



GENDER EQUALITY JURISPRUDENCE AND THE ROLE OF THE JUDICIARY IN PROMOTING WOMEN'S ACCESS TO JUSTICE

INTRODUCTION

Access to justice for women is a critical component of delivery of justice globally and at the national level. In Uganda JLOS conducted a survey in 2011 which showed limited capacity of judicial officers in the delivery of gender sensitive justice to the population but most specifically to women.

We can identify the gender based barriers at 3 major sites. Substantive law, Administration of the law and communities where disputes occur. This is where discrimination against men and women manifests itself mainly in the laws, cultures and traditions, religion training and orientation. We are talking about written law and the lived reality, How Power is distributed and controlled among men and women both in the private and public sphere, how men and women have been socialized to accept and sometimes never to question the gendered status quo.

1. Substantive law

- a) Gender biased laws
- b) Gender Neutral Laws

2. Administration of the law

- a) Physical access to justice delivery centers
- b) Training and orientation
- c) Delayed delivery of justice
- d) Attitude of judicial officers

3. Communities where Disputes occur

- a) Patriarchy ó Men lead women follow
- b) Culture
- c) Tradition

- d) Religion
- e) Poverty
- f) Public/private divide
- g) War and insecurity
- h) Household: Equality/power and control
- i) Corruption

Examples

1. a) Gender biased laws

- I. The law of criminal adultery
- II. Provocation
- III. Corroboration in sexual offences
- IV. Succession and inheritance
- V. Citizenship
- VI. The right of assembly and association
- VII. Equality in matrimonial matters (marriage and divorce)
- VIII. Conjugal rights and offences such as Marital rape

b) Gender neutral laws

- I. Open court hearing
- II. Bank loan policy

The Role of the Judiciary

- a) Identify and recognize the gender based barriers. Gender biased laws biased in favour of a particular gender. They give different power, status, privileges and opportunities to different sexes.
- b) Interpret the law in light of constitutional guarantees and international human rights instruments. For example: The Bill of Rights, ICCPR, UDHR, CEDAW, DEVAW, ICESCR, CAT etc
- c) Declare the law discriminatory, unconstitutional or both. Use IHRI, Constitutions.

- 🚩 The AG of Botswana v Unity Dow [1992] LRC 623,
- 🚩 Sarah Longwe v Intercontinental Hotels [1993]4 LRC 221,
- 🚩 Ephraim Pastory v Kazingire [1990] LRC 575,
- 🚩 LAW and Advocacy for women v AG Constitutional Petition No. 05 of 2006,
- 🚩 Mifumi Limited and 12 others v AG and Kenneth Kakuru Constitutional Petition No. 12 of 2007.

d) Question, problematize the existing law. Does it promote gender equality? Article 274 of Uganda's constitution.

- ✚ At marriage: early marriages, forced marriages, demand for dowry *Mifumi Limited and 12 others v AG and Kenneth Kakuru Constitutional Petition No. 12 of 2007*.
- ✚ In marriage: property rights, forced pregnancies, abortion, family name *Julius Rwabinumi v Hope Bahimbisomwe SCCA No. 10 of 2009*
- ✚ And at its dissolution: distribution of property, custody of children, refund of dowry, *Pettit v Pettit [1969] 2 ALLER 383*, S. 26 of the Divorce Act, Article 31 of the 1995 Constitution of the Republic of Uganda.
- ✚ For girls and boys in education, upbringing; Health, pregnancy before marriage, choice of career. *Mfolo and others v Minister of Education Bophuthatswana [1992] 3 LRC 181* *Students Representative Council of Mole polole College of Education v AG [1995] 3 LRC 447*
- ✚ Does it promote gender equality at the place of work?
- ✚ Anti-sexual harassment: *Vishaka v State of Rajasthan*

e) Judicial Activism

Rights of women call for judicial activism to make them a reality as human rights under article 33, 32 and 274 of the 1995 constitution;

GIVE VALUE TO THE WOMEN AND THEIR roles including unremunerated household work.

- ✚ The state must protect women and their rights
- ✚ The state must provide facilities and opportunities for women
- ✚ The state must recognize and protect the unique status of women
- ✚ The state must recognize and protect the natural maternal function of women in society
- ✚ The state must take affirmative action in favor of women as a marginalized group
- ✚ The state must prohibit laws, cultures, customs and traditions which are against the dignity, welfare and interest of women or undermines their status

The Judiciary has a duty to construe the existing law with such modifications, adaptations, qualifications and exceptions to promote gender equality. We are mandated to craft legal procedures and legal remedies (See the now famous *ERIC BUSHOBOROZI V UGANDA* on the minister's orders, *Vishaka and Others v State of Rajasthan*, Supp. (1997) 3 S.C.R. 404 (India))

f) Avoid bias and gender stereotyping.

- ✚ *Hugo v the President of South Africa* (father as a single parent)
- ✚ *E.B V France* (can a lesbian adopt a child?)
- ✚ *Egan v Canada*
- ✚ *Uganda v Stephen Apai* (civil language in Court)

- g) Hold trials of SGBV cases in camera (not necessarily chambers where kids are near the accused)
- h) Drop corroboration and the cautionary rule where it promotes statutory discrimination. (Maina v Rep, Mukungu case and Uganda v Peter Matovu)
- i) Develop Bench Briefs for the courts and court users. Avail legal authorities, best practices, persuasive authorities and comments on dissenting judgments
- j) Research and training: Bridge the gap of communication created by legalese. SIMPLIFY LANGUAGE AND CONCEPTS. Use examples in culture, religious holy scriptures that liberate the women.
- k) Hold open court days , radio and TV shows, open dialogue and Conferences

Lead by example as Champions. Preach and practice Equality, Safety, Empower the woman/girl and empower the nation.

Convention on the Elimination of all forms of Discrimination against Women Article 1 states:

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Convention on the Elimination of all forms of Discrimination against Women Article 5 (a) states:

States Parties shall take all appropriate measures:

A) 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.

Constitution of the Republic of Uganda, Article 8A states:

(1) Uganda shall be governed based on principles of national interests and common good enshrined in the national objectives and directive principles of state policy.

(2) Parliament shall make relevant laws for purposes of giving full effect to clause (1) of article.

The 1995 Constitution of the Republic of Uganda, Article 126 states:

- (1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.
- (2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles
 - (a) justice shall be done to all irrespective of their social or economic status;
 - (b) justice shall not be delayed;
 - (c) adequate compensation shall be awarded to victims of wrongs;
 - (d) reconciliation between parties shall be promoted; and
 - (e) substantive justice shall be administered without undue regard to technicalities.

Constitution of the Republic of Uganda, 1995, Article 2 of provides

- (1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.
- (2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

Constitution of the Republic of Uganda, 1995, Article 274 provides:

- (1) Subject to the provisions of this Article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.
- (2) For the purposes of this Article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date.

Points to Note

- Judicial officers must appreciate life experiences of people from different backgrounds and understand potential difficulties, barriers or inequities that they may face in relation to court proceedings.
- The different ranges of cultures, traditions, religious beliefs, values, lifestyles and life experiences of people from different backgrounds are stereotyped in court proceedings.
- People from disadvantaged backgrounds have the greatest likelihood of being both victims of personal crime or of being involved in crime.
- Characteristics such as disability, gender, ethnicity, religious affiliation and socioeconomic background may or may not have a determining influence on any particular individual's values, life experience or behaviour with a compounding effect.

R v R [1991] 3 WLR 767 a husband's defence to rape was rejected by the Court of Appeal. It held that:-

This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.