



COMBATING NEGATIVE CULTURAL PRACTICES IN CONTEMPORARY TIMES – THE ROLE OF WOMEN JUDGES

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Tools Available to Women Judges in Curbing Harmful Cultural Practices Against Women

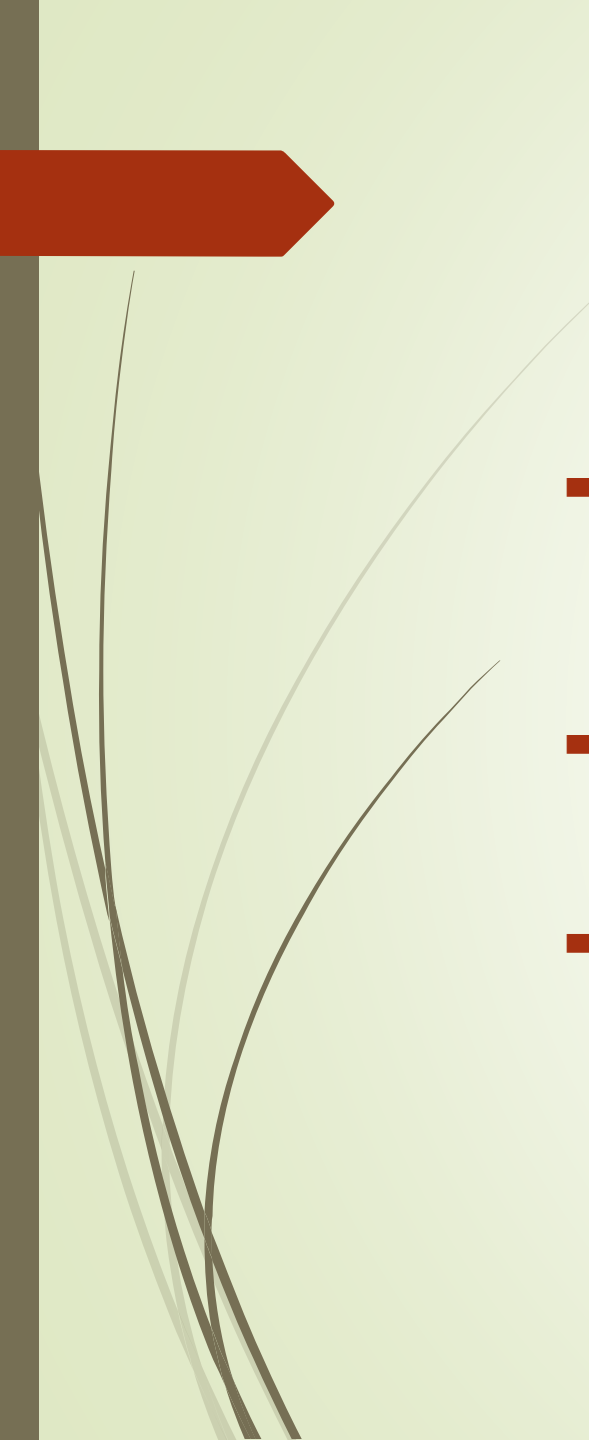
Presented by Lady Justice Roselyne Korir,
Judge of the High Court of Kenya



Overview



- ▶ This Paper gives an overview of the Policy and Legal Framework adopted by the International Community in advancing the human rights of women, and in particular in protecting women from harmful cultural and traditional practices.
- ▶ Women Judges no doubt occupy an influential position in society. Through the judicial work they do, coupled with knowledge of the communities they serve, they are uniquely positioned to contribute to efforts to stamp out these harmful practices.
- ▶ Using some of the harmful cultural practices, including Female Genital Mutilation (FGM) and Early Child Marriage, the Paper discusses the critical role of Women Judges and the practical tools they can employ in curbing harmful practices.

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- ▶ The Maputo Protocol under Article 1 (g) defines harmful practices as: “**All behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.**”
 - ▶ Negative or harmful cultural practices refuse to die or, at best, die a slow death. They persist despite concerted effort by the world community to bring them to a quick end.
 - ▶ The existence of a plethora of policies, international human rights instruments, declarations, legislations, and a range of directives and activities bear testament to the need to curb and stamp out the practices altogether.



Select practices for discussion

- ▶ **FGM and its evil twin, early child marriages**
- ▶ More than 200 million girls and women alive today have undergone FGM in 30 countries in Africa, the Middle East, and Asia, where FGM is practiced (WHO Fact Sheet, 5 February 2024).
- ▶ In Kenya, in 13 of 47 counties, 1 in every 2 women marry before age 19, denoting a practice of early child marriage. These practices often prevent women from achieving their full potential as productive members of society because they result in unequal access to education, healthcare, economic opportunities, and leadership positions. (AFIDEP, 2017)
- ▶ **Wife inheritance**
- ▶ Some countries are at different stages of rooting out these practices while at the grassroots level some communities persist in rationalising them, which demonstrates the tensions between culture and progressive human rights.



TOOLS AVAILABLE TO WOMEN JUDGES IN CURBING THE HARMFUL CULTURAL PRACTICES



1. Policy and Legislative Framework

❖ International Conventions and human rights framework

- ▶ There is a robust human rights framework underscoring the need to protect and promote the rights of women and to secure a safe environment for the exercise of those rights.
 - ▶ **The Universal Declaration of Human Rights (1948)** outlines the main foundation for the protection against harmful cultural practices and promotes equality of all persons.
 - ▶ **The International Covenant on Economic, Social and Cultural Rights (1976)** ensures the equal rights of men and women to the enjoyment of all economic, social, and cultural rights outlined in the Covenant and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
 - ▶ **The Convention on the Elimination of All Forms of Discrimination Against Women (1979)** defines discrimination against women and challenges states to fight Harmful Cultural Practices.
 - ▶ **The Convention on the Rights of the Child (1989)** guarantees the rights of every child without discrimination of any kind and establishes the right to be free from all forms of physical or mental violence and ill-treatment.



- ❖ **Regional Instruments (Africa)**

- The African Charter on Human and Peoples' Rights (1981)
- African Charter on the Rights and Welfare of the Child (1990)
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

- ❖ **Other Instruments for the Elimination of Discrimination and Protection against Harmful Practices**

- ❖ The United Nations Sub-Commission on the Promotion and Protection of Minorities adopted a Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children in 1994
- ❖ United Nations, Resolution Adopted by General Assembly on Traditional or Customary Practices Affecting the Health of Women and Girls (1 February 1999) A/Res/53/117
- ❖ There have been numerous declarations and resolutions.



2. Municipal Policy and Legislative Framework – The Kenyan Case

- ❖ Constitution of Kenya, 2010
- ❖ Prohibition of Female Genital Mutilation, 2011
- ❖ The Children Act NO.29 of 2022
- ❖ The Penal Code, Cap 63 Laws of Kenya
- ❖ The Sexual Offence Act, 2006



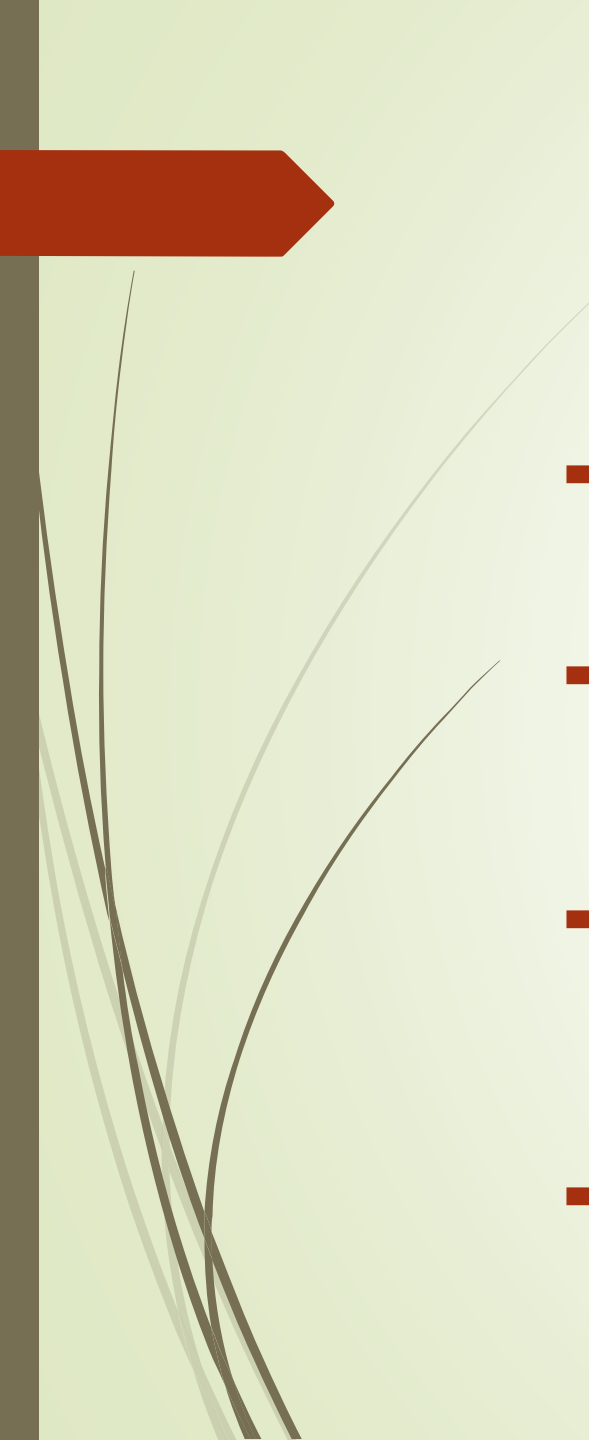
Social Transformation through Access to Justice (STAJ)

- ▶ The approach in Kenya in dealing with harmful cultural practices is rooted in Chief Justice Martha Koome's Vision of Social Transformation through Access to Justice (STAJ). The vision "is borne out of the reality that justice is... broad and multi-faceted... and that all people are stakeholders in the delivery of justice."
- ▶ Women and girls who are victims of harmful cultural practices are considered vulnerable, and clear effort must be made to make justice more accessible to them within their cultural context. The Judiciary is therefore committed to not only widening its doors to this group but also encouraging efforts to sensitise communities on the harmful effects of the practices in a bid to further foster social transformation.



3. Progressive Jurisprudence


- ▶ Law plays a critical role in not only affirming the human rights of women and girls, but also in bringing about desired positive change.
- ▶ In countries with specific laws, a purposive interpretation of the law will not only give legal address to the parties before the court, but would also broadly affirm rights for women and girls at the individual, community, and national level.
- ▶ The IAWJ – Kenya Chapter has in its **Strategic Plan (objective II)** prioritised the development of relevant jurisprudence and towards that end will support the development and strengthening of jurisprudence on women and children's rights to protect the principles of the rule of law and equality for all before the law. The overall Strategic Objective is *“to strengthen jurisprudence on gender parity to create awareness on women and children rights.”*

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- ▶ A leading case in Kenya is *Kamau vs. Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (Constitutional Petition 244 of 2019) [2021] KEHC 450 (KLR) (Constitutional and Human Rights) (17 March 2021).
 - ▶ The petitioner, who was a medical doctor, pleaded that sections 2, 5, 19, 20, and 21 of the Prohibition of Female Genital Mutilation Act contravened articles 19, 27, 32, and 44 of the Constitution of Kenya, 2010 by limiting women's choice and right to uphold and respect their culture, ethnic identity, religion, and beliefs, and by discriminating between men and women.
 - ▶ The court held that:
 - ▶ While the Constitution had a general underlying value of freedom, that value of freedom was subject to a limitation that was reasonable and justifiable.
 - ▶ The Constitution had not inscribed the freedom to inflict harm on oneself in the exercise of those freedoms.
 - ▶ The case was dismissed.



4. Implementation of the Policies and Laws against the Harmful Traditional Practices through Penal Sanctions

- ▶ A number of countries including Kenya have made great strides in passing legislation prohibiting various types of harmful traditional practices.
- ▶ This paper has highlighted several cases brought under the Anti-FGM Law in which persons have been charged and convicted of various offences, including:
 - ▶ Failure to report FGM
 - ▶ Procuring FGM
 - ▶ Using home for procuring FGM
- ▶ Sentences of 3 years' imprisonment and a fine of Ksh. 200,000.



5. Judicial Training and Capacity Building

- ▶ Upskilling judges in the human rights framework and gender-responsive interpretation of the law.
 - ▶ CEDAW
 - ▶ Maputo Protocol
- ▶ The Kenya Judiciary Academy (KJA) has designed courses and training programmes to equip judges to interpret human rights conventions and apply a human rights approach in their judicial work.
- ▶ Beyond training, however, there is a felt need to make justice more accessible to women and girls. Presently, IAWJ – Kenya Chapter has purposed to promote and encourage gender equality in all matters relating to the administration of justice.



6. Community Outreach and Sensitization as a Tool

- ▶ **Outreach** is the activity of providing services, information or knowledge to any population that might not otherwise have access to those services
- ▶ **Sensitization** is the process of raising or creating awareness.
- ▶ Women Judges are a repository of legal knowledge, and in particular, knowledge of human rights for women and girls. They are therefore well-positioned to impart that knowledge at the community level.
- ▶ In Kenya, the primary stakeholders in the administration of justice have been brought together through the Court Users Committees (CUCs) established in every court station.
- ▶ The IAWJ – Kenya Chapter has experience in leveraging the CUC in the implementation of key programmes. It has trained CUCs in SGBV in various court stations, which has led to improved handling of SGBV cases. Concerning FGM, the IAWJ – K members in Bomet Court and Kajiado Court among others have led Court Users in holding public sensitisation forums.

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- ▶ It is recognised that Women Judges are indeed very busy with their judicial work and are not endowed with resources for community outreach.
Conducting stakeholder engagement and collaborating with NGOs and civil society is therefore key.
 - ▶ Women Judges recognise that certain government departments, including ministries of gender and civil society and grassroots organisations, have distinct competencies and resources to combat harmful cultural practices.

IAWJ KENYA OUTREACH

Outreach



OUTREACH



IAWJ-KENYA STAKEHOLDER ENGAGEMENT





7. Mentorship of Women and Girls


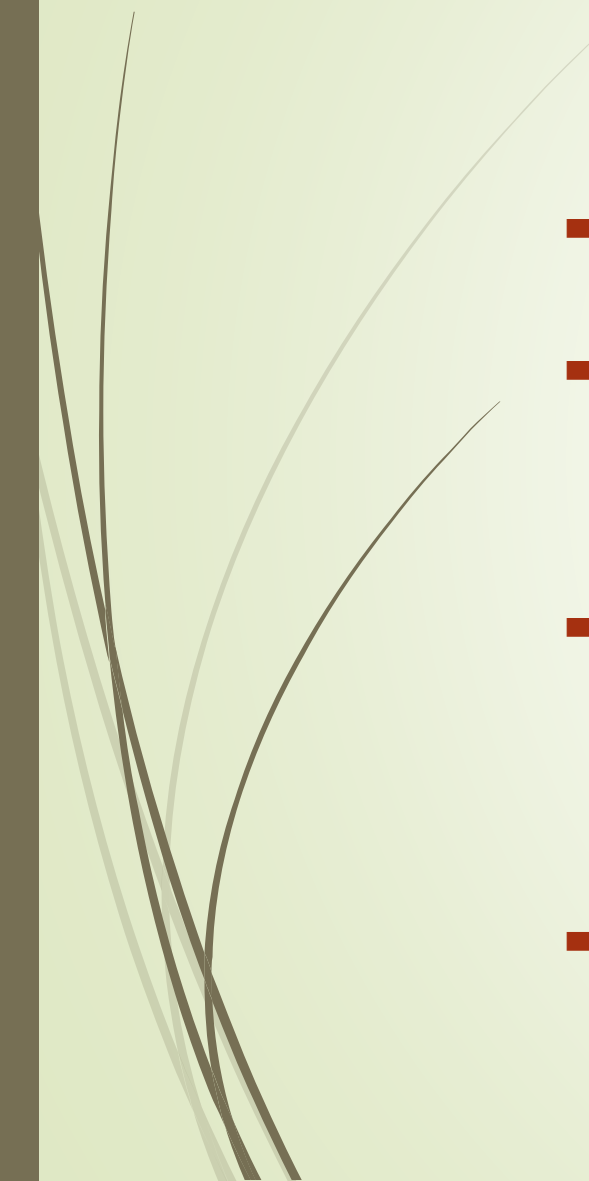
- ▶ Women Judges are influential in society and are perceived to be so. A judicial seat is one with power donated by the people for the benefit of the people. Women Judges are, therefore, well-positioned to champion causes that empower girls and women to say no to harmful cultural practices. They can do this through mentorship programs.
- ▶ The IAWJ – Kenya Chapter has in its Strategic Plan committed to undertake mentorship of young women and girls in the various regions of the country. The mentorship programme, which is in its formative stages with support from IAWJ and partners, is aimed to be both inward and outward looking. For the inward strategy, it is expected that this activity will “**strengthen and empower the capacities of young women and girls within the regions through mentorship in leadership and gender justice.**”



IAWJ - KENYA MENTORSHIP





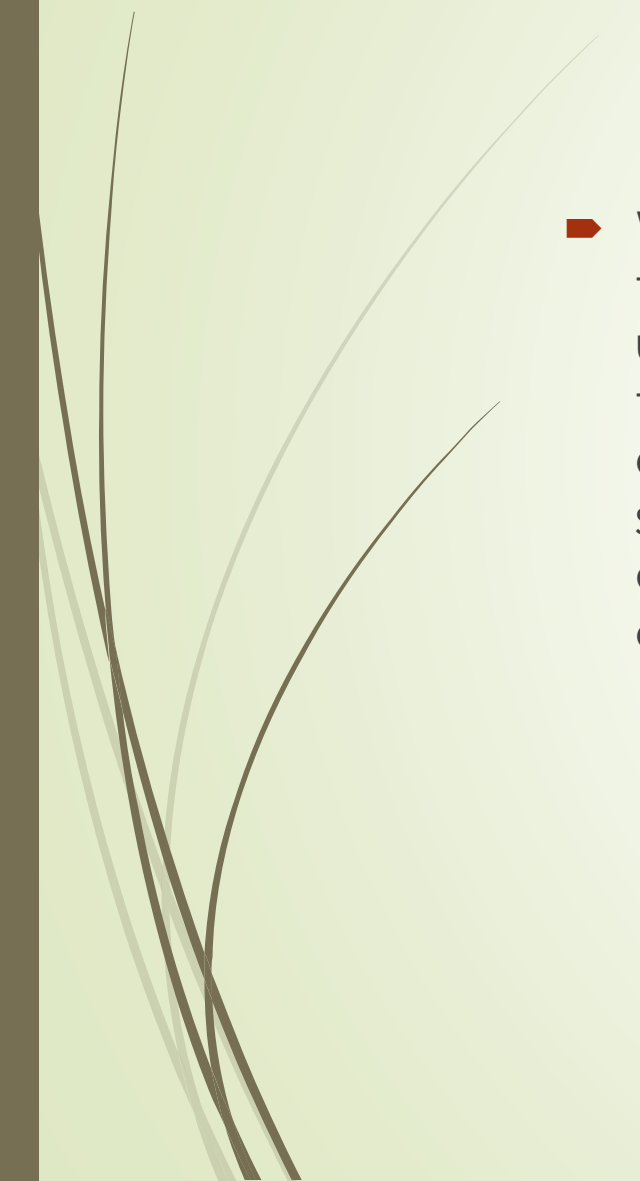
THE DICHOTOMY OF WOMAN AS PERPETRATOR AND WOMAN AS VICTIM OF HARMFUL CULTURAL PRACTICES

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- ▶ Efficacious strategies for eradicating harmful cultural practices must relook at the role women play within their lived reality.
 - ▶ Many studies suggest that men, and particularly elders, were responsible for upholding culture and the perpetuation of harmful traditional practices. In other words, the supposition is that women were both objects and subjects of harmful traditional practices.
 - ▶ However, women play a powerful role in upholding societal norms and culture. I even dare say that they were the primary custodians of culture. Like men, women operate in an environment with clearly defined roles and in most cases are not bystanders or just objects of the harmful cultural practices.
 - ▶ Refer back to Case Law. See Table.

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- ▶ For whose benefit are these harmful practices upheld? Do women submit to these practices voluntarily? What options are open to women who find themselves in a cultural environment that promotes FGM and its evil twin, namely early child marriage?
 - ▶ The data casts doubt on the efficacy of law alone in stamping out the practice. The long jail terms may serve a deterrent purpose for those who are not yet cut but clearly serves no rehabilitative purpose for the ones already cut and in jail. The profiles also showed that the women in jail had left behind their young children who ran the risk of dropping out of school or being abused. The import of this observation is the need for multi-sectoral approaches.



CONCLUSION AND CALL TO ACTION

- ▶ Women Judges have a critical role to play in curbing harmful cultural and traditional practices. It has shown that they have been at the forefront in using and promoting relevant jurisprudence. They have deployed the law to great impact and have led in training their colleagues in jurisprudence of equality. They are called upon to do more. They have received more and so more is demanded of them. It is my firm belief that Women Judges can do more by looking beyond the court room. They must step outside the court room for lasting impact.
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I thank you for your attention.