which are introduced to combat gender stereotypes in sexual violence cases in Fiji.

### **Marital Rape**

The shocking statistics of FWCC clearly demonstrate the stereotype, that the wife or the partner is a sexual property of the man, is commonly believed by many in our society irrespective of their gender. However, in Fiji marital rape is criminalized by the Crimes Act in its efforts to combat gender stereotypes in sexual violence cases. The deep-rooted gender stereotypes in our society are evident from the words utter by the accused in a case<sup>5</sup> where the accused had said "'don't try to be a virgin, I can do whatever I want as I am the legally married husband", when his wife refused to have sexual intercourse with him. He was later sentenced to 12 years imprisonment for raping his wife.

Slowly but surely, it can be seen that victims of marital rape in Fiji are gaining courage to report such violence to authorities.

According to the statistics published by the Office of the Director of Public Prosecutions, four incidents of marital rape were reported in 2020.

*"There was one incident of marital rape where a 38-year-old man was charged with the rape and assault with intent to commit rape of his 32-year-old wife, however, this matter*

*was discontinued due to the inability to locate the victim. (March 2020)*

*There were two incidents of marital rape. A 50-year-old man was charged with the rape of his 55-year-old wife while in another incident, a 57-year-old man was charged with multiple counts of rape of his 46-year-old wife, however, this matter was withdrawn after the death of the victim. (October 2020)*

*There was one incident of marital rape where a 39-year-old man was charged with the rape of his 30-year-old wife. (December 2020)"<sup>6</sup>*

It should also be noted that another progressive step taken by Fiji to ensure safety of women against gender stereotypes is the increasing of the valid age of marriage from 16 years to 18 years by the Marriage (amendment) Act 2009. No more minors (16) can be given in marriage and now the women can exercise their right to consent for marriage under the law. It can be considered as a noteworthy measure to prevent children and women being considered as sexual property of men.

### **Gender Neutrality**

One of the salient features in our sexual offences is gender neutrality. This can be considered as one of the biggest steps taken by Fiji to eliminate gender stereotypes in sexual violence cases.

Although there are a number of sexual offences in the Crimes Act, I will basically focus on rape in this discussion.

Historically the term rape was largely associated with portraying men as perpetrators and women as victims. The Crimes Act now has provisions

<sup>4</sup> Fiji Women's Crisis Center. 2013. *Somebody's Life, Everybody's Business! National Research on Women's Health and Life Experience in Fiji (2010/2011)*. Suva. [online] available at:

<https://pacificwomen.org/wp-content/uploads/2017/09/FWCC-National-Research-on-Womens-Health-Fiji.pdf> [accessed 31 January 2021]

<sup>5</sup> State v Ismail [2014] FJHC 628; HAC115.2012 (26 August 2014)

<sup>6</sup> ODPP Rape and Sexual Offences Statistics 01 January to 31 December 2020, ODPP Media Update [online] available at: <https://odpp.com.fj/media-updates-2/> [accessed 31 January 2021]

which defines offences such as rape in a broader context. CEDAW Committee's General Comment Number 35 requires from State Parties to characterize rape as 'a crime against women's right to personal security and their physical, sexual and psychological integrity'<sup>7</sup>.

Yet the Crimes Act has gone beyond making rape a crime against women and made it a gender-neutral offence. Irrespective of the gender, penetrative sexual violation on any person's vulva, vagina, anus, or mouth by a penis is broadly defined as rape in the Crimes Act.

Further any person can rape another person by penetrating the other person's vulva, vagina, or anus with a thing or a part of the other person's body that is not a penis.

In **State v Talala [2016] FJHC 1025; HAC30.2015 (11 November 2016)** the court convicted nine accused persons for raping another man. It was alleged that they committed rape by inserting a stick into the anus of the other man without his consent.

Also, there is another interesting matter that I need to highlight at this point. In Fiji "forced to penetrate" or "compelled sexual penetration" is not considered as rape according to the Crimes Act.

If a female penetrates the anus of a male with an object without the consent of that person, it is considered as rape in view of Section 207(2) of the Crimes Act.

But if a female forces a male to penetrate her vagina, that act does

not fall within the ambit of rape. It will only come within the scope of sexual assault (Section 210).

But in some jurisdictions compelled sexual penetration is recognized as rape. For example, Section 39 of the **Crimes Amendment (Sexual Offences and Other Matters) Act 2014 of Victoria** introduced compelled sexual penetration as rape.

Although in Fiji we have not given much thought about "compelled penetration," we can get an idea about the gravity of this issue from the studies conducted in other jurisdictions.

In a survey conducted in 2010 in US it was found that approximately 1 in 21 (4.8%) of men reported that they were made to penetrate someone else during their lifetime and of those 4.8 per cent, 79.2 per cent reported the perpetrator as being female<sup>8</sup>.

In any event gender neutrality in the sexual offences in the Crimes Act can be considered as a commendable step towards eradicating gender stereotypes in sexual violence cases in Fiji.

### Consent

Presence of physical resistance is not necessary for the offence of rape. Although some may still believe the myth that there should be evidence of physical resistance based on gender stereotypes, the law in Fiji expressly states that submission without physical resistance does not constitute consent.

Section 206(1) provides that "consent" means consent freely and

voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

Also, the consent must have been given freely and voluntarily. A person's consent to an act is not freely and voluntarily given if it is obtained—

- (a) by force; or
- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or
- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

It should also be noted that there is another myth based on gender stereotyping that orgasm connotes consent. However, research has consistently highlighted that not only can men sustain erections without being sexually aroused, but, in the same way female rape victims can experience vaginal lubrication and orgasmic responses in non-consensual sexual intercourse<sup>9</sup>.

Therefore, we must remember that merely because someone consents for sexual intercourse once or even in multiple occasions does not mean that it's a blanket consent to have sexual intercourse at any time. Anyone has the right to refuse to have sexual intercourse, even if previously consented.

### Penetration

<sup>7</sup> Committee on the Elimination of Discrimination against Women. 2018. *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*. [online] Available at: <[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/)

[CEDAW\\_C\\_GC\\_35\\_8267\\_E.pdf](#) [Accessed 1 February 2021].

<sup>8</sup>National Center for Injury Prevention and Control, 2010. *National Intimate Partner and Sexual Violence Survey*. [online] Cdc.gov. Available at: <[https://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf)> [Accessed 2 February 2021].

<sup>8</sup> Smith, R., Pine, C. and Hawley, M., 1988. Social cognitions about adult male victims of female sexual assault. *Journal of Sex Research*, 24(1), pp.101-112.

<sup>9</sup>Smith, R.E., Pine, C.J. and Hawley, M.E. (1988) 'Social Cognitions about Adult Male Victims of Female Sexual Assault', *Journal of Sex Research* 24: 101-112.

As far as rape is concerned, many wrongful gender stereotypes can be found in respect to penetration. Penetration of vulva, vagina, or anus by a penis to any extent would be sufficient for the offence of rape as per the Crimes Act.

The Crimes Act defines penetration broadly and if a person penetrates vulva, vagina, or anus of the other person **to any extent** with an object or a body part which is not the penis that is sufficient to establish penetration for the offence of rape.

Further if someone penetrates the mouth of another to any extent with the person's penis that would be sufficient to establish rape.

Crimes Act further eliminates gender stereotypes by broadly defining genitalia, penis, vulva, or vagina to include surgically constructed such organs as well whether provided for a male or a female.

Therefore, the myths based on gender stereotypes that there should be ejaculation or tears in the hymen to prove penetration are not valid in law.

### **Corroboration**

In Fiji the law clearly provides that no corroboration is required in sexual offences. Therefore, even medical evidence or evidence of recent complaint are not necessary to prove a sexual offence. Section 129 of the Criminal Procedure Act provides;

*“Where any person is tried for an offence of a sexual nature, no corroboration of the complainant’s evidence shall be necessary for that person to be convicted; and in any*

*such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration”.*

### **Previous sexual history**

Another salient provision in the Criminal Procedure Act which negates gender stereotypes in sexual violence cases is found in Section 130.

Section 130(2) - In any case of a sexual nature, no evidence shall be given, and no question shall be put to a witness, relating directly or indirectly to —

(a) the sexual experience of the complainant with any person other than the accused; or

(b) the reputation of the complainant in sexual matters, except by leave of the court.

### **Gender stereotypes relating to persons of different sexual orientation, gender identity and expression in sexual violence cases**

It should be admitted that we very seldom discuss the rights of LGBTQI community in relation to sexual violence cases. It would not be an overstatement to say that people with different sexual orientation, gender identity and expression are the most silent, but the biggest victims of gender stereotypes.

Time and again homophobic and transphobic violence have been recorded in Fiji. These attacks constitute a form of violence based on gender stereotypes, driven by a desire to punish those seen as defying gender norms. Due to gender inequality, and power relations within

families and wider society, lesbians and transgender women are at a particular risk.

In a study conducted in Fiji in 2012, of 464 individuals who were transgender or men who have sex with men, 48% reported verbal abuse and 28% reported physical abuse. There was a considerably higher rate of physical violence against transgender sex workers (36%) than against sex workers who were not transgender<sup>10</sup>.

An activist advocate for transgender equality in Fiji stated that lack of trust due to fear of discrimination, harassment, and violence discourages LGBT citizens from working in cooperation with law enforcement. Due to the repercussions from the community, people of different sexual orientation and gender identities who are subject to sexual violence on our streets are too frightened to report to Police<sup>11</sup>.

All over the world violence against people of different sexual orientations, gender identities and expressions tend to be vicious compared to other bias motivated crimes. The Organization for Security and Cooperation in Europe (OSCE) states that homophobic hate crimes and incidents often show a high degree of cruelty and brutality and include beatings, torture, mutilation, castration, and sexual assault<sup>12</sup>.

There are reports from many regions of lesbians being attacked, raped, or forcibly impregnated because of their sexual orientation. The Special Rapporteur on Violence Against Women noted that *“lesbian women face an increased risk of becoming*

<sup>10</sup> Asian Development Bank, 2015. *Country Gender Assessment*. [online] Adb.org. Available at: <https://www.adb.org/sites/default/files/institutional-document/210826/fiji-cga-2015.pdf> [Accessed 2 February 2021].

<sup>11</sup> Pireport.org. 2017. *Fiji Victims Of Anti-Gay Violence Often Fear Community*

*Repercussions If They Report Attacks To Police | Pacific Islands Report*. [online] Available at: <http://www.pireport.org/articles/2017/03/12/fiji-victims-anti-gay-violence-often-fear-community-repercussions-if-they-report> [Accessed 2 February 2021].

<sup>12</sup> Osce.org. 2007. *Hate Crimes in the OSCE Region: Incidents and Responses - Annual Report for 2006*. [online] Available at: <https://www.osce.org/odihr/26759> [Accessed 2 February 2021].

victims of violence, especially rape, because of widely held prejudices and myths, for instance, that lesbian women would change their sexual orientation if they are raped by a man<sup>13</sup>.”

Sometime back I have come across a case in Fiji where a woman was raped by a family member because she was found to be a lesbian.

In the landmark human rights case, **Toonen v. Australia**, the Human Rights Committee found that “adult consensual sexual activity in private is covered by the concept of “privacy” under the International Covenant on Civil and Political Rights. Therefore, States are obligated to protect individuals from discrimination on the basis of their sexual orientation<sup>14</sup>.”

Fiji is a secular state as per section 4 of the Constitution. Therefore, we have to give effect to the rights enshrined in the Constitution and other laws regardless of our beliefs and faith.

Our Constitution bans discrimination based on sexual orientation and gender identity or expression.

Article 26(3) of the Constitution reads as follows:

A person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her (a) actual or supposed personal characteristics or circumstances, including race, culture, ethnic or

social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status, or pregnancy; or

(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others, or on any other ground prohibited by this Constitution.

Further the Crimes Act, 2009 decriminalized homosexuality in Fiji and therefore it is no more an offence for people of same sex to engage in sexual practices as long as the parties’ consent to such acts.

At this point it would be interesting to note the case of *McCoskar* (2005)<sup>15</sup> which led to the decriminalization of the offence of sodomy in Fiji. In that case Justice Winter held that section 17(a) and (c) [carnal knowledge against the order of nature] as well as section 177 [gross indecency between males] of the old Penal Code are inconsistent with the previous Constitution of Fiji.

When the Crimes Act decriminalized homosexuality in 2009, Justice Shameem, who is now the president of the United Nations Human Rights Council said it was *McCoskar*’s case which led to decriminalization of homosexuality in Fiji and that

decision was the precedent for the change in laws<sup>16</sup>.

When we look at all these changes in laws and guarantees enshrined in our Constitution, it can be seen that Fiji has taken commendable efforts to eliminate harmful and wrongful gender stereotyping unlike most of the other Pacific countries.

### Judicial stereotyping

There is another regime that I would like to briefly touch upon as far as gender stereotypes in sexual violence cases are concerned.

Women, children, and other socially marginalized people often face a number of barriers when they seek access to justice. Gender stereotyping makes it harder for them to have access to justice in various levels.

Judicial stereotyping is a common and pernicious barrier to justice, especially for survivors of violence and women victims<sup>17</sup>. Women victims and survivors “should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions”<sup>18</sup>.

*‘Judicial stereotyping’ is the practice of judges:*

- ascribing to an individual specific attributes, characteristics, or roles by reason only of her or his membership in a particular social group

<sup>13</sup> A/HRC/4/34/Add.1, paras. 632-633. Both the Committee on the Elimination of Discrimination against Women and the Special Rapporteur on violence against women, its causes and consequences have addressed so-called “curative” or “corrective” rape, perpetrated by men who claim their intent is to “cure” women of their lesbianism. See, for example, the concluding observations of the Committee on South Africa (CEDAW/C/ZAF/CO/4), para. 39; and on the report of the Special Rapporteur on her mission to Kyrgyzstan (A/HRC/14/22/Add.2), para. 38.

<sup>14</sup> *Toonen v. Australia*, communication No. 488/1992 (CCPR/C/50/D/488/1992).

<sup>15</sup> Human Dignity Trust. 2005. *McCoskar v The State* [2005] FJHC 500; HAA0085 & 86.2005 (26 August 2005). [online] Available at: <[https://www.humandignitytrust.org/wp-content/uploads/resources/Nadan\\_\\_McCoskar\\_v\\_State.pdf](https://www.humandignitytrust.org/wp-content/uploads/resources/Nadan__McCoskar_v_State.pdf)> [Accessed 2 February 2021].

<sup>16</sup> Chand, S., 2010. *Same sex law decriminalised - Fiji Times Online*. [online] Web.archive.org. Available at: <<https://web.archive.org/web/20110822>

063355/http://www.fijitimes.com/story.aspx?id=140812> [Accessed 1 February 2021].

<sup>17</sup> Pillay, N., 2014. *Equality and Justice in the Courtroom*. [online] Huffpost.com. Available at: <[https://www.huffpost.com/entry/equality-and-justice-in-t\\_b\\_4892624](https://www.huffpost.com/entry/equality-and-justice-in-t_b_4892624)> [Accessed 3 February 2021].

<sup>18</sup> L’Heureux-Dubé, C., 2001. Beyond the Myths: Equality, Impartiality, and Justice. *Journal of Social Distress and the Homeless*, 10(1), pp.87-104.

- *perpetuating harmful stereotypes through their failure to challenge stereotyping*<sup>19</sup>.

An Italian judgment which was delivered in 2019 triggered a lot of uproar as the human rights activist claimed that the judgment was tainted with gender stereotyping. The Italian appellate court overturned a conviction in a rape case stating that the ‘victim was not pretty enough to be raped’. The three **female appellate court judges** agreed with the argument that the victim looked too masculine for the two men to have been attracted to her<sup>20</sup>.

Therefore, it is very clear that gender stereotypes can be manifested in judicial decisions as well. Unfortunately, judicial stereotypes will not only make miscarriages of justice, but those decision will attribute validity to such gender stereotypes in the society.

Women victims and survivors of violence are not the only groups affected by judicial stereotyping. It can also undermine justice for male victims of violence<sup>21</sup> and lead to miscarriages of justice in cases involving violence against people who identify as lesbian, gay, bisexual or transgender. For instance, a judge may be unable to recognize domestic violence in a same-sex relationship due to stereotypes related to marriage and family relations which may in turn result in the judge denying a request for a protection order against such violence<sup>22</sup>.

<sup>19</sup>Cusack, S., 2014. *Eliminating judicial stereotyping*. [online] Rm.coe.int. Available at: <<https://rm.coe.int/1680597b20>> [Accessed 3 February 2021].

<sup>20</sup> Tamkin, E., 2019. *Italy’s highest court overturns decision that woman was too ‘masculine’ to be raped*. [online] The Washington Post. Available at: <<https://www.washingtonpost.com/world/2019/04/10/italys-highest-court-overturns-decision-that-woman-was-too-masculine-be-raped/>> [Accessed 3 February 2021].

In a research conducted in Florida from 1994 to 2004 it was found that female offenders were treated more leniently than males, particularly when the judge in the female’s case was male. Because judges may tend to view females as less blameworthy, less dangerous to the community, and more adversely affected in their parenting role by a lengthy incarceration, they may give women reduced sentences<sup>23</sup>.

Other theories examine the role of chivalry and paternalism in a male-dominated judicial system, suggesting that a judge may feel more “protective” toward a female defendant than a male<sup>24</sup>.

Once Justice Shameem said in one of her papers published on a law journal;

*“Judges and magistrates are expected to be independent and impartial in the way that they do their work. Yet they are themselves, products of the society they live in. They are brought up by parents who may have taught them about gender expectations, they may go to churches, temples, and mosques where women are segregated and treated differently from men, and they may have partners and spouses whose roles may be driven by culturally driven expectations about the way women behave. We are all subject to social and culturally-driven attitudes. Recognizing our own attitudes and acknowledging the ways in which*

<sup>21</sup> Foster, G., Boyd, C. and O’Leary, P., 2012. *Improving policy and practice responses for men sexually abused in childhood*. [online] Australian Institute of Family Studies. Available at: <<https://aifs.gov.au/publications/archive/d/3975>> [Accessed 3 February 2021].

<sup>22</sup> “‘Honey, We Don’t Do Men’: Gender Stereotypes and Provision of Services to Sexually Assaulted Males’ (1996) 11(3) *Journal of Interpersonal Violence* 441.

<sup>23</sup> Van Slyke, S. R., & Bales, W. D. (2013). Gender dynamics in the sentencing of

*these attitudes can prevent us from hearing a case on its merits, is a challenge for judicial officers.”*

It should be noted that in all jurisdictions, judicial stereotyping is more or less reflected especially in sexual violence cases as judges also carry their own beliefs. To combat judicial stereotyping the following measures were recommended in a paper presented to the Office of the High Commissioner of Human rights by an Australian Human Rights lawyer who has done extensive research on gender stereotyping.

- highlight the harms of judicial stereotyping through evidence-based research.
- advocate legal and policy reforms that prohibit judicial stereotyping.
- monitor and analyse judicial reasoning for evidence of stereotyping.
- challenge judicial stereotyping through petitions and expert evidence.
- highlight good practice examples of judges challenging stereotyping.
- improve judicial capacity to address stereotyping<sup>25</sup>.

## Conclusion

In conclusion I would like to note that in our society we have seen, as lawyers and as judicial officers, enough instances where females as well as people of other gender identities, sexual orientations and expressions are often victimized,

white-collar offenders. *Criminal Justice Studies*, 26, 168-196.

<sup>24</sup> Curry, T. R., Lee, G., & Rodriguez, S. F. (2004). Does victim gender increase sentence severity? Further explorations of gender dynamics and sentencing outcomes. *Crime & Delinquency*, 50, 319-343.

<sup>25</sup> Cusack, S., 2014. *Eliminating judicial stereotyping*. [ebook] Available at: <<https://rm.coe.int/1680597b20>> [Accessed 4 February 2021].

penalized, and marginalized due to various wrongful and harmful gender stereotypes.

Unlike most of the other Pacific countries we can be proud that Fiji has put in place Constitutional guarantees and has introduced new laws to combat harmful effects of gender stereotypes in sexual violence cases.

I must also note that the judiciary of Fiji in its efforts to strive for excellence has taken a lot of proactive steps to strengthen judicial capacity and to sensitize judges in gender issues. Fiji judiciary holds regular workshops and training programs to address important issues such as gender stereotyping apart from close scrutiny of judicial work to minimize negative effects on access to justice and equality before the law.

It is the duty of all of us to understand, identify and sensitize ourselves to eliminate these wrongful and harmful gender stereotypes in sexual violence cases to ensure access to justice and equality before the law to all citizens of Fiji regardless of their gender, sexual orientation, gender identity or expression.

## NEW TOOL TO ASSESS SEXUAL OFFENCES IN THE COMMONWEALTH

In April 2021, Human Dignity Trust launched a new digital tool to support the reform in outdated and discriminatory sexual offences laws around the Commonwealth.

[Changing Laws, Changing Lives: Assessing sexual offences laws in the Commonwealth](#), reviews sexual offence legislation in all 54 Commonwealth countries against a set of indicators to assess their human rights compliance in 4 areas of the law: sexual assault, child sexual assault, disability, and consensual

same sex activity. The indicators against which the countries are assessed are:

1. Sexual assault crimes are gender neutral;
2. Marital rape and sexual assault are crimes;
3. Free and voluntary consent is required;
4. Evidence of resistance is not required;
5. All non-consensual sexual acts involving penetration are offences;
6. All non-penetrative, non-consensual physical sexual acts are criminal offences;
7. No corroboration required;
8. Prior sexual conduct is inadmissible and irrelevant;
9. Terminology in sexual assault laws is legal and non-moralistic;
10. There are specific child sexual offence laws;
11. Child sexual offence laws are gender neutral;
12. There is no defence of consent in child sexual offence laws (other than close-in-age defences);
13. Consensual sexual activity with a person who has a disability is not an offence;
14. No discriminatory derogatory or stigmatising language is used with reference to people with a disability;
15. Consensual same-sex activity is not a crime;
16. No discriminatory derogatory or stigmatising language is used regarding same sex activity.



The tool is to be used in legislative reforms. It also provides an important comparative analysis of legislation across Member States of the Commonwealth. For example, in 32 Commonwealth countries it is not

a crime for a woman to be raped if the perpetrator is her husband; yet it remains a crime for LGBT people to engage in consensual, intimate relationships in 35 countries. It also highlights good practice.

## 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.*

### ENGLAND AND WALES

In July 2021, it was reported that an amendment to the Health and Care Bill 2021 had been suggested in order to ban virginity testing and virginity repair. This followed a BBC report about the practice in the UK. If the amendment is adopted, doctors or midwives performing either could face imprisonment. The United Nations and the World Health Organisation consider virginity testing to be a violation of human rights. Whilst it is still practiced in more than 20 countries worldwide, it cannot provide any evidence, according to WHO that a woman or a girl has had sex, as the hymen can tear for other reasons. There have been a number of instances of women being subjected to violence or honour killings for failing the test.

### GHANA

In August 2021, it was reported that The Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 had received its first reading in parliament. Although gay sex is punishable by 3 years in prison already, the new bill imposes a maximum five-year term for anyone who is gay, lesbian, bisexual, transgender, transsexual, pansexual

and non-binary (i.e.: someone who does not identify as male or female). In addition, it criminalises any advocacy for LGBT+ rights, as well as any sympathising or offering of help whether financial or medical - to LGBT+ people or their organisations a crime punishable by up to 10 years in jail.

*“This proposed legislation is a gross violation of the human rights of Ghana’s lesbian, gay, bisexual and transgender community, who already face high levels of violence, abuse, stigma and discrimination,”* the UNAIDS representative for West and Central Africa, Patrick Brenny stated.

## KENYA

Whilst female genital mutilation has been banned in Kenya since 2011, a case was taken to court claiming that the banning of FGM was unconstitutional. In March 2021, the High Court ruled that the law was valid. The three judges in the case were also concerned that a provision in the law that allowed genital procedures to be carried out by doctors during labour or delivery could be used by traditional circumcisers to perform FGM on women. In addition, the judges were concerned that women could be pressurised into undergoing FGM, even when consent was given. In any case, they pointed out that *“no person can licence another to perform a crime”*. Whilst cultural norms were respected, any customary practices that were harmful against women was unconstitutional.

Interestingly, around the same time, the court dismissed a case, on the recommendation of the Attorney General against 21 LGBT activists arrested in late May for “unlawful assembly” who had attended a training course organised for lawyers to better identify and report human rights violations suffered by LGBTQ Ghanaians.

## INDIA

In March 2021, the Supreme Court of India, following a case lower courts to **avoid expressing any stereotypical or patriarchal opinions** in court orders relating to crimes against women. For example, they should avoid using words such as “women are physically weak, should be submissive and obedient, good women are sexually chaste”. The Supreme Court issued the direction in a judgment which set aside a decision by the High Court of Madhya Pradesh that had given bail to a man accused of outraging the modesty of his neighbour provided that that he request the victim to tie a rakhi on his wrist (A rakhi is a thread bracelet that a sister ties on her brother’s wrist during the Hindu festival of Raksha Bandhan, which celebrates the bond between a brother and a sister or any similar relationship).

The Judges in the case further stated that courts should not suggest, entertain or encourage marriage between the survivor and the accused, or mandate mediation between them, as these forms of compromises are beyond the power and jurisdiction of the court.

The Supreme Court also ordered that judges, lawyers and prosecutors must undergo gender sensitivity training to ensure an end to stereotypical language, the granting of bail conditions in such cases and the re-traumatising of victims.

The full judgment can be found at: [20318\\_2020\\_35\\_1501\\_27140\\_Judge ment\\_18-Mar-2021\\_1.pdf \(legalbrief.co.za\)](#)

## MALAWI

In March 2021, the Malawi High Court found that a company had not provided adequate protections to a woman who experienced sexual harassment in the workplace. Judge Tembo indicated in his judgment that

the company had failed to ensure the safety and welfare of the woman, even though she had made a complaint. He further indicated that whilst the woman had not suffered any physical damage, the company was still liable for the psychological damage that she had suffered even though she had not claimed this. The judge awarded her aggravated damages for her suffering. The full judgment can be found at:

[T K v Mota Engil Engenharia Construcao Africa, SA \(576/2017\) \[2021\] MWHC 26 \(20 February 2021\); | Malawi Legal Information Institute \(malawilii.org\)](#)

## NEW ZEALAND

In March 2021, New Zealand introduced a law that provides mothers and their partners the right to paid leave following a miscarriage or still birth. It also provides for paid leave for parents in adoption or surrogacy cases. India is the only other country in the world that has this legislation. Mothers, partners, or parents will be given 3 days compassionate leave. Previously they would have had to take sick leave.

## SEYCHELLES

The CMJA congratulates former Chief Justice Dr Mathilda Twomey, on receiving the Franco-German Human Rights Prize for her work on the defense of sexual abuse victims especially minors. She was presented with the Award on 30 July 2021.

In accepting the award, she said *“in my role as chair of the committee for the reform of child law to prevent and punish child abuse, sexual abuse and exploitation, I sought to strengthen the legal protection offered to children in accordance with the Constitution of Seychelles, and with international and regional human rights law.”*

Justice Twomey recently submitted a proposal for a Sexual Offences Bill to the President of Seychelles. She reported that there had been an increase in abuse in the Seychelles, especially of children, some of which was online and some of which seemed to be organised by criminal groups.

## SOUTH AFRICA

In February 2021, the Constitutional Court overturned a gender-based inheritance law stating that the Equality Act was now the benchmark to evaluate the conduct of a private person which had an impact on another person's right to equality. The case involved a will which was 100 years old that provided that the farms should be given to the male descendants for 3 generations. *The sisters of one of the male heirs initially approached the High Court and then the Supreme Court, both of which dismissed their application. The Constitutional Court held that 'The provisions of the preamble to the Equality Act make its nature and intended purpose clear. The consolidation of democracy requires the eradication of inequalities, especially those that are systemic in nature and which were generated in SA's history by colonialism, apartheid and patriarchy.'*

In August 2021, the Commission for Gender Equality urged the government to expediate the process for dealing with Gender Based Violence which has seen an upsurge in South Africa during the pandemic. Consultations on two bills are currently taking place at provincial level. The Commission called on the government to open digital designated sexual offences courts which it was hoped would alleviate the plight of women. In addition, it urged the government to open more care

centre to assist in sheltering women who had been abused.

## UGANDA

In 2014, the government introduced legislation prohibiting pornography in Uganda which it claimed would protect women and children. There were protests at the time that this was contrary to the constitutional provisions that all citizens were equal, and a number of prominent women entertainers were prosecuted under the law for indecency due to their clothing, or for lyrics that were demeaned to be contrary to the law. Women have been attacked publicly for wearing certain types of clothing that were considered indecent under the law as well. In August 2021, the Constitutional Court annulled the legislation and disbanded the 9 member commission which had been set up to enforce the law.

## 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](mailto:info@cmja.org)

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

## GENDER SECTION NEWS

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## 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.

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