Report
IAWJ 12TH Biennial Conference 2014
Arusha, Tanzania

In my view it is impossible to describe in words the impression that is left on you after a visit to Africa, and on this occasion to Arusha. So we have put together some photographs that I hope will give you a taste of the colours, sights and sounds of this extraordinary place.

There were over 550 delegates and accompanying persons from over 20 jurisdictions attending the 12th IAWJ Biennial Conference.

The Conference was entitled "Justice for All" and was opened by the Chief Justice of Tanzania, the Hon. Justice Othman, who introduced Dr Kikwete, the President of the United Republic of Tanzania, Dr Kikwete who gave the opening address. His speech concentrated on the reform of the justice sector. While he has been President, 46% of appointees to the High Court have been women. He told us there is a move to modernise the old colonial laws and procedures to make them more appropriate to modern-day Tanzania. They are building courts and establishing court administration services. They are working for an increase in the number of lawyers because there is a very low proportion of lawyers to the population, particularly in rural areas. Dr Kikwete recorded the country's commitment to human rights and to remove discriminatory laws, particularly affecting women and children, from the legal system.

It is always a delight to hear Baroness Hale speaking and her address on "Reflections on the changing meaning of justice for all" took us through the development of the welfare state in England and to the legal aid system and how in recent years, as in New Zealand, the system has gone into reverse. A paper well worth reading. She concluded with a quotation from the President of the Supreme Court where he said "I am concerned that we are getting into a position where there is a serious risk of people being denied access to justice".

The Hon Eusebia Munuo, the then President of the IAWJ and a retired Court of Appeal Judge of Tanzania, spoke of her amazing experiences in the Tanzanian judiciary from being the first resident magistrate in East Africa in 1970, rising through the ranks to serve on the Court of Appeal of Tanzania in 2002. After 42 years on the bench she retired in 2012. She told us how the lower courts in Tanzania now have equal representation; out of 61 High Court judges 27 are women, 4 out of the 16 Court of Appeal judges are women. There are more women studying law and in many faculties the women students equal the men. She stressed the importance of protecting the rights of women and children in having a diverse bench.

Isn't it ironical that in some of the third world countries the justice system appears, at least in some part, to be moving into the 21st century whereas the so called developed countries are going backwards.

Another very interesting session was the presentation from GLOW (Global Leadership of Women) representatives from each country and the international tribunals. The Netherlands-funded GLOW projects is one of the most ambitious IAWJ has ever undertaken. GLOW brings together judges from the international criminal tribunals based in the Hague and Arusha with judges from domestic courts in six countries in West Africa and South Asia. The project seeks, first, to tell the story of women on these tribunals in real time – women who have developed the vast majority of the international humanitarian law jurisprudence on rape and sexual assault. Secondly, the project looks at "lessons learned" at these relative high-resourced tribunals in three core areas: substantive jurisprudence (especially on the issue of "consent" as a defence in sexual assault cases), procedural and evidentiary rules that can make courts more open "user-friendly", and steps to address the cultural barriers that so often prevent women from coming forward. It seeks to transfer "lessons learned" to communities in the six countries.

One of the themes was that human rights not only belong to defendants but also victims and witnesses, in particular ensuring there is a proper environment for victims of sexual violence. In some of the countries involved they have used a series of retired judges for judicial and justice sector education. In Ghana they have worked with the "Queen Mothers". These were the traditional women leaders before colonialism, who worked with the male leaders. They are wise women who dealt, and still do deal with disputes for women and children and sometimes men in traditional society. They are usually the first port of call in these disputes and are consulted on matters pertaining to the wellbeing of the community, whether it is advice on bringing up children, traditional rights, or on issues such as mediation. One of the difficulties, however, is that they have a tendency to think that they can deal with crimes against children without them being dealt with in court. The Queen Mothers have been encouraged to sit in court and understand the process, and refer matters to the police so that the courts can deal with them within the criminal jurisdiction.

In Cameroon all the different laws dealing with violence against women have been collated into a manual for the judges, and the judges have also been educated about international laws which were not readily available to them.

A Moot Court was held, dealing with sextortion. The term 'sextortion' is a term that was coined by the IAWJ to deal with the form of corruption where sexual favours are required for administrative or other transactions or favours.

The moot court was constituted as the Court of Appeal for Tanzania and was composed of delegates who sat on that Court and some who sat on courts in other jurisdictions, including in Uganda, Zambia and Taiwan.

The moot started with the clerk being asked to call the case. They really meant that, as the clerk did indeed call while the judges came in. A long, high and continuous call. The case involved sexual intercourse between an arresting police officer and a woman facing charges of theft in a police cell. There was a request for money and, failing that, a request for and obtaining of sex in order to get the charges dropped. On the facts, the victim had been held overnight without food, blankets and was not given access to legal counsel.

"Counsel" were from the Tanzanian High Court. It was interesting to see the types of arguments used for the rape charges. The argument focused on whether there had in fact been intercourse. This was despite the appellant having admitted having sex and the evidence that the woman had asked for a condom. There was also an issue of consent. The issue was whether consent had been true and free in light of the position of power, the fact she was in a police cell and the promise of release to her ailing mother and four children.

The interesting point was the judgments given and in particular a minority opinion on the rape charge by the Zambian judge. The conclusion was that there was a choice for the victim, despite being "between a rock and a hard place". This was an available view on the facts. What was interesting, however, was that the judge in question went on to say that it was not in the public interest to encourage detainees to bargain for their freedom and the dropping of charges through the offer of sexual favours. Oddly, the action of the police officer in "accepting" or pressing for such favours was not mentioned.

The idea of the moot was to show that sextortion, even in the absence of specific laws, can be prosecuted under the ordinary laws of the various jurisdictions, such as sexual offences and ordinary anti-corruption laws.

The judge from Uganda, Hon Esther Kisaakye, was particularly interesting. The two Tanzanian judges, Hon Nathalia Kimaro and Hon Justice Katherine Oriyo, were also very impressive.

Susan Glazebrook's session on communication, as you would expect, was extremely successful. It was attended by over 250 of the delegates. She had to use her own communication skills to overcome some IT problems and the rather oddly shaped room, for an interactive presentation. Well done Susan, we were all very proud of you.

We all face the challenges of judging, but listening to speakers from Brazil, Zimbabwe and Korea who have had to deal with coups, torture, no crimes of rape of a minor or marital rape, make it even more challenging. It was also fascinating to learn the difficulties and differences within the different states of the USA in relation to same sex marriages and relationships. Only 18 out of the 52 states recognise same sex marriages. Traditionally marriage issues were a matter of state law, but there is a movement at the Federal level for protection.

There were also speakers on the Hague Convention which, as Annis and Dale reported back, show how far ahead New Zealand is. The session encouraged other countries who are non members to become members of the Convention.

Claire Ryan has reported on one of the presentations in respect of justice for vulnerable witnesses, which is attached.

The last session dealt with post-retirement and part-time options for judges. Dr Kelly Askin, who is a senior legal officer for international justice of the Open Society Justice initiative, spoke about the International Criminal Court and made a plea for competent judges to be appointed because that court is in crisis and under-performing. Other judges spoke about mediation and arbitration and mentoring of new judges.

At our regional meeting, Susan and Peggy Pi-Hu Hsu were confirmed as board members of the IAWJ for the next two years.

At the AGM two resolutions were passed, one on human trafficking to update a previous resolution to draw attention to labour trafficking. The second related to the condemnation of the kidnapping of over 200 Nigerian girls, which had happened only a month before the conference, and the commitment of the Association to the abolition of gender-based violence and the rule of law.

The Conference was closed by the 2nd Vice President of the Revolutionary Government of Zimbabwe, reading a speech from the President who was not able to attend.

Following tradition, the IAWJ banner was handed over to the USA amid much singing, chanting and dancing.

The final act was the hand-over of the Presidency to Justice Terisita Leonardo-De-Castro of the Supreme Court of the Phillippines, who led the Filipino judges in a traditional dance.

The formal dinner was the final event. It was a wonderful affair with many of the women in traditional dress. We all joined in the dancing and our own "Dancing Queen", Queen Annis, taught the amazing American and Afro-American dance women kapa haka.

Our thanks to Heads of Bench for what was a truly inspirational and stimulating conference in a wonderful part of the world.

Nicky Mathers
President

Report on IAWJ Conference in Arusha; parallel session b on Tuesday 6 May 2014.
Justice for vulnerable witnesses.

(An abridged version of this report was presented to the NZAWJ conference on 3 November 2014)

Introduction

Tena koutou katoa. As M Scott Peck once said, there can be no vulnerability without risk, there can be no community without vulnerability, there can be no peace and ultimately no life without community. He could have been describing the philosophy underpinning 3 presentations on a tepid afternoon in Arusha, each of which held the presence of the vulnerable at the heart of the rule of law.

This report focuses on only one of the three presentations. Justice Gita Mittal's visual presentation of the reshaping of the courtroom and surrounding areas to accommodate young complainants and other witnesses was similar to the one she gave in Auckland in May 2013 and may be on the NZAWJ website. Justice Fernanda Cervetti's session described Italian legislation and case law, quite different from our own, in relation to elder abuse, vulnerability to scams and the undue influence of others when managing the assets, properties and wills of the elderly. A number of presentations were about the law in the presenter's own country but members of the audience could, if they chose, make a comparison with the position in their own nation.

Focus of this report; Convention on the Rights of Persons with Disabilities

However, the presentation by Dean Kristin Glen Booth bore direct relevance to the position in our own country;

(a) firstly because it dealt with the Convention on the Rights of Persons with Disabilities and its Optional Protocol, New Zealand having ratified the Convention on 26 September 2008 although it has not yet acceded to the Optional Protocol; and

(b) Secondly because of recent developments in NZ's relationship with the Convention.

Kristin Glen Booth is the Dean of the City University of the New York School of Law. More than an academic, she came with quite a pedigree in speaking to a room full of judges, although self-effacing about that! She was a Judge of the Civil Court of New York County from 1981, served on the New York Country Supreme Court from 1986 to 1993, was an Associate Judge of the Appellate Court from 1995 to 2006 and presided on the New York County Surrogate Court until her retirement in 2012.

Scope of this report.

In the brief time I have, I would like to focus on 3 aspects of the presentation and its relevance for New Zealand;

(a) Why the Convention?
(b) What is the Convention?
(c) Its paradigm shift
(d) Implications for New Zealand.

(a) Why the Convention?

It was a response to a previously overlooked development challenge: approximately 10% of the world's population comprises persons with disabilities (over 650 million persons), approximately 80% of whom live in developing countries

It was also a response to the fact that although pre-existing human rights conventions offer considerable potential to promote and protect the rights of persons with disabilities, this potential remained untapped. People with disabilities continued being denied their human rights and were kept on the margins of society in all parts of the world.

The Convention sets out the legal obligations on States to promote and protect the rights of persons with disabilities. As Kristin stressed, it does not create new rights.

(b) What is the Convention?

Firstly, it is both a development and a human rights instrument. Secondly, it is a policy instrument which is cross-disability and cross-sector. Finally, it is legally binding (on those nations that adopt it.)

Its purpose is clearly articulated in Article 1:
To promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

(c) Its paradigm shift

Perhaps the most powerful portion of this presentation was its analysis of the paradigm shift inaugurated by the Convention.

In short, the Convention marks a 'paradigm shift' in attitudes and approaches to human beings with disabilities. Its language requires that they are no longer viewed as "objects" of charity, medical treatment and social protection but as "subjects" with rights, capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.

In even shorter, the Convention gives universal recognition to the dignity of persons with disabilities and calls for assenting nations to do likewise.

Challenged and moved by Kristin's presentation, I scribbled on my notes at the time "An end to a kyriarchal[1] approach to legislation about disabilities?" The important part that those with disabilities can and must play in legislation, legal interpretation and practical outcomes of justice for them cannot be estimated.

"Nothing about us without us."

(d) Implications for New Zealand.

A number of our statutes in relation to disabilities pre-date the Convention, are drafted in a pre-Convention milieu and have not been amended since the Convention.

Examples include;
Protection of Personal and Property Rights Act 1988
Mental Health (Compulsory Assessment and Treatment) Act 1992
Human Rights Act 1993
Criminal Procedure (Mentally Impaired Persons) Act 2003
Intellectual Disabilities (Compulsory Care & Rehabilitation) Act 2003.

You will no doubt be aware of the Court of Appeal decision in *Ministry of Health v Atkinson*[2] Parliament's subsequent Public Health & Disability Amendment Act 2013 followed by High Court decision of *Spencer v Attorney-General*[3]. I propose to say no more about it than to highlight the challenges for us as Judges.

At the same time, Courts in this country have made useful advances in this area. The pre-Convention decision of *R v Willeman*[4] involving communication assistance for a tetraplegic complainant is a case in

[1] . "Kyriarchy" is a term coined by the feminist theologian Elisabeth Schüssler Fiorenza in her 1992 book *But She Said: Feminist Practices of Biblical Interpretation.* It is derived from the Greek words κύριος, *(kyrios),* or "lord, master" and ἄρχω (*archō)*, "to lead, rule, govern" It describes connecting social (and arguably economic and legal) systems built on and maintained by domination, oppression, and submission. It involves the often unconscious internalizing and institutionalizing the subordination of one person or group to another. More on this is available to those interested!
[2] *Ministry of Health v Atkinson* [2012] NZCA 184
[3] *Spencer v Attorney-General* [2014] 2 NZLR 780

point. Communication assistance in the Youth Court is developing conceptually and practically. SS 103-105 Evidence Act 2006 and s 98 Criminal Procedure Act 2011 enable judicial officers to "think beyond the square" when considering different modes of evidence, which may include modes for those with physical and intellectual disabilities.

The debate as to pre-recording continues and I wonder whether the time has come in the light of the Convention to seriously consider a CP(MIP) Court so that vulnerable defendants and frequently complainants do not constitute another proceeding in a busy JAT or list court.

Finally there is the wero set down by the Committee on Rights of Persons with Disabilities established by the United Nations and over the past year involved in a review of **New** Zealand's implementation of the Convention.

It its Concluding Observations on the First Review of Implementation by NZ[5] in October 2014 the Committee said this in relation to Justice for the Disabled;

> **Access to justice (art. 13)**
> 23. The Committee notes that, in New Zealand, persons who acquire a disability through injury only have recourse to compensation via the Accident Compensation Corporation. The Committee notes that persons who have suffered injuries are concerned over the lack of access to justice to pursue their claims. There is concern about the limited amount of legal aid funding that is available and about the discretionary basis upon which legal costs are awarded. There is also concern that the Accident Compensation Corporation machinery lacks a human rights focus.
>
> 24. **The Committee recommends that the State party examine the processes for the assessing of compensation by the Accident Compensation Corporation to ensure that adequate legal aid is available and that its processes are fully accessible to all claimants, and finally to ensure that this mechanism has a human rights focus.**
>
> 25. The Committee notes that the Government is considering the establishment of an accident compensation tribunal to replace appeals to the District Court. The Committee is concerned that there has been insufficient consultation with persons who have acquired disabilities through injury, and with their representative organizations, about the establishment and operation of this tribunal.
>
> 26. **The Committee recommends that organizations representing persons with disabilities be consulted about the proposal to establish an accident compensation tribunal. The Committee also recommends that the tribunal adopt a flexible approach to the admission of evidence, and that those who lack the means should be given adequate legal aid to ensure full access to the tribunal.**
>
> 27. The Committee is concerned that no specific training of judges by the Institute of Judicial Studies has been given either on the Convention or on the requirement that justice be accessible to all persons with disabilities, including those with intellectual and those with psychosocial disabilities.
>
> 28. **The Committee recommends that the Institute of Judicial Studies, in conjunction with disabled persons' organizations, run training programmes on the Convention and on the rights of persons with disabilities who come before New Zealand courts and tribunals.**

He waka eke noa. We're all in this together. I look forward to learning from you and from others at such an IJS course.

Claire Ryan

---

[4] *R v Willeman* [2008]NZAR 644

[5] http://www.odi.govt.nz/what-we-do/un-convention/monitoring-implementation/2014-review.html