



Report 4th Meeting – Gender Issues Concerning Approaches to Female Counsels

On May 29, 2021, Africa Legal Aid (AFLA), held the 4th meeting of its Gender Mentoring Training Programme for Judges of International Courts and Tribunals. The topic of the discussion, *Gender Issues Concerning Approaches to Female Counsels*, was presented by Alka Pradhan, Human Rights Attorney for Guantanamo Bay Detainees and Civilian Drone Strike Victims; Melinda Taylor, Victims' Advocate in International Criminal Law and Lead Defence Counsel before the International Criminal Court (ICC); and Sarah Bafadhel, Barrister, 9 Bedford Row, a respected barrister who has represented clients in high-profile and complex cases before international and regional courts and tribunals resulting in landmark decisions.

The meeting was attended by:

Judge Reine Alapini-Gansou, Judge of the ICC, Former Member of the African Commission on Human and Peoples' Rights.

Judge Solomy Bossa, Judge of the ICC; Former Judge of UN IRMCT; Former Judge of the ICTR; Former Judge of the African Court on Human and People's Rights.

Judge Luz Ibáñez Carranza (Acting Chair), Judge of the ICC; Former Superior National Prosecutor of Peru.

Judge Janet Nosworthy, Judge of the STL; Former Judge of the ICTY.

Judge Julia Sebutinde, Judge of the ICJ; Former Judge of the SCSL.

Evelyn A. Ankumah, Coordinator of the Gender Mentoring Training Programme for Judges; Executive Director of AFLA.

Gabrielle Louise McIntyre, Co-Coordinator of the Gender Mentoring Training Programme for Judges; Chairperson of the Truth, Reconciliation and National Unity Commission of the Seychelles; Former Chef de Cabinet and Principle Legal Advisor to the President of IRMCT and four successive Presidents of the ICTY.

Participants adopted the following agenda items for discussion:

1. Do historical narratives concerning the involvement/competence of women in male dominated fields influence how judges assess the competence of female counsels and the strength of their case? How has this affected their clients?
2. Discrimination against women is often layered. What forms of intersectional discrimination have you observed against female counsels?

While judges may not intend to discriminate against any person in the discharge of their functions, a number of studies have highlighted the fact that judges do suffer from unconscious bias. What strategies can be used to address the issue of unconscious bias?

3. What lessons if any, can international courts and tribunals learn from Alka Pradhan's experiences as counsel for Guantanamo Bay detainees?
4. Melinda Taylor made reference to the presumption of competence for men and presumption of incompetence for women. What are your observations if any, on these assumptions? How can we do away with these stereotypes?
5. What impact, if any, can negative perceptions of female counsels by external actors, like the journalist in Melinda Taylor's case, have in the justice process?
6. Sarah Bafadhel highlights three main difficulties faced by minority female counsels. How best can these be resolved?
7. Women have played prominent roles in modern day international tribunals. In view of the vast contribution of women to international criminal law, what explains the negative perception of female counsels?
8. What role can international criminal courts play in removing stereotypes and intersectional discrimination against female counsels?

Discussion

In her video statement, Alka Pradhan touched on her encounters with intersectional discrimination - as one of the few women of colour to have appeared before the Guantanamo Bay Court. She opined that her experiences were very predictable given that this field is dominated by white male practitioners. For Pradhan, the intersectional discrimination which exists in the courtroom is not explicit and is mostly unconscious. Unconscious bias manifests in various ways including presumptuous comments made about her ability to balance family life and career; assumptions that she is sympathetic to the crimes her clients have allegedly committed; verbal and near physical attacks due to her juxtaposition as a woman of colour who is a defence counsel; continuous attempts to discredit her competency and labelling her as overly emotional.

Pradhan observed that such comments and attitudes become more problematic when they affect the work of the individual, and the credibility of the lawyer in the eyes of their client. She implored that discriminatory attitudes towards female counsels should not affect their clients' ability to seek justice. Pradhan expressed the view that judges can also perpetuate such discriminatory attitudes when they fail to call out such behaviour by other actors in the courtroom e.g., male counsels, as this can be seen as legitimising such bias. The influence of judges extends beyond the courtroom and includes what the public sees and perceives as justice. Pradhan explained that bias is difficult to deal with and takes time and energy away from counsel's work. Therefore, it is important for judges to play their part in setting an example that such bias is not tolerated in the courtroom.

Pradhan expressed her hope to see more examples of top-down leadership within the courtroom, exemplifying equal treatment of all genders, races and cultures. This is particularly

important in international courts where the purpose is to uplift and maintain international values and combat crimes which are born out of hate.

In her video statement, Melinda Taylor noted at the outset that since the beginning of her engagement with the ICC as defence counsel there have been positive developments, including the appointment of a gender focal point and the continued reiteration of the ICC's commitment to gender equality by ICC principals. Although it is important to highlight the progress made, Taylor called on participants not to forget how much further there is to go.

Taylor discussed a serious way in which gender bias manifests in the courtroom: the presumption of competence of male counsels and incompetence of female counsels. Despite having more than 15 years of experience in working on defence teams in international tribunals and as lead defence counsel at the ICC, she still experiences professional indignities. Prior to starting her recent case as lead defence counsel at the ICC, a journalist asked her why she thought her client had chosen her. She explained that such questions seek to both undermine and question her competence and qualifications and suggest that she got the job for reasons outside of her capabilities.

Taylor used the legal aid scheme as an example of how gender bias creates structural obstacles for female counsels, contending that the legal aid scheme had been structured to benefit the average European male counsel who had little to no parenting duties. She noted that although the issue of parental leave has been repeatedly raised by female counsels, it has not been properly addressed, resulting in female counsels being forced to choose between parental duties and their career. She said the lack of a comprehensive and inclusive legal aid scheme impacts counsel's ability to attend and effectively participate in trial hearings. She called for discussions on how the legal aid scheme could be amended to ensure gender equality.

Taylor addressed the culture of discriminatory treatment of female counsels, noting that women in the courtroom are often not seen or heard in the same way as their male colleagues. She shared that early on in her career she was advised to adopt a certain style of presentation to be taken more seriously. She also gave the example of a female colleague who wore very high heels to court in order to be seen. She expressed the view that the volume and force used in presenting an argument were often given precedence over whether the argument was legally sound and factually correct. She noted that as a woman counsel she was never going to win a volume match. Taylor called for a change in this kind of attitude and for the content of arguments to become the focus in the courtroom.

In conclusion, Taylor contended that international courts and tribunals have a positive obligation not only to ensure that justice is done but also to ensure that it is done in a way that promotes equal treatment of women. Judges play an important role, as their public treatment of female counsels and non-tolerance of discriminatory behaviour of women counsels in the courtroom sends a clear message of the court's support for gender equality.

In her video statement, Sarah Bafadhel recounted her experiences as a minority female counsel working in spaces typically reserved for men, and the various forms of intersectional discrimination encountered by minority women, how such discrimination manifests, and ways

in which multiple forms of discrimination can be addressed. She cited three main difficulties faced by minority female counsels to address intersectional discrimination. Firstly, minority females who reach senior positions are obligated to feel grateful and are not given the space to share experiences of discrimination. Secondly, the discrimination experienced is a combination of both slight but recurring treatment and exceptional but infrequent discrimination, making it difficult to highlight such issues. Thirdly, intersectional discrimination is a hard uncomfortable subject to broach with colleagues.

Bafadhel discussed various examples of how the intersectional discrimination which minority female counsels face manifests in international courts and tribunals. She explained how as a female counsel she's often given background roles of managing teams, interpreting, among other supporting roles, while her white male colleagues present the arguments and findings in court. This practice is reinforced by the lower credibility accorded to arguments presented by minority female counsels as opposed to a white male counsel. Additionally, Bafadhel explained that minority female counsels have to work harder and put in longer hours multitasking and playing behind-the-scenes roles like supporting clients, which is beneficial to the professional development and the needs of the client but forces female counsels to sacrifice more personal time on these tasks than their white male colleagues. She ascribes this to a number of factors including the fact that minority female counsels have less opportunities to fall back on, and they have a feeling that they must hold on to every opportunity they have. Moreover, many minority females have additional skills which they bring to the table. For example, speaking multiple languages and having greater access to witnesses during investigations, which results in a greater workload in comparison to their male and non-minority colleagues.

Bafadhel highlights two important ways in which such intersectional discrimination in international courts and tribunals can be tackled. Firstly, by initiating dialogue and intervention such as this judicial mentoring project which brings to the forefront issues of intersectional discrimination and sensitizes persons in power. Additionally, by creating safe spaces for minority females to feel more comfortable to flag situations in which they have been discriminated because of their gender and race, without fear of repercussions for speaking out. Following the three video submissions by the female counsels, the Judges turned to the agenda items which inspired lively debate, and the sharing of insightful anecdotes and suggestions. Recurring themes from the discussion that followed included, the duty of female judges to call out instances of gender bias in the courtroom; the importance of creating an environment where female counsels feel safe to share experiences of discrimination and the importance of continued training and engagement on approaches to female counsels for both male and female judges.

The Judges expressed that they were saddened by the commonality of the experiences of all three female counsels who presented statements. Concerns were expressed that there is still a persistent belief within international criminal justice circles that the archetypal individual to be successful is a white European male. This leads to an assumption of competence for those who fit that identity group and incompetence for those who fall outside of it, resulting in a lack of recognition and respect for those who do not belong to that group.

The Judges observed that judges themselves can be unwittingly participants in gender discrimination as they may be unaware of their bias. This is sometimes seen in the attitudes and language of judges towards female counsels, for example when judges do not pay attention when female counsels speak. This further exemplifies the importance of the Gender Mentoring Training Programme for Judges to sensitize judges of international courts and tribunals on the need to adjudicate with a gender sensitive lens, to be able to recognise bias against females and to avoid perpetuating it. The Judges reiterated the need for continuous training to enable judges to better detect instances of gender discrimination and to be better prepared to respond to them. Participants noted that judges have a duty to uphold gender equality in the courtroom. This can be achieved by pointing out to their fellow judges that gender discrimination is not acceptable and highlighting the detrimental effect it has on the entire judicial process. It is also important to assess the impact of discrimination of female counsels on the victims they represent. If victims are affected because their counsels are discriminated by male counsels or from the bench, then justice is not being served.

On the issue of intersectional discrimination of female counsels, it was noted that there are various layered factors which women are discriminated on. These include their minority background, religion and the languages they speak.

The Judges also discussed the urgent need to develop strategies to address the issue of unconscious bias. They reflected on their duty, as women on the bench, to recognise what impact their actions or non-actions will have on future generations of female lawyers and judges. As professionals at the height of their careers, most judges may not share the same experiences of discriminations, however in reflecting on the experiences of younger and future generations it is important to champion gender equality to ensure that they do not face such discriminations. Participants discussed various ways in which they can champion gender equality including leading by example in their handling of trial proceedings; sharing lessons from their experiences with younger female professionals to encourage them; and creating an environment where female counsels' experiences are validated, and they feel confident to share the experiences they have had.

The Judges further noted that the presumption of competence for men and incompetence for women is not unique to the international criminal justice field and is a stereotype which is socialised from birth. It is a stereotype which is difficult to fight against and break. It results in women judges and lawyers having to work extra hard every day to prove themselves. The Judges stressed that the only way to end stereotypes is to have continued gender-sensitive training and to hear the experiences of female practitioners.

The role which external actors play in perpetuating negative perceptions of female counsels and the international justice process as a whole was also addressed. Insidious comments by journalists and other external actors add an additional layer of pressure on female counsels and further invalidate their competence and disrespect their efforts. It is important for such external actors to be properly sensitised on both gender bias and the international criminal justice process as they inform public opinion on the work of international courts and tribunals. Outreach programmes would help to sensitise external actors.

It was noted that although women play increasingly prominent roles in modern day international tribunals, there are nonetheless pervasive negative perceptions of female counsels, in fact, of all females who are part of the international criminal justice process. Participants discussed that a lack of education and gender sensitive training contributed to the continued perpetuation of such negative perceptions. The international criminal justice field is historically a male dominated environment. In order to change the male dominated culture of international courts and tribunals, there needs to be a comprehensive strategy to ensure gender parity and equality of opportunities. Participants noted that women judges can play a key role in ensuring gender parity and equality as they are often consulted in the hiring process for senior positions. In this process women judges can advocate for greater geographic and gender representation.

In closing, the Judges reiterated that overcoming the negative stereotypes and gender bias against female counsels can only be done with a coordinated and structural strategy which ensures gender parity, equality in opportunity and considers the intersection of other factors such as race and culture. Participants stressed that tackling negative stereotypes against female counsels begins with gender-sensitive trainings.