

# Evaluating Gender Parity: Status of Women in East Africa Judiciaries



Published by:

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# Evaluating Gender Parity: Status of Women in East Africa Judiciaries

# List of Acronyms

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DEVAW	Declaration on the Elimination of Violence against Women
EAMJA	East Africa Magistrates and Judges Association
IAWJ	International Association of Women Judges
ICCPR	International Covenant on Civil and Political Rights
ICJ Kenya	Kenyan Section of the International Commission of Jurists
ICJ	International Commission of Jurists
IEBC	Independent Electoral and Boundaries Commission
JSC	Judicial Service Commission
KMJA	Kenya Magistrates and Judges Association
KWJA	Kenya Women Judges Association
NAWJU	National Association of Women Judges - Uganda
NGEC	National Gender and Equality Commission
TAWJA	Tanzania Women Judges Association
UDHR	Universal Declaration of Human Rights

# Table of Contents

Executive Summary .....	iii
A. Introduction to the Project.....	2
About ICJ Kenya.....	3
B. Purpose and Scope of the Research.....	4
Methodology and Limitations .....	4
C. Women’s Representation and Participation in Judicial Institutions – Theoretical Framework.....	6
1. Enhancing judicial legitimacy.....	6
2. Improving women’s full and equal participation across society .....	7
3. Compliance with international treaty obligations .....	7
4. Perceived impact of women on judicial decision-making .....	8
D. Findings on Obstacles to Enhancing Gender Equity .....	9
1. Social attitudes and political will .....	9
2. Judicial culture .....	10
3. Policy development and implementation .....	11
4. Representational equality – mixed results.....	13
5. Substantive inequality through internal policy .....	15
E. Findings on the Maputo Protocol and its Impact on East African Judiciaries.....	18
1. Perceptions about impact on judicial decisions .....	18
2. Imprint on case law .....	19
F. Strategies for Change – Good Practices from Around the Region .....	24
1. Affirmative-action – just the beginning.....	24
2. Continuing training and sensitization.....	24
3. Clear policy guidelines.....	25
4. Transforming management of human capital.....	26
5. Role of civil society .....	28
6. Role of donor partners.....	28
Conclusion and Recommendations .....	28
Bibliography .....	31
Appendix A & B: Interviewee List & Guide .....	33-37
Footnotes.....	38

## Foreword

The development of the publication on the Profile and Status of Women in Judiciaries in East Africa is a significant contribution towards realization of gender equity and equality within the regional judiciaries in Kenya, Uganda and Tanzania.

This publication has been developed at a time when equal gender representation and participation of women in the judiciaries across Kenya, Uganda and Tanzania remains unrealized. This is despite the existence of progressive domestic, regional and international legal frameworks on gender equality in the social, political and economic spheres.

The publication finds that, despite the critical role that women in the judiciary play in reducing barriers to women's access to justice and preserving the legitimacy courts, there still exists barriers that constantly impede achievement of gender equality within the judiciaries. Thus, it presents an analysis of the extent to which the equal gender representation has been implemented across judiciaries in Kenya, Uganda and Tanzania, the obstacles to enhancing gender equality, the extent of implementation of the Maputo Protocol and its impact on judicial decisions and recommends various strategic responses towards addressing the gaps that hinder full realization of gender equality and equity within judiciaries. The findings of the study will be a useful read, particularly to judicial officers, policy makers and lawyers.

# Acknowledgement

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) acknowledges the contributions, dedication and support of different strategic partners and stakeholders throughout the entire research process and publication of the findings.

We express our deepest appreciation for the invaluable contributions of all the correspondents interviewed during the field visits to gather information for the research including: judges and magistrates from Kenya, Uganda and Tanzania; representatives of judiciaries and judicial training institutes in Kenya, Uganda and Tanzania; associations for women and other judicial officers including Kenya Magistrates and Judges Association (KMJA), Kenya Women Judges Association (KWJA), Tanzania Women Judges Association (TAWJA) and National Association of Women Judges in Uganda (NAWJU); regional law societies including Law Society of Kenya, Uganda Law Society and Tanganyika Law Society; Strategic Partners such as the Judicial Service Commission (JSC) and the National Council on Administration of Justice (NCAJ) respectively in Kenya; and other Civil Society Organizations such as Federation of Women Lawyers - Uganda (FIDA Uganda), Federation of Women Lawyers - Kenya (FIDA Kenya), Tanzania Women Lawyers Association (TAWLA), Centre for Widows and Children Assistance (CWCA) in Tanzania, Legal and Human Rights Center (LHRC) in Tanzania, Legal Services Facility – Tanzania and Tanzania Network of Legal Aid Providers (TANLAP).

Further, we express our utmost gratitude to Ms. Laura Young of ProRights Consulting, for her meticulous consultancy services on the research and succinct representation of the findings that collectively makes the document a worthwhile read.

Finally, we would also like to appreciate our development partners for their support to ICJ Kenya's women's rights work including the development and publication of this research document. We commend the dedication demonstrated by the ICJ Kenya under the strategic leadership of its Council Members and Secretariat staff. We especially appreciate the Human Rights Programme team comprising of Edigah Kavuravu, Lorraine Ochiel and Joan Mutonga for their meticulous conceptualization and coordination of the research and publication of the findings.



Samwel Mohochi  
Executive Director  
ICJ Kenya





## Executive Summary

Despite notable achievements in the struggle for gender equality within judiciaries in East Africa, obstacles remain which hinder full realization of women's rights. The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is undertaking a project that seeks to strengthen the judicial implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol). ICJ Kenya conducted interviews with stakeholders amongst judiciaries in Kenya, Uganda and Tanzania. The overall objective of the study is to generate a current snapshot of gender equality within the judiciaries of Kenya, Tanzania, and Uganda.

Equal representation of women in the judiciary serves several critical social functions, including enhancing institutional legitimacy, positively impacting equality in other sectors of society, and fulfilling government commitments under multiple international instruments. Unfortunately, multiple factors impede the full realization of equal representation of women within the judiciary. East African societies remain conservative and patriarchal, despite incremental gains for women. Women in the judiciary confront these stereotypical attitudes, the old boys network, and the notion that gender equality is the province of women only. Moreover, the culture of the judiciary itself tends to reinforce such attitudes given its hierarchical nature and patriarchal history. The law as a profession, and judiciaries specifically, have long been male-dominated, and are just recently emerging from a historical gender imbalance.

Societal and institutional attitudes have recently begun to change, encouraged by constitutional and legislative initiatives throughout the region, such as the constitutional affirmative action requirement in Kenya requiring that no more than two-thirds of any appointed government body be of the same gender. These changes have also been accompanied by an increase in efforts to develop clear policy guidance related to gender equity within judicial institution. As a result of these initiatives, judiciaries in Kenya, Tanzania and Uganda are rapidly approaching numerical equality. In Kenya women make up 44% of judicial officers, in Tanzania they make up 43%, and in Uganda women hold 44% of judicial posts.

Despite increasing numerical equality, women within judiciaries continue to confront significant challenges in relation to substantive equality. Women are perceived to hold fewer substantive leadership positions than men, and no woman has ever held the highest judicial post – that of Chief Justice – in either Kenya, Tanzania or Uganda.

Internal policies also lag behind the real experiences of both men and women working in judiciaries. Personnel policies related to work-family balance, transfers, performance appraisals, workload, and other similar concerns are critical issues for women, and often for men. Sexual harassment also remains a significant concern for many women working in judiciaries. Sexual harassment is an issue that often divides men and women employees in their perceptions of and approach to the problem. None of the judiciaries under study have a sexual harassment policy in place, though Kenya is close to official adoption of a policy that has been pending for some years.

Lack of sufficient training, capacity building, and mentoring also were identified as key gaps in measures to address women's substantive equality within judiciaries. Training on gender equity does occur in each of the three countries, but overall there is a lack of consistency in ensuring that all officers are effectively trained. In part, this is a result of the fact that much gender equity training is donor funded. While the positive impact of training was universally acknowledged, the inconsistent availability and requirements for such training undermined its broader effectiveness. More generalized training for women judicial officers, such as in courtroom management, leadership, dealing with difficult litigants, and managing workload, also was a concern.

Because women feel pressure to perform at an even higher level to dispel stereotypes, they are particularly desirous of such training and support. Mentoring programs for women judicial officers also was perceived as a key need.

In addition to key informant interviews with stakeholders in East African judiciaries, ICJ Kenya also examined whether the Maputo Protocol may have impacted judicial decision-making in the three countries. Three key findings emerged about the impact of the Maputo Protocol on judicial decision-making: (1) knowledge about and reference to the Protocol is low among judicial officers, (2) training and capacity building for both judicial officers and other justice sector stakeholders is a key intervention, and (3) lack of knowledge and judicial reference to the protocol mirrors attitudes toward international law in general amongst East Africa's judges.

In line with these findings, the Protocol's imprint on case law in the three countries has been extremely light. There was only one ascertainable reference to the Protocol in case law from Uganda, a constitutional appeal. In Kenya, mentions were found in six cases decided since 2013. No references to the Maputo Protocol were found in Tanzanian case law.

Judicial decisions in the three countries did include other international instruments, such as CEDAW. These international norms provided an important basis for upholding gender equality in multiple judicial decisions. From the number of cases that emerged in this research, it is not possible to make any scientifically rigorous statement regarding differences between male and female judicial officers in their use of international and regional instruments such as CEDAW and the Maputo Protocol. Anecdotally however, it seems clear that judgments making use of CEDAW or the Maputo Protocol are more likely to have been written by women judges, and that those women are likely to have been engaged in organizations or training on gender equity.

East African judiciaries continue to make substantial progress in relation to gender equality. Commitments from government, civil society, and judiciaries themselves have significantly improved the role and status of women in East Africa's judiciaries as compared to previous decades. East African judiciaries can learn much from each other as they continue to enhance gender equity. Kenya has led the way in relation to implementation of Constitutional directives on gender quotas and on integration of international legal principles into judgments. Tanzania has strong requirements for training on gender equity, led by a very active women judges' association, and continues to implement innovative training programs across the justice sector. Uganda is the only judiciary to have officially adopted a gender policy and has developed unique programs including a country-specific gender bench book, a strong system of judicial practice roundtables, and a close working relationship with civil society.

Despite this progress, opportunities remain in relation to policy development and implementation, training, human capital management, and support systems for gender champions within judiciaries. ICJ Kenya has specific recommendations for judiciaries in the region, including:

- Consider development of a standardized model gender policy for regional judiciaries, incorporating regional and international best practices.
- Develop opportunities for women judges to be formally mentored by experienced judges, both male and female.
- Work with partners to ensure that women judges can participate in targeted leadership development training.
- Work with partners to make training on the Maputo Protocol available to all judicial officers and staff.
- Hold regular practice dialogues during which judicial officers can share their experiences of addressing gender in their work.
- Enhance dissemination of bench books on gender issues, such as the Commonwealth's bench book or country-specific bench books.
- Work with partners to develop and implement training programs using the Commonwealth or other bench books.

- Ensure that hiring procedures and policies for evaluation of applicants are readily available to all.
- Ensure that a mechanism for inquiries and complaints about hiring processes is readily available to all applicants.
- Consider integration of a recruitment exam to select judicial officers, as these have been shown to enhance numerical equality.
- Ensure that women judges associations play a substantive role in training their peers on gender equity.
- Recruit and actively engage male judges to act as trainers on gender equity.
- Create a regional support network of gender equity champions to share challenges and success and provide creative thinking on solutions.
- Consider development of a family policy to enhance work-life balance for all employees.

The full set of recommendations, included at the end of the full report, includes country-specific recommendations and highlights the important role of civil society and donor partners. Judiciaries in East Africa have made significant progress in relation to gender equality and sharing of good practices from across the region can sustain that progress into the future.



## A.

## Introduction to the Project

“... to design interventions targeting gender equality and empowerment within judiciaries it is important to review the profile and status of women within judiciaries in East Africa.”

The International Commission of Jurists Kenya Section (ICJ Kenya) is undertaking a project that seeks to strengthen the judicial implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol). The specific objectives are to (1) strengthen the technical capacities of judicial officers in East Africa on interpretation and application of the Protocol, (2) support increased women representation in regional judiciaries, and (3) enhance general awareness on the relevance of the Protocol.

ICJ Kenya recognizes the unique role that judges and magistrates play as duty bearers, leaders, interpreters of national, regional and international laws, as well as champions of human rights and the rule of law. At the same time, it notes that special role that women play within the judiciaries, in similar or comparable capacities to their male counterparts, and the need to strengthen their contribution to the administration of justice. However, to design interventions targeting gender equality and empowerment within judiciaries it is important to review the profile and status of women within judiciaries in East Africa.

The Maputo Protocol was adopted on July 11, 2003 to complement and strengthen the articles of the African Charter on Human and Peoples' Rights (ACHPR) related to protection and promotion of women's rights in Africa. It is an important instrument of reference given its broad provisions that seek to protect the rights of women, and it is a symbol of the commitment of African States to end discrimination, violence, gender stereotyping and other violations against the African woman. Thirty-six countries have ratified the protocol, including all States in Eastern Africa region save for Eritrea, Ethiopia, Sudan, and South Sudan. Moreover, the Constitutions, statutes and policies of the various East African countries, and several regional and international instruments including the Universal Declaration of Human Rights (UDHR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Declaration on the Elimination of Violence against Women (DEVAW) affirm the protection of the rights of women. More importantly, they assure women of equal rights with men in every sphere and emphasize affirmative action to remedy past inequalities. Further, they require States to put in place administrative, legal, policy and institutional measures to promote and protect women's rights.

Despite notable achievements, and whereas global and regional instruments as well as domestic laws and policies are important for the advancement of women, their enforcement and implementation has been fraught with challenges. There are still obstacles which hinder full realization of women's rights on the continent, including access to decision making platforms in appointive and elective positions. Eighteen African Union member States are yet to ratify the Maputo Protocol; the continued violation of women's rights; the absence of sufficient legal protection in national legislation; the failure to implement the rights enshrined in the national legislation and regional and international instruments; and low levels of awareness on the provisions of the such instruments.

Of most relevance for this research report is the Maputo Protocol's directive that "women are represented equally in the judiciary." Women's equality within judiciaries is perceived to have significant impacts throughout the justice sector. Accordingly, ICJ Kenya has examined the role and status of women in East Africa's judiciaries in the broader context of the implementation of the Protocol.

A 2014 research report by the International Commission of Jurists<sup>1</sup> highlighted findings from a series of colloquia focused on women and the judiciary worldwide and provides a baseline examination of the situation in Kenya, Tanzania, and Uganda.


In relation to Kenya the report notes that, “Women’s representation in the Kenyan Judiciary is among the highest in sub-Saharan Africa...[although] progress has been recent and is attributed to concerted civil society advocacy that resulted in explicit legal and policy commitments to advance women’s equal representation... [Key] Constitutional provisions have had a visible effect since their adoption [in 2010].”<sup>2</sup>

Despite important gains, “there are still challenges to achieving women’s full and equal representation in Kenya’s judiciary. Women lawyers and judges point to the lower numbers of women in higher judicial offices and speak to a ‘glass ceiling that is preventing women from being able to move into high-ranking offices within the judiciary.’ They also note that patriarchal attitudes, such that women are unable to serve in demanding and important offices and that leadership roles are not appropriate for women, still impede the career progression of women lawyers and judicial officers.”<sup>3</sup>

In relation to Tanzania, the report highlighted the fact that as of 2014, there had been a significant increase in women’s representation in the judiciary in Tanzania. According to the report “Women now comprise more than half of all magistrates and approximately 56 per cent of Court of Appeal and High Court judges. In large part, this progress has been the result of concerted government policy, which has also sought to increase women’s representation in political bodies.”<sup>4</sup> The report goes on to suggest that Tanzania lags behind Kenya in some aspects of women’s representation, especially in relation to customary and religious courts and that women continue to face challenges across the court system.

Turning to Uganda, the report indicated that “women comprised 39 per cent of all judges in Uganda and 33 per cent of all Supreme Court and High Court judges”<sup>5</sup> and that constitutional and legislative provisions provide for affirmative action in relation to appointments within all sectors of the Ugandan judiciary. As in the other two East African countries, challenges remain, including “prevailing discriminatory practices by the male judges” and court processes and hours that make it difficult for women with family responsibilities to maintain work-life balance.<sup>6</sup> This preliminary research by ICJ’s Geneva Secretariat provided an important foundation for the current study in Kenya, Uganda and Tanzania.

## About ICJ Kenya



The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-profit and a member-based organization. Founded in 1959, ICJ Kenya is the oldest human rights organization in Kenya. Its membership is drawn from the Bar as well as the Bench and currently constitutes of over 500 jurists as members. ICJ Kenya is dedicated to the legal protection of human rights in Kenya, and the African region in terms of the general mandate for national sections defined by Article 4 of the ICJ Statute. ICJ Kenya is the only African national section. It is affiliated with International Commission of Jurists (ICJ), Geneva, but operates autonomously. ICJ Kenya is registered as a Society under the Societies Act, Chapter 108, Laws of Kenya.

<sup>1</sup> Women and the Judiciary: Geneva Forum Series No. 1 (International Commission of Jurists, 2014).

<sup>2</sup> Id., pp. 40-41.

<sup>3</sup> Id., p. 42.

<sup>4</sup> Id., p. 48.

<sup>5</sup> Id., p. 55.

<sup>6</sup> Id., p. 57.

## B. Purpose and Scope of the Research

“.... to generate a current snapshot of gender equity within the judiciaries of Kenya, Tanzania, and Uganda.”

The overall objective of the study was to generate a current snapshot of gender equity within the judiciaries of Kenya, Tanzania, and Uganda. It is important to note that this report uses the term gender equity to mean the measures, processes, and strategies that lead to gender equality. Gender equality is understood in this report to mean the eventual state in which men and women are treated and represented equally. Specifically, the goals of this research were:

- To increase understanding of the roles played by women in regional judiciaries; and,
- To motivate and inform policy makers to commit to invest in gender equality within regional judiciaries.

The research built on the current literature in the field, including the 2014 study by ICJ’s Geneva Secretariat referenced above. The scope of the research included the following thematic areas:

- Assessment of policy, legal and institutional mechanisms for gender equality and empowerment;
- Review of women’s representation and participation in judiciaries and institutional decision-making;
- Review of internal policies and their impact on gender equality and empowerment;
- Analysis of the perception of judicial officers’ on gender equality and empowerment;
- Analysis of variations of existing measures and their effects to promote women’s participation in leadership and decision-making, and on gender equality and empowerment; and
- Review emerging trends and best practices towards promotion of gender equality within judiciaries.

## Methodology and Limitations

ICJ Kenya engaged ProRights Consulting<sup>7</sup> to carry out the research for the project, which was conducted from May 2017 through October 2017 in Kenya, Tanzania, and Uganda. Research methods included a literature review, key informant interviews, and thematic review of relevant caselaw from East Africa.

The literature review focused on identifying best practices in gender inclusion in judiciaries, lessons learned from legislative and policy implementation on affirmative action, and the impact of women’s equal participation in the judiciary on gender justice. A full bibliography is included at the end of the report. Key informant interviews were conducted in Entebbe and Kampala Uganda in May 2017, in Dar es Salaam, Tanzania in July 2017, and in Nairobi, Kenya in October 2017. Interviews were conducted with:

- Representative members of various levels of the judiciary
- Representatives of judicial training institutions
- Representatives of judges’ associations
- Legal research officers
- Bar association leaders
- Women’s rights organizations
- Relevant civil society organizations in the law and governance sector

<sup>7</sup> See [www.ProRightsConsulting.com](http://www.ProRightsConsulting.com). ProRights’ mission is to support projects that promote social inclusion and public participation, good governance, and effective land and natural resource governance. ProRights provides technical assistance to community groups, non-governmental partners, as well as state actors.

The Key Informant Interview Guide and a list of interviewees is included in Appendix A.

To examine the current imprint of women's human rights instruments on case law in East Africa, relevant case law was identified through review of judicial bench books and other case law compilations, as well as through keyword searches on national law reporting services. These searches identified cases that refer to either CEDAW or the Maputo Protocol. A summary table describing the cases can be found in Table 2.

The research project confronted certain limitations. First this research does not address the role of specialized courts, such as Khadis courts or military courts. Nor does the research specifically examine other quasi-judicial bodies, such as administrative tribunals. Because of limited time and access, it was not possible to gather data related to these institutions.

Given the busy schedules of judicial officers in the three countries, the project team was unable to conduct interviews with as many subjects as would have been preferable. In addition, when the topic of the research was explained to contacts in the judiciaries of the relevant countries, an assumption was often made that discussion of gender equity was the province of women judges and magistrates only. Accordingly, the research team was generally referred to women judges' associations in the country of interest and was unable to reach a broader audience within the judiciary at large. While a limitation, this is an important finding discussed later.

Finally, the political situation in all three countries became volatile at some point during the period of the research, due to demonstrations against constitutional reform in Uganda, annulment of the presidential election results in Kenya, and increasing tensions between the legal profession and the presidency in Tanzania. Accordingly, there was a high level of distraction amongst judicial officers across the region and it was often difficult to effectively engage with relevant key informants due to competing demands on their time.

Nevertheless, judicial officers and staff, as well as civil society representatives, were extremely generous with their limited time and the research team is very grateful to all those who participated.



## C.

## Women's Representation And Participation In Judicial Institutions – Theoretical Framework

“... [women's representation and participation in the judiciary] equal representation of women serves several critical social functions.”

Why do governments, organizations, and the public see women's representation and participation in the judiciary as a critical issue? As this section describes, equal representation of women serves several critical social functions. First, equal representation of women enhances institutional legitimacy. Second, equal representation in judiciaries has important impacts across other sectors of society. Third, equal representation is a requirement in many international and regional instruments, making it a benchmark by which government performance can be measured. Finally, there is a strong perception that women judges positively impact decision-making processes within judiciaries.

### 1. Enhancing Judicial Legitimacy

The Sustainable Development Goals (SDGs) highlight the importance of institution building in Goal 16 and link that process to justice and peace. Goal 16 is designed to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels.”

Building trust in institutions, including the judiciary, is a significant concern across East Africa. Lack of public confidence in institutions of government has ongoing negative consequences, such as an apathetic citizenry, creation of parallel mechanisms that are outside legal control, and eruption of violent conflict. For the judiciary, lack of public confidence may be reflected in public disinterest in bringing cases to court, attempts to manipulate judicial outcomes through corruption, use of non-judicial mechanisms which have negative human rights outcomes, and vigilante justice, amongst others.

Institutions that reflect the diversity and composition of society at large generally are seen as more legitimate and thus generate higher levels of social trust.<sup>8</sup> Inclusion of women is one of the most obvious methods of enhancing the representativeness and inclusivity of institutions – women make up half of all societies and there is little definitional controversy over what constitutes a woman.<sup>9</sup> Ensuring that institutions reflect gender diversity is simple both for policy makers and the public to understand and thus is one of the most important ways to begin to ensure that an institution reflects the composition of society.

This is not to say that once an institution has a membership that is half women, its inclusivity and legitimacy is assured. Nevertheless, gender equality in an institution is a critical prerequisite for legitimacy and public trust. Women's equal representation starts institutions – especially judicial organs – on the path to sustainability and long term public confidence.<sup>10</sup>

<sup>8</sup> Acemoglu, D., & Robinson, J. A. (2012). *Why nations fail: the origins of power, prosperity and poverty* (1st ed). New York: Crown Publishers.

<sup>9</sup> This is in contrast to other types of inclusivity, such as disability, minority status, sexual orientation or religious diversity which can be much more complex.

<sup>10</sup> Kalantry, Sital. “Women in Robes.” *Americas Quarterly*, 2012.

## 2. Improving Women's Full and Equal Participation Across Society

Gender representation in judiciaries is critically important given the judiciary's unique role in ensuring the application of laws that protect the rights of women across the rest of society.<sup>11</sup> In relation to laws that ensure equal opportunity in education and employment, equal access to critical services such as health care, financial services, information, and justice, as well as equal treatment throughout public and private institutions, the judiciary is a critical bulwark against discrimination. There is no guarantee that equal representation of women in judiciaries will be an automatic guarantee of protection against discrimination and patriarchy, which are deeply embedded and can influence the judgments of men and women alike. But, when judiciaries include women decision-makers at all levels, societies have taken the first critical step toward protecting equal opportunity and equal access in all other areas.

The impact of women on judicial decision-making will be discussed later in this report, but there is a broad agreement that enhancing diversity in institutions necessarily enhances diverse viewpoints during the process of decision-making within those institutions, and thus broadens the opportunity for minority and marginalized experiences to be better understood and their unique circumstances taken into account.

Women judges may have a particularly important role to play in enhancing sustainable development, especially in the global south. O'Connor and Azzarelli argue that as the world recognizes the power and potential of the millions of individuals living at the bottom of the global income pyramid, the majority of whom are women, the importance of having women at the top of the pyramid to enhance rule of law is critical.<sup>12</sup> This argument may be particularly important in the African context where women make up a substantial majority of the working poor, the so-called bottom of the economic and development ladder.

## 3. Compliance With International Treaty Obligations

Recognizing the important gains in legitimacy and public confidence that come with inclusive institutions, international and regional treaties have repeatedly reaffirmed the importance of inclusion of women at all levels in government institutions, specifically including the judiciary. Multiple international normative instruments require non-discrimination in public and judicial appointments, including the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the Convention on Elimination of all Forms of Discrimination against Women (CEDAW). Gender equality is emphasized in article 3 of the ICCPR, according to which States parties "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." Article 1 of CEDAW describes "discrimination against women" as meaning "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." Article 7 provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life, including the right to hold public office, such as judicial office. Through operation of Article 8, States parties agree to take all appropriate measures to overcome historical discrimination against women and obstacles to women's participation in decision-making processes.

African regional instruments contain important norms related to inclusion of women in judiciaries. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>13</sup>, adopted by the African Commission on Human and Peoples' Rights in 2001 specifies in principle A(4)(j) that "Any person who meets the cri-

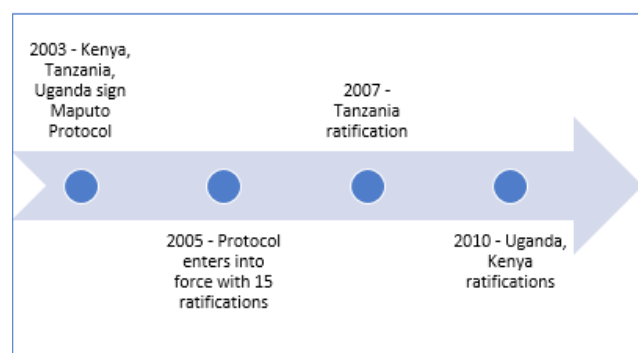


Figure 1. Timeline of Maputo Protocol Adoption

11 O'Connor, Sandra Day, and Kim Azzarelli. "Sustainable Development, Rule of Law, and the Impact of Women Judges." *Cornell International Law Journal* 44 (2011): 3–9.

12 *Id.*

13 African Union, DOC/OS (XXX) 247 (2001), at <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>.

teria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status.” The UN Basic Principles on the Independence of the Judiciary<sup>14</sup> specify at Principle 10 that “In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status...”

The African human rights system not only prohibits discrimination but requires affirmative action by States to ensure equal representation. Article 8(e) of the Maputo Protocol specifically requires States party to take all appropriate measures to ensure “that women are represented equally in the judiciary and law enforcement organs.” Kenya, Tanzania, and Uganda all have ratified the Maputo Protocol and accordingly are bound by this important provision, requiring not only non-discrimination but appropriate measures including affirmative action on women’s equal representation in the judiciary. Accordingly, women’s representation in judiciaries is one key benchmark which African states are working to achieve.

The CEDAW Committee’s General Recommendation No. 23, highlights the fact that the implementation of Article 7 is a challenge across the globe. “Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men.”<sup>15</sup>

## 4. Perceived Impact of Women on Judicial Decision-Making

There remains an open question as to whether men and women judges and magistrates decide cases differently, and whether this is a valid rationale for increased inclusion of women in judiciaries. Studying this issue in a scientifically rigorous manner is challenging, and a majority of the research in this area has been conducted in the global north. Results remain inconclusive. Multiple studies have been conducted to determine whether the gender of a judge influences the decisions he or she makes. According to a meta-analysis, “[a]bout one-third of these studies show that women judges come to different conclusions than male judges, about one-third have mixed results, and the final third find no sex-based differences whatsoever.”<sup>16</sup>

The question of whether a man and a woman judge would look at the same set of facts relative to the same law and come to a different decision, controlling for all other differences such as age, education, region, culture goes to the very heart of the role of the judiciary as an objective arbiter. Researcher Sital Kalantry highlights a number of theoretical approaches to this question:

“The ‘different voice’ approach, espoused by psychologist Carol Gilligan, suggests that women judges are likely to bring a unique feminine perspective to the bench, since women and men are inherently different. However, the application of this theory in the context of the work of judges has received much criticism because it strikes at the heart of the fundamental characteristics required of a judge: impartiality and objectivity. Another theory, known as ‘representational theory,’ suggests that women on the bench will represent the interests of other women and will use it as an opportunity to make decisions that favor equality. A third theory, described by academics Christina Boyd, Lee Epstein and Andrew Martin, is the ‘informational theory,’ which suggests that women don’t necessarily represent a class but that their professional experiences give them unique and valuable information that may impact their decision-making.”<sup>17</sup>

The ICJ Kenya research described in this report, conducted over a short period in three countries, cannot hope to resolve a research question which has proven intractable as well as controversial. The larger ICJ Kenya project does attempt to highlight important examples of both women and men judges in the East Africa region advancing women’s equality through their work and their jurisprudence.

This research report examines this issue in an informal manner at section E in relation to how judges in East Africa reference important international and regional instruments on women’s rights. In addition to obstacles, however, judiciaries in the region are making strides toward enhancing gender equity. The following sections highlight findings from key informant interviews relative to (1) what obstacles prevent full gender equality in East African judiciaries, and (2) what good practices in enhancing women’s representation are emerging in the region.

<sup>14</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985,

<sup>15</sup> CEDAW General Recommendation No. 23: Political and Public Life Adopted at the Sixteenth Session of the Committee on the Elimination of Discrimination against Women, in 1997, UN Document A/52/38.

<sup>16</sup> Kalantry, Sital. “Women in Robes.” *Americas Quarterly*, 2012.

<sup>17</sup> Id.

## D.

## Findings on Obstacles to Enhancing Gender Equity

Interviews in Kenya, Tanzania and Uganda focused on documenting the perceptions and experiences of stakeholders in relation to gender equity in the region's judiciaries. Interviewees identified both obstacles and important gains in each country. This section discusses the common obstacles undermining gender equity across the three countries, based on interviews and the literature review.

### 1. Social Attitudes and Political Will

Across East Africa, patriarchy and sexism persist, as they do across the globe. Interviewees from all three countries described the fact that their societies remain conservative and patriarchal, despite incremental gains for women. These attitudes are reflected across the spectrum of experiences of women working in judicial institutions.

Stereotypical perceptions about women's role in society and their biological differences from men persist. One interviewee in Tanzania noted that "all the negatives about women are considered – she has to get permission from her husband, she might become pregnant, she might be breastfeeding, etc. – but the negatives about men are never taken into account" when it comes to decisions about promotions or other employment related benefits.<sup>18</sup> An interviewee in Uganda described her perception that "there remain stereotypes about women – that they are gossiping, that they run after people for small things, and other stereotypes. It makes us feel like we have to work harder to prove that we are not those things."<sup>19</sup> In Kenya, interviewees noted that women judicial officers often are perceived as incompetent to handle certain types of cases, such as land matters, especially in more rural courts. One judge said that in her experience, "there is a perception on certain cases, like divorce, maintenance, inheritance, that as a women judicial officer you are there to hurt the men."<sup>20</sup> These attitudes reflect the global struggle of women and girls for recognition of their substantive equality along with celebration of their unique roles in society.

Interviewees in each country also noted that it is very challenging to have their voices heard about issues of gender equity within institutions. Reflecting broader social attitudes, there is a perception that gender equality is "a women's issue" and that men have little or no role to play. For example, when issues related to gender equity present themselves before the judiciary (research requests, training, etc.) they are readily relegated to the women judges and magistrates association in the country, instead of being addressed as an issue that impacts the judiciary broadly. This reflects a perception that gender equality is something that pertains only to women and is the work of women only. Relegation of gender equity work as "women's work" perpetuates the marginalization of the issue as one that is unimportant for the society or the judiciary as an institution. Indeed, exactly the opposite is true. Gender equity addresses itself to the equal treatment and status of men and women in all spheres of public and private life, and it requires a whole of society approach.

Stereotypical attitudes reportedly have significant impacts on judicial officers, both male and female, who attempt to champion gender equity within the judiciary or in other spheres. Women judicial officers noted that male colleagues who contravene social norms and are supportive of gender equity may suffer professional repercussions, such as lack of respect and unwelcome transfers.<sup>21</sup> Women in the judiciary who are active and outspoken advocates of gender equity report being labeled as "a problem" or "insubordinate".<sup>22</sup> Interviewees noted that judicial officers may be warned by colleagues and superiors not to be outspoken or to participate in particular types of meetings related to gender issues for fear of being blacklisted for future promotions, transfers, or other opportunities.<sup>23</sup>

Political will often reflects social attitudes. It should be said that in East Africa there has been improving political will over the past two decades for appointment of women in public office, which has led to strong numeric gains for women in judiciaries across the region. But political will is a double-edged sword, as recently became clear in Tanzania. In 2013, a report by the International Commission of Jurists Geneva Secretariat found that in "recent years there has been a significant increase in women's representation in the judiciary in Tanzania. Women now comprise more than half of all magistrates and approximately 56 per cent of Court of Appeal and High Court judges."

<sup>18</sup> Judge Member, Tanzania Women Judges Association (July 7, 2017; Dar es Salaam).

<sup>19</sup> High Court Judge (May 26, 2017; Kampala).

<sup>20</sup> Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

<sup>21</sup> High Court Judge (May 24, 2017; Entebbe).

<sup>22</sup> High Court Judge (May 24, 2017; Entebbe).

<sup>23</sup> Representative, Uganda Law Society (May 26, 2017; Kampala).

However, by the time ICJ Kenya's research was being conducted for this report, just a few years later, there was significant concern about backsliding on gender equity in Tanzania.

In the week before research interviews were conducted in Dar es Salaam, the Tanzanian president was in the media for his extremely gender-insensitive comments about school girls who become pregnant, while endorsing a ban on their return to school after delivery.<sup>24</sup> Tanzanian interviewees reflected upon this and other statements and linked it to the lack of recent female judicial appointees in the country, a marked change from the previous presidential administration.

While the situation in Tanzania is concerning, there is a critical point to be made that applies to all countries in the study. Where gender equity is dependent on the discretionary actions of political officials, progress towards gender equality will remain tenuous. Where political actors have discretion, instead of having their actions constrained by clear policy and legislative directives, the potential for backsliding is all too real.

Ugandan interviewees also identified backsliding on judicial appointments of women as a concern. Interviewees noted that during the 1990s there was a strong push for appointment of women, but that when those judges began retiring in the next two decades there was a perception that they were being replaced by men, not women.<sup>25</sup>

In contrast in Kenya, where gender representation in public institutions is a constitutionally mandated directive, interviewees expressed no concerns about backsliding. Indeed, interviewees highlighted the fact that in 2016 more women graduated from law school in Kenyan than did men, suggesting that equal representation will only continue to increase.<sup>26</sup>

Regardless of the direction of political will in relation to promoting or undermining women's appointments, numerical equality is not the same as substantive equality. Subsequent sections of this report describe that although numerical equality is improving in Kenya and Uganda, there remain important gaps in substantive equality. As one advocate in Uganda said, "the numbers are there, and it seems like a big change but there remain significant gaps. The country remains very patriarchal and in this way women are relegated to certain types of work and certain types of law."<sup>27</sup>

## 2. Judicial Culture

The institution of the judiciary is an inherently conservative and hierarchical one; indeed, this conservatism and hierarchy facilitates the functioning of the judicial system and the rule of law. Judicial processes, especially in common law systems, have evolved over several centuries based on an elaborate system of rules that preserve the primacy of historical precedent and which recognize a distinct progression of decision making power from lower to higher courts. While the conservatism and hierarchy of the judiciary are important tools, they also create barriers to transformation and progress, especially when coupled with a history of male domination.

The law in general and judiciaries specifically, have long been male-dominated, and are just recently emerging from this gender imbalance. Accordingly, judicial culture's conservatism and hierarchical nature reinforces societal patriarchy in important ways. As one judge in Uganda noted, "We have come from a history of chauvinism and oppression of women and it's going to take a lot to break that history."<sup>28</sup> Research conducted by the judiciary itself in Kenya reflected a similar sentiment. The Kenya Judiciary's Transformation Framework described the culture of the institution as reflecting "its founding history of dominance, power, prestige and remoteness, as opposed to service and equality."<sup>29</sup> The culture of the judiciary as a hierarchical and patriarchal institution is reflected in numerous ways. Interviews revealed that concerns about sexual harassment and extortion, as well as the impact of an "old boys network" were the most salient for stakeholders.

Women in the judiciary report that despite increasing numerical equality, they are marginalized throughout the institution because of the so-called old-boys-network. The network is a euphemism for the marginalization of women throughout an institution through use of gender-based networks and informal processes of influence in decision-making. This phenomenon is reflected in research globally – around the world "women judges report that an 'old boys' club' mentality surrounding judicial appointments poses a crucial barrier to entry in the legal profession, particularly in the higher courts."<sup>30</sup>

24 Ratcliffe, R. (2017, June 30). "After getting pregnant, you are done": no more school for Tanzania's mums-to-be. *The Guardian*. Retrieved from <http://www.theguardian.com/global-development/2017/jun/30/tanzania-president-ban-pregnant-girls-from-school-john-magufuli>

25 High Court Judge (May 25, 2017; Kampala).

26 Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

27 Representative, Uganda Law Society (May 26, 2017; Kampala).

28 High Court Judge (May 24, 2017; Entebbe).

29 "Judiciary Transformation Framework 2012-16." Nairobi, Kenya: Chief Registrar of the Judiciary, n.d., p. 15.

30 Kalantry, Sital. "Women in Robes." *Americas Quarterly*, 2012.



This phenomenon becomes most apparent during the process of judicial appointments and promotions. Interviewees in Tanzania noted that it is very difficult for women judicial officers to be promoted as often as men because they do not have the references and networks that are necessary.<sup>31</sup> Women judges from around the world surveyed by the Virtue Foundation in 2011 echoed these findings, with “nearly 70 percent of respondents saying that the lack of networks and connections that facilitate advancement is a major challenge for women in their pursuit of judgeships.”<sup>32</sup> While the operation of the old-boys network is perhaps most obvious in the process of promotions and appointments, it operates in many other spheres as well, such as in selection for special trainings, selection to travel abroad to conferences, and even at the level of inclusion in informal conversations or social gatherings where networks are solidified and decisions are made. The key is that where there is discretionary decision-making in the hands of a few individuals, without objective and transparent criteria, there is opportunity for networks, patronage and discrimination to more easily dominate the process.

### 3. Policy Development and Implementation

Kenya, Tanzania and Uganda each have clear Constitutional directives on non-discrimination and women’s equality. Moreover, the Maputo Protocol, ratified by all three nations, demands that policy makers implement all appropriate measures to ensure that women are equally represented in the national judiciary. Research revealed that judiciaries in the three countries under study are at various stages of developing and implementing gender equality policies.

Uganda is furthest along in its development and implementation of clear gender policy directives. The Ugandan judiciary has had a gender policy in effect since 2012. The policy is primarily focused on delivery and equal access to justice. The policy’s objectives include:

- (i) To ensure access and delivery of justice to both females and males.
- (ii) To create institutional awareness and demonstrable commitment to gender equality amongst judicial officers and staff of the Judiciary.
- (iii) To address gender obstacles in the delivery of justice by the Judiciary.
- (iv) To establish systems and mechanisms to address discrimination, enforce women’s rights and address unfair treatment/ outcomes based on gender.<sup>33</sup>

The policy also includes certain provisions that impact the role and status of women within the judiciary, including (1) a goal of 50% of judicial and non-judicial appointments at all levels going to women, (2) maintaining a gender and the law component as part of induction training for the judiciary, (3) encouraging judicial officers to attend the gender and the law refresher course, (4) developing a specific procedure for reporting sexual harassment claims, and (5) deploying both male and female magistrates in all magisterial districts.

Uganda is to be lauded for its work in creating and approving this policy. According to the Judicial Training Institute, every judicial officer in Uganda has taken the Gender and the Law course offered by the institute and the course is offered regularly each year.<sup>34</sup>

Despite this, interviewees expressed concerns regarding the policy’s implementation. Interviewees noted that understanding and knowledge of the gender policy within the judiciary is not widespread and needs to be improved.<sup>35</sup> Moreover, many of the provisions of the policy have not been implemented or have been slow to take root. For example, while Gender and the Law remains a component of induction training for judges and magistrates, interviewees noted that many new judicial officers do not actually receive any induction training at all due to lack of time or funding.<sup>36</sup> As discussed below, no specific policy or procedure for sexual harassment claims has yet been developed in Uganda; instead these claims continue to move through the regular disciplinary committee. One interviewee noted that there is much more interest from donor partners in ensuring implementation of the policy than from the government itself.<sup>37</sup>

31 Judge Member, Tanzania Women Judges Association (July 7, 2017; Dar es Salaam).

32 Kalantry, Sital. “Women in Robes.” *Americas Quarterly*, 2012.

33 Judiciary Gender Policy and Strategy: Attaining gender equality in access and treatment by the judiciary (The Judiciary of the Republic of Uganda, 2012).

34 Law Reporting Officer, Uganda Judiciary (May 25, 2017; Kampala).

35 High Court Judge (May 24, 2017; Entebbe); High Court Judge (May 25, 2017; Kampala).

36 High Court Judge (May 24, 2017; Entebbe); Division Registrar, Uganda Judiciary (May 24, 2017; Entebbe).

37 High Court Judge (May 25, 2017; Kampala).

In Kenya, a gender policy is in draft form and is awaiting approval from the Judicial Service Commission (JSC).<sup>38</sup> The process of completing the gender policy has been ongoing for several years. Importantly, the draft policy for Kenya addresses both employees and customers of the judiciary. The objectives of the draft policy for Kenya are:

- I. To promote gender awareness and sensitivity within the Judiciary;
- II. To promote equal opportunities in recruitment, promotion and career advancement within the Judiciary;
- III. To eliminate gender-based discrimination against employees and customers; and
- IV. To support the capacity of the Judiciary to undertake gender responsive planning, implementation and evaluation of policies, programmes and projects.

To support its focus on its employees, the draft policy specifies several areas of intervention in relation to all staff and judicial officers including:

- Recruitment
- Affirmative action
- Allocation of duties
- Appraisals
- Training
- Promoting gender awareness and sensitivity
- Transfers
- Maternity and paternity leave and flexible working hours

Should the policy be adopted by the Judiciary as currently drafted, it would indeed be an important model for the region. However, its adoption has been pending for more than a year and it is unclear when adoption might be approved. The Kenya Women Judges and Magistrates Association (KWJMA) has been an active participant in drafting the policy and continues to advocate for its adoption.<sup>39</sup>

In Tanzania, there is no specific gender policy, but gender mainstreaming is part of the judiciary's strategic plan for 2015-2020. Like in Uganda however, interviewees noted that many members of the judiciary are not very aware of the strategic plan or their role in its implementation.<sup>40</sup>

Kenya has a sexual harassment policy currently under review and awaiting final approval from the JSC (Appendix B). According to the Kenyan Judicial Training Institute, training on the policy is already being conducted in anticipation of its approval and the policy is largely being implemented already. Judicial officers we interviewed in Kenya were very aware of the policy and despite its approval, treated it effectively as already approved. One judicial officer highlighted the fact that "there is still significant stigma about sexual harassment and the policy is designed to ensure people have a safe space to go and report the issue."<sup>41</sup>

Tanzania deals with sexual harassment claims through its judicial ethics committee, though interviewees noted that most of the members of the ethics committee are male.<sup>42</sup> Uganda has a sexual harassment law but there is no specific process or policy to handle claims within the Ugandan judiciary – complaints are dealt with through the disciplinary committee, which until recently was all male and this reportedly had an influence on the reporting of and decisions of the committee in the handling of sexual harassment complaints. One interviewee suggested that there was a draft sexual harassment policy, but that there was no institutional interest in implementing it.<sup>43</sup>

Interviewees highlighted the fact that sexual harassment often becomes a dividing line between men and women judicial officers. Women judicial officers may encourage their colleagues who have been harassed to come forward and pursue claims while male judicial officers often are perceived as urging complainants to drop their claims.<sup>44</sup> Interviewees from each country described the fact that male perpetrators of sexual harassment were almost never publicly disciplined or removed from their posts; at most they might be transferred to a different duty station. Disturbingly, some interviewees noted that men who had engaged in severe sexual harassment were sometimes promoted, while the woman who was victimized would be transferred to a new duty station.

Despite the hierarchical nature of the judiciary, rank does not appear to protect women judicial officers from harassment. Judges in Uganda highlighted one case of a male employee who had harassed the female Deputy Chief Justice of the Supreme Court over a substantial period of time. The case did ultimately end up in the disciplinary committee, but the perpetrator simply claimed as a defense that he was in love with his victim.

38 Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

39 Id..

40 Unfortunately, the full strategic plan was not made available to the researchers and thus a complete analysis of its provisions on gender could not be conducted.

41 Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

42 Judge Member, Tanzania Women Judges Association (July 7, 2017; Dar es Salaam).

43 High Court Judge (May 24, 2017; Entebbe).

44 Division Registrar, Uganda Judiciary (May 24, 2017; Entebbe).

Some interviewees from Uganda reported that although sexual harassment remains an issue, there has been some improvement. They noted that while instances of sexual harassment may be slowly decreasing, women still have severe challenges in raising cases of sexual harassment because of fear of retaliation.<sup>45</sup> Interviewees in Kenya also shared multiple stories of women being forced to drop claims in the past, but noted that there had been improvements since dissemination of the sexual harassment policy, despite the fact that full adoption of the policy has not yet taken place.<sup>46</sup>

## 4. Representational Equality – Mixed Results

Appointing women into the ranks of the judiciary, both as judicial and non-judicial officers is perhaps the clearest indicator of gender equality. Unfortunately, none of the countries studied for this report are yet to achieve equality of gender representation amongst the members of the judiciary, even though improvements have been made.

Across the judiciary in Kenya, as of 2017, men made up 56% of the judicial officers as described in Table 1.<sup>47</sup> Kenyan interviewees had the perception that among magistrates and registrars there were in fact more women than men; the list of officers on the judiciary's website suggests that while there are a significant number of women in the ranks of judicial officers, the perception is not entirely accurate. There has been an important positive trend in Kenya, where in 2011 there were no women sitting on the Court of Appeal, but by 2016 there were nine out of a total of 21.

In Tanzania as of 2017, women make up 43% of all members of the judiciary, judicial and non-judicial. This is a worrying change from just four years earlier when it was reported that women made up more than half of magistrates as well as 56% of Court of Appeal and High Court judges.<sup>48</sup> Today 67% of Court of Appeal and High Court judges are men. The reasons for this shift in Tanzania could not be effectively examined during the short time period that this research was carried out. However, interviewees noted that the recent change in leadership at the Presidential level was causing concern across the legal profession.

In Uganda, women make up 44% of judicial officers according to the judiciary's own website listing of judicial officers in 2017. This number is an improvement from 2012, when the overall percentage of women in judgeships was reported at 39%<sup>49</sup>, but it still falls short of the Judiciary's own stated policy goal of seeking "to attain a balance in representation (50/50) amongst judicial officers and non-judicial staff in the Judiciary at all levels."<sup>50</sup> Indeed some interviewees expressed concern that as women judges were retiring they were being replaced with men, which was undermining representational equality.<sup>51</sup>

**Table 1. Gender Representation in East Africa's Judiciaries**

<b>Gender Distribution in Kenyan Judiciary 2017<sup>52</sup></b>	<b>Men</b>	<b>Women</b>
Judges	98 (61%)	62 (39%)
Magistrates & Khadis	265 (55%)	215 (45%)
Registrars	5 (33%)	10 (67%)
<b>Total officers</b>	<b>368 (56%)</b>	<b>287 (44%)</b>
<b>Gender Distribution in Tanzania Judiciary 2017<sup>53</sup></b>	<b>Men</b>	<b>Women</b>
Court of Appeal	12 (80%)	3 (20%)
High Court	36 (54%)	31 (46%)
Registrars	2 (67%)	1 (33%)
Deputy Registrars	30 (68%)	14 (32%)
Lawyers at the Judiciary	1 (50%)	1 (50%)
Judges law assistants	22 (39%)	34 (61%)

45 Representative, Uganda Law Society (May 26, 2017; Kampala).

46 Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

47 Percentages calculated based on listing of judicial officers on the website of the Kenya Judiciary, at <http://www.judiciary.go.ke/portal/home>.

48 Women and the Judiciary: Geneva Forum Series No. 1 (International Commission of Jurists, 2014).

49 Id.

50 Judiciary Gender Policy and Strategy (Judiciary of Uganda, 2012).

51 High Court Judge (May 25, 2017; Kampala).

52 Website of the Judiciary of Kenya, "Courts", at <http://www.judiciary.go.ke/portal/page/courts>.

53 Judge Member, Tanzania Women Judges Association (July 7, 2017; Dar es Salaam).



Resident Magistrates	381 (55%)	315 (45%)
District Magistrates	4 (80%)	1 (20%)
Primary Court Magistrates	306 (60%)	207 (40%)
<b>Total officers</b>	<b>794 (57%)</b>	<b>607 (43%)</b>

<b>Gender Distribution in Uganda Judiciary 2017<sup>54</sup></b>	<b>Men</b>	<b>Women</b>
Supreme Court	5 (55%)	4 (45%)
Court of Appeal	9 (69%)	4 (31%)
High Court (including judges on special assignment)	30 (56%)	23 (44%)
Registrars	4 (100%)	0
Deputy Registrars	18 (56%)	14 (44%)
Assistant Registrars	5 (45%)	6 (55%)
Chief Magistrates	25 (57%)	19 (43%)
Magistrates Grade I	95 (49%)	97 (51%)
Magistrates Grade II	36 (78%)	10 (22%)
<b>Total</b>	<b>227 (56%)</b>	<b>177 (44%)</b>

Given the importance and visibility of representational equality in judiciaries, the body making judicial appointments is a critical actor. In all three countries under study, judicial appointments are mediated by a commission which recruits judges and magistrates. The commission makes recommendations to the executive for judges' appointments and appoints magistrates directly to their station. In general, the composition of judicial service commissions is determined by law.

In Kenya, women's representation, but not numerical equality, on the JSC is assured through rules that require one of two representatives from the Law Society to be a woman, and equally so the representatives of the public.<sup>55</sup> As of the time of publication, there were four women commissioners out of a total of eleven on Kenya's JSC.<sup>56</sup>

In Tanzania, interviewees expressed concern about the composition of the commission, and the fact that until recently there had only ever been a single woman member on the commission.<sup>57</sup>

Uganda's JSC currently is a model of gender equality, with five women members out of a total of nine. The deputy chairperson is a woman.<sup>58</sup>

<sup>54</sup> "Judicial Officers." Accessed May 24, 2017. <http://www.judiciary.go.ug/data/smenu/91/Judicial%20Officers.html>.

<sup>55</sup> Kameri-Mbote, Patricia, and J. M. Migai Akech. *Kenya: Justice Sector and the Rule of Law: A Review by AfriMAP and the Open Society Initiative for Eastern Africa*. Nairobi, Kenya: Open Society Initiative for Eastern Africa, 2011, p. 8.

<sup>56</sup> See <http://www.judiciary.go.ke/portal/page/jsc-commissioners>.

<sup>57</sup> Judge Member, Tanzania Women Judges Association (July 7, 2017; Dar es Salaam).

<sup>58</sup> See <http://www.jsc.go.ug/jsc/commission>.

## 5. Substantive Inequality Through Internal Policy

Representational equality on the bench is just the beginning. Gender inclusive judiciaries require complete transformation, not simply quotas. Women judges around the world report that, especially in the early years of judicial transformation, even though they were present they felt invisible and were simply ignored by male colleagues.<sup>59</sup>

### Women at the apex

One indicator of women's role and status in the judicial system is the presence of women leaders at the very apex of the system, the chief justice. Unfortunately, in comparison to neighboring countries and to other common law countries in Africa, East Africa has fallen behind. Between 1990 and 2014, in six of the twelve common-law countries in Africa, women were appointed as chief justice (Gambia, Ghana, Liberia, Malawi, Nigeria, and Sierra Leone). Common-law countries with no selection of a female chief justice during the same period were Kenya, Sudan, Swaziland, Tanzania, Uganda, and Zambia. Benin, Burundi, Gabon, Niger, Rwanda, and Senegal also had women heads of their constitutional courts and Djibouti had a woman head of its supreme court. Indeed, a neighbor in the region, Burundi had two subsequent serving women presidents of its constitutional court, both elected by their peers to serve in the position. Multiple interviewees described the unspoken rule across East Africa that men must always be in the highest position of leadership, while women can only be appointed as the deputy.

Key informant interviews echo research from around the world when it comes to enhancing substantive equality within judiciaries. Key factors impact whether women feel that they are treated fairly, including:

- Women in substantive decision-making positions within the judiciary,
- Gender sensitive personnel policies, and
- Training and capacity building on gender equity.

### Women in substantive leadership

Interviewees in this study described the fact that while the numbers of women in East African judiciaries' ranks is approaching parity, there is a perception that women continue to be left behind in key leadership positions and decision-making bodies. For example, none of the countries under study have ever had a female chief of their highest court.

Kenya's deputy chief justice currently is a woman and the deputy of the highest court in both Tanzania and Uganda have been women. Women also may be appointed to heads of committees or divisions. But, many interviewees described unspoken rules about how leadership positions are allocated, noting that chief positions are reserved for men, while women have extreme difficulty rising above the level of deputy.

Interviewees described the fact that women often do not have the networks and connections to lobby for the promotions they might be eligible for. Some interviewees described the fact that even when women do get promoted into leadership positions, they may be retained as acting for years, under an unspoken assumption that the position is designated for a man.

Because of the stereotypes and unspoken rules about women's leadership, lobbying for women to be promoted or appointed to positions of substantive equality takes a much more concerted effort than it does for male judges. Often, entire networks of judges, parliamentarians, and civil society organizations may need to get behind a single woman candidate to ensure that she has equal opportunity for a promotion, especially in higher level courts. This kind of concerted lobbying can be a challenge, as described by one Ugandan interviewee: "Women fail to strategize effectively around the political processes that are involved in making sure that women get appointed into leadership; instead we find that women are competing with each other for the small number of positions that are available, instead of making sure that women as a group strategize about who is the person who could most likely get appointed and everyone rallies around that one person; instead of having a united front we have a divided front."<sup>60</sup>

59 E.g., Cowan, Ruth. "Women's Representation on the Courts of the Republic of South Africa." *University of Maryland Law Journal of Race, Religion, Gender, and Class* 6 (2006).

60 High Court Judge (May 26, 2017; Kampala).

Lobbying efforts have, however, been successful when they were well coordinated. For example, recent efforts in Uganda to promote a woman as Deputy Chief Justice were successful in part because of extensive support from civil society organizations who provided information and recommendations to the JSC.<sup>61</sup>

## Gender-sensitive personnel policies

Interviewees identified personnel policies related to work-family balance, transfers, appraisals, workload, and other similar concerns as critical issues for women in East Africa's judiciaries. A report on the Kenyan judiciary noted that "one of the factors that may keep women from the judiciary is the failure to make conditions conducive for them to perform roles in public and private as wives and mothers..."<sup>62</sup> This reflects research globally which has highlighted for decades that "social norms generally assume that women will take primary responsibility for domestic chores and the care of young children and other family members. This limits their participation in the labour market compared to men or confines them to lower quality and lower paid jobs and livelihoods that can be 'reconciled' with unpaid work, but often at great cost to women themselves."<sup>63</sup>

One of the primary issues in each country was the continual transferring of judicial officers. Interviewees in Tanzania and Uganda noted that there are no policies regulating transfers, apart from general civil service rules, which make the process arbitrary and give the presiding or principal judge extensive power over subordinates. A Tanzanian interviewee noted that the Chief Justice has the power to transfer any judicial officer throughout the country without consultation, and that generally judicial officers who are transferred leave their families behind for the entire period of their new posting.<sup>64</sup> While Kenya has adopted a policy on judicial transfers, interviewees noted that it remains largely unimplemented.<sup>65</sup> Research in Kenya noted that "frequent transfers are likely to affect women who tend to be the anchors of homes and carers for their families...transfers may affect children's learning and discourage women from judicial service."<sup>66</sup> Interviewees said they were aware of women who had to leave their jobs because of problems with transfers.<sup>67</sup>

Interviewees also highlighted the fact that sometimes transfers were used punitively, with no recourse. In Kenya, the Judiciary itself identified punitive and haphazard transfers as a problem that has undermined morale and productivity in the judiciary over the years.<sup>68</sup> While the Kenyan Judiciary has a policy document to address transfers, interviewees identified implementation as a concern. Interviewees in all three countries noted that the problem of transfers was particularly difficult for younger officers, who were just getting married or starting families, as transfers often separated families at a great distance. As one judicial officer in Kenya noted, "many Magistrates and judicial staff are young and newly married so transfers are a real issue for them; sometimes transfers end up breaking the family or ending a career."<sup>69</sup>

The issue of transfers also is related to the lack of sufficient infrastructure that many of East Africa's judiciaries face, especially in rural stations. "The increase in the number of women being recruited in the lower benches has implications on the current policy of posting judicial officers, and in particular, the need to provide resources that can make the out of city postings more comfortable and attractive for judicial officers who have to fulfill their gender roles as fathers and mothers."<sup>70</sup> Interviewees described the fact that they couldn't move with their families to many up-country postings given that the level of housing, health, and educational facilities simply wasn't comparable to what their families were accustomed to in larger urban areas. A judicial officer in Kenya described the fact that in some judicial stations in Kenya, "the reality is that when women are posted to these distant locations, it's a real challenge, it impacts their performance, and we need to be more sensitive."<sup>71</sup>

61 Representative, Uganda Association of Women Lawyers (FIDA Uganda) (May 25, 2017; Kampala).

62 Kameri-Mbote, Patricia, and J. M. Migai Akech. *Kenya: Justice Sector and the Rule of Law: A Review by AfriMAP and the Open Society Initiative for Eastern Africa*. Nairobi, Kenya: Open Society Initiative for Eastern Africa, 2011, p. 8.

63 UN Women, *Progress of the World's Women, 2015-16*, p.34.

64 Judge Member, Tanzania Women Judges Association (July 7, 2017; Dar es Salaam).

65 Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

66 Kameri-Mbote, Patricia, and J. M. Migai Akech. *Kenya: Justice Sector and the Rule of Law: A Review by AfriMAP and the Open Society Initiative for Eastern Africa*. Nairobi, Kenya: Open Society Initiative for Eastern Africa, 2011, p. 8.

67 Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

68 "Judiciary Transformation Framework 2012-16." Nairobi, Kenya: Chief Registrar of the Judiciary, n.d., p. 16.

69 Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

70 Uganda Judiciary Gender Policy 2012, p. 18.

71 Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

Other policies, such as maternity/paternity leave, sick leave to care for a child or other family member, and scheduling of court sessions, also have a disproportionate impact on women, and especially young women entering the judiciary. “The most important challenge cited by women judges in [a recent global] survey was balancing work and family responsibilities (96 percent).”<sup>72</sup> At least one interviewee in Uganda described the fact that the adoption of the judiciary’s gender policy had had a very positive impact on sensitivity to these issues within the judiciary.<sup>73</sup>

## Training and capacity building

Interviewees also identified lack of sufficient training, capacity building, and mentoring as a gap in women’s substantive equality with judiciaries. While interviewees all identified training and capacity building as a critical component of empowerment and gender equity, there was equal concern that there were insufficient opportunities and support for these interventions.

Training for judicial officers begins with induction as officers assume their posts. In each country, some aspect of gender equity training is included in induction for judicial officers. Tanzania’s training seems to be the most advanced in this regard. It is conducted by the Tanzania Women Judges Association (TAWJA) and includes discussion of domestic laws as well as international instruments, including the Maputo Protocol. However, induction training in Tanzania is a relatively new phenomenon, having become widespread only in the past decade.<sup>74</sup> In Uganda, while a component on gender and the law is included in induction trainings, some interviewees noted that not all judicial officers actually receive the induction training for a variety of reasons. In Kenya, the Judicial Training Institute reported that gender equity training is generally an ad hoc component of other trainings, including staff induction.

Interviewees noted that training on gender has observable benefits and leads to perceived changes in behavior, however, it needs to be more targeted at key leaders and decision-makers within judiciaries. In addition, interviewees observed that funding for training on gender equity issues generally is dependent on donor support, which can generate some level of uncertainty.

Interviewees also described how training and mentoring for judges on key aspects of their core functions is a critical component of ensuring women’s success in the judiciary, but often is lacking. Many described their desire for training on courtroom management, prioritizing cases, scheduling, dealing with difficult litigants, and managing workload. Because women feel pressure to perform at an even higher level to dispel stereotypes, they are particularly desirous of such training and support. Interviewees in Tanzania and Uganda particularly lamented the fact that women judges and senior magistrates do not have the time or opportunity to formally mentor younger or new judicial officers on how to navigate the system. Although judges in Kenya described the fact that they felt informal mentoring was working effectively, none of the countries under study had a formal mentoring program, (e.g., a program that is sanctioned by the judiciary and that is a recognized part of judicial duties) for judges or magistrates.

While informal mentoring is extremely valuable, it can become a significant burden for those women who are willing to mentor others. Informal mentoring also is unlikely to reach all those individuals who are interested in and could benefit from such a relationship.

72 Kalantry, Sital. “Women in Robes.” *Americas Quarterly*, 2012.

73 Law Reporting Officer, Uganda Judiciary (May 25, 2017; Kampala).

74 Judge Member, Tanzania Women Judges Association (July 7, 2017; Dar es Salaam).

## E.

## Findings on the Maputo Protocol and its Impact on East African Judiciaries

“.... the Maputo Protocol contains specific provisions requiring African governments to take all appropriate measures to ensure equal representation of women in judiciaries.”

The focus of the Maputo Protocol is to give greater effect and specific content to Article 18 of the ACHPR, in which countries had already agreed to “eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions.” As described above, the Maputo Protocol contains specific provisions requiring African governments to take all appropriate measures to ensure equal representation of women in judiciaries. Equally important however, was the expectation that the Maputo Protocol would provide direction for judges and magistrates in decision-making on matters related to gender equity, such as discrimination, violence against women, inheritance, employment equity, and matrimonial property cases.

## 1. Perceptions about Impact on Judicial Decisions

Three key findings emerged from interview data about the impact of the Maputo Protocol on judicial decision-making. First, there was broad agreement that knowledge about and reference to the Protocol is low among judicial officers. Second, interviewees universally agreed that training and capacity building for both judicial officers and other justice sector stakeholders was a key intervention. Third, lack of knowledge and judicial reference to the protocol’s content mirrors attitudes toward international law in general amongst East Africa’s judges.

“Not many magistrates and judges have heard of it, nor are they schooled in it effectively,” according to one interviewee from Uganda.<sup>75</sup> Other judges echoed this sentiment, noting that the East African judiciary was really in the very early stages of being able to integrate the Protocol into its jurisprudence. A civil society lawyer in Dar es Salaam said that “I have never seen a single mention of the Maputo Protocol at the magistrate court level in all my years working on these issues.” A representative of TAWJA further noted that the “level of knowledge amongst lawyers and judges on Maputo Protocol is very low, unless you work with an NGO and have that specific area of interest you won’t have clear knowledge on this issue; and yet there is a lot of good material in the Protocol that we could use in the courts, but people just don’t know about.”<sup>76</sup> In Kenya, judges agreed that their decision-making relies primarily on the Kenyan Constitution, which incorporates ratified international instruments via Article 2.<sup>77</sup>

“We need more training in that area to help us understand the Protocol. The training we have in law school is focused on the supremacy of the Constitution and we received little information about the lived realities of women. We see the Convention on the Elimination of all Forms of Violence Against Women and the Universal Declaration of Human Rights as more foreign, whereas the Maputo Protocol is seen as home grown and as recognizing the lived reality of women here in Africa. We rushed to ratify but then we didn’t take the next step to ensure that we could effectively apply the Protocol in our legal decisions.”<sup>78</sup>

Interviews also highlighted the fact that training on the Protocol needs to extend across the justice sector, in particular to advocates who have the responsibility to bring arguments based on the Protocol to the courts in the first place. “Advocates are not even raising these issues. It would be great to organize training on the Maputo Protocol and CEDAW for advocates. Younger lawyers have studied these issues more in law school, but the older generation of lawyers have never studied these issues and need continuing education. Really anyone who studied from the year 2000 back needs additional training on these things.”<sup>79</sup> Another interviewee said that while “some lawyers do bring in international instruments to their cases, they are very few and they are generally those who practice at the international tribunals.

<sup>75</sup> High Court Judge (May 26, 2017; Kampala).

<sup>76</sup> Civil society representative (July 6, 2017; Dar es Salaam).

<sup>77</sup> Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

<sup>78</sup> High Court Judge (May 26, 2017; Kampala).

<sup>79</sup> Civil society representative (July 6, 2017; Dar es Salaam).

Those lawyers even have real challenges, the judge will tell them ‘move on, don’t talk about that,’ but judges also say that if the lawyers don’t raise these issues, the judges aren’t going to take the initiative to introduce such law.”<sup>80</sup>

Civil society representatives also said that “it’s critically important that communities are educated on the provisions of the Maputo Protocol so that they can protect their own rights; marriage registration for example is critical and is protected under the protocol; many of the provisions of the Protocol are in fact protected under our laws, but the knowledge of the protocol is very low from the community level up through the highest level of the judiciary and the political actors.”<sup>81</sup>

While training was universally endorsed as an important intervention, interviewees also noted that trainers may confront an uphill battle. Advocates in Uganda noted that “there is very little reference to international instruments broadly; it’s hard to claim success around international jurisprudence. We still need to develop judicial champions within key divisions, even though it’s clear that women’s issues are coming up in every space within the judiciary.”<sup>82</sup> Overall, the conservative nature the judiciary tends to undermine the integration of international and regional legal references into judgments, according to interviewees. “Judges are really not interested in these issues in the ways that they should be. There needs to be sensitization across the justice sector. They don’t see it as their business. The focus is entirely on local laws.”<sup>83</sup> This is not to say that judges and magistrates are not making decisions that support gender equity, but they may simply be referring to domestic legislation and national constitutions instead of international and regional legal principles.

A Ugandan interviewee summarized the situation: “Many judges have a sense that international law is only persuasive, it’s not considered hard law. But there are some very progressive judges in this regard, but it’s quite a mixed bag and every judge establishes their own standard on how international law should be applied in the courts. There is a critical need for training on this issue to help demonstrate its usefulness at the domestic level. The training needs to be very practical. Judges need to feel more confident about applying these principles. It’s a work in progress.”<sup>84</sup>

## 2. Imprint on Case Law

In complimenting the interviews, a review of case law from the three jurisdictions under study, from the date of the Protocol’s adoption to the present day, did indeed reveal very few references to the Maputo Protocol. There was only one ascertainable reference to the Protocol in case law from Uganda, a constitutional appeal, and the other mentions were in Kenyan decisions since 2013. No cases referencing the Maputo Protocol were found in Tanzanian case law. It should be noted that this may be in part a result of law reporting systems in the three jurisdictions. Kenya has by far the most comprehensive and accessible digital case law reporting system. However, the fact that the dearth of cases does correlate with the interview data, and specifically the fact that Tanzanian interviewees indicated they were not aware of a single case that had ever made reference to the Protocol, mitigates this concern to a certain extent.

In Uganda, *MIFUMI v Attorney General*<sup>85</sup>, decided in 2016, was a landmark judgment which outlawed the traditional practice of bride price. In its decision to outlaw this harmful traditional practice, the judgment relied on CEDAW and the Ugandan Constitution, also making mention of the Maputo Protocol.

In discussing CEDAW, the court opined:

*The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides but one example of such Convention imposing obligations on Uganda to take action in line with the prayers made in this Petition. Under Article 2 (f) of this Convention, Uganda as a state party condemned discrimination against women in all its forms, and agreed to: pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.*

<sup>80</sup> Civil society representative (May 27, 2017; Kampala).

<sup>81</sup> Civil society representative (July 6, 2017; Dar es Salaam).

<sup>82</sup> Civil society representative (May 27, 2017; Kampala).

<sup>83</sup> High Court Judge (May 26, 2017; Kampala).

<sup>84</sup> High Court Judge (May 26, 2017; Kampala).

<sup>85</sup> Constitutional Appeal No. 02 of 2014 [2015] UGSC 13, Kisaayke, J.



*Uganda also made specific undertakings under the CEDAW Convention to tackle discrimination occurring at the time of contracting the marriage under Article 16(1)(b), which provides as follows: States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same right freely to choose a spouse and to enter into marriage only with their free and full consent.*

*Lastly, under Article 16 (1)(c) of the CEDAW Convention, Uganda is also obligated to ensure that women enjoy equal rights and responsibilities during marriage. It provides thus: States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same rights and responsibilities during marriage and at its dissolution.*

The case was brought by a women's rights NGO, MIFUMI, and it is clear from the description of arguments in the judgment, that counsel for the petitioners made submissions based on both CEDAW and the Protocol.

The first Kenyan case to address the Maputo Protocol as part of its substantive judgment was *NGEC v IEBC*<sup>86</sup>, decided in 2013, and referred to the representation of women and other marginalized groups on political party nomination lists. A three-judge panel of two men and one woman determined that the Maputo Protocol's obligation on States party to undertake affirmative measures in relation to political participation provided part of the "milieu in which the issues in this matter will be considered."<sup>87</sup> The court then ordered the respondent, the Independent Electoral and Boundaries Commission (IEBC), to "develop a program, in conjunction with constitutional and statutory commissions and political parties, to develop policies and measures geared towards increasing the participation of women, youth, persons with disabilities, marginalized groups and other vulnerable persons to effectively participate in political processes."<sup>88</sup>

The second Kenyan case to substantively rely on the Maputo Protocol as part of its findings, *MAO v Attorney General*<sup>89</sup>, is a constitutional case filed in 2012 on behalf of two women who had been detained in hospital for inability to pay maternity charges, even though a government policy waiving all maternity hospitalization charges was in effect at the time. In her 2015 judgement Judge Mumbi Ngugi<sup>90</sup> found that the medical providers were liable for damages to the patients they had illegally detained after their babies were delivered. Judge Ngugi specifically referred to Article 1, 2, and 3 of the Maputo Protocol which specify the rights to dignity and non-discrimination. The judge also referred to the ACHPR and CEDAW, amongst other references to Kenyan law and cases.

A few other Kenyan judgments in 2016 and 2017 made mention of the Maputo Protocol, but have done so only in their summaries of the petitioner's case.<sup>91</sup> This reflects the fact that advocates in Kenya are continuing to raise the Maputo Protocol as part of their arguments before the court, but that the courts are not always relying on those arguments as a substantive part of their judgments. Advocates are raising arguments based on the Maputo Protocol in a variety of cases, including eviction matters, access to abortion, and affirmative action in government appointments.

In Tanzania, our research did not reveal any cases making mention of the Maputo Protocol. A number of Tanzanian judgments relied on CEDAW in their analysis, as do several from Kenya and Uganda. Accordingly, ICJ Kenya expanded its analysis to review cases making mention of CEDAW as well as those mentioning the Maputo Protocol anytime from 2000 onward. The Tanzanian cases which mention CEDAW in their analysis cover a variety of topics, including inheritance, matrimonial property, rape and domestic violence.

<sup>86</sup> High Court at Nairobi, Petition No. 147 of 2013 (2013).

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> High Court at Nairobi, Petition 562 of 2012 (2015).

<sup>90</sup> It may be relevant to note that Judge Mumbi Ngugi was also a member of the panel in the 2013 *NGEC v IEBC* case described above.

<sup>91</sup> *Olweny v Attorney General, Env & Land Court Kisumu*, Petition No. 27 of 2014 (2016) (an eviction matter, the court mentioned the Protocol, as well as CEDAW and ICCPR, only in its review of the petitioners' submission and did not mention the international instruments further in its dismissal of the petition); *FIDA v Attorney General*, High Court at Nairobi, Petition 266 of 2015 (2016) (focused on access to safe abortion; petitioners relied on the Maputo Protocol as well as the African Charter on the Rights of the Child; judge referred the matter to a full bench and thus a complete judgment has not yet been rendered in the case); *CREAW v Speaker of the National Assembly*, High Court at Nairobi, Petition No. 371 of 2016 (2017) (focused on implementation of the constitutional 2/3 gender affirmative action principle, also mentioned the Maputo Protocol only as part of the 1<sup>st</sup> interested party's submissions). *NGEC v Judicial Service Commission*, High Court at Nairobi, Petition No. 446 & 456 of 2016 (2017) (focused on implementation of 2/3 within the judiciary, also mentioned Maputo Protocol as part of petitioner's submissions, though the judge held against the petitioners).

In Tanzania, two women judges, Munuo and Kimaro, account for seven out of the eight judgments that our research was able to discover and that mention on CEDAW.<sup>92</sup> Judge Munuo was a past President of the International Association of Women Judges (IAWJ) and the first woman to join the bench in Tanzania. Judge Kimaro, a judge of the Tanzanian Court of Appeal, also was involved with IWAJ and TAWJA as an expert trainer in their Jurisprudence of Equality Program.

Across the region, our research shows that courts have primarily addressed the following CEDAW Article 1<sup>93</sup>, Article 2<sup>94</sup>, Article 5<sup>95</sup>, Article 12<sup>96</sup>, Article 15<sup>97</sup>, and Article 16<sup>98</sup> in their judgments.

Courts also refer to CEDAW, along with other instruments such as the ICCPR or UDHR, to highlight the general international obligations which States Parties have assumed. For example, in *Ephraim v. Pastory*<sup>99</sup>, a seminal Tanzanian case from 1990, the court declared that “Tanzania has ratified the Convention on the Elimination of All Forms of Discrimination against Women, 1979. That is not all. Tanzania has also ratified the African Charter on Human and Peoples’ Rights, 1981, which in article 18(3) prohibits discrimination on account of sex. And finally, Tanzania has ratified the International Covenant on Civil and Political Rights, 1966, which in article 26 prohibits discrimination based on sex. The principles enunciated in the above-named documents are a standard below which any civilized nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.”

From the number of cases that emerged in this research process, it is not possible to make any scientifically rigorous statement regarding differences between male and female judicial officers in their use of international and regional instruments such as CEDAW and the Maputo Protocol. Anecdotally however, it seems clear that judgments making use of CEDAW or the Maputo Protocol are more likely to have been written by women judges, and that those women are likely to have been engaged in organizations or training on gender equity.

92 It is important to note that because Tanzania’s law reporting system is not as readily accessible as those in Uganda and Kenya, there may be other cases related to CEDAW and the Maputo Protocol that simply remain undiscovered as part of this research.

93 “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”; Cited in *Uganda v. Matovu*, Criminal Session Case N. 146 OF 2001 [2002] UGHCCRD 14; *In re ole Ntutu*, (2008) e K.L.R. 1, 5-9 (H.C.K.); *Rono v. Rono*, Court of Appeal at Eldoret, civil appeal 66 of 2002, 29 April 2005; *In re Musyoka*, Succession Cause 3030 of 1998, HC at Machakos (2005); *FIDA & 5 Others v. Attorney General*, HC Nairobi No. 102 of 2011; *Kalalu v. Mashirima*, Civil Appeal No. 145 of 2001, High Court at Dar es Salaam.

94 “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”; Cited in *M.A.O. v Attorney General*, HC Nairobi, Petition 562 of 2012 (2015); *Chilla v. Chilla*, Civil Appeal No. 188 of 2000, High Court of Tanzania at Dar Es Salaam, Jan. 6, 2004; *Ndossi v. Ndossi*, Civil Appeal No. 13 of 2001, High Court of Tanzania at Dar Es Salaam, Feb. 13, 2002; *Njobeka v. Mkorogoro, P.C.* Civil Appeal No. 6 of 2001, High Court of Tanzania at Dar Es Salaam, July 13, 2001.

95 “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, (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases”; cited in *Otikor & Ors v. Anya*, Civil Appeal No. 38 OF 2012, [2016] UGHCLD 10.

96 “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”; cited in *M.A.O. v Attorney General*, HC Nairobi, Petition 562 of 2012 (2015).

97 “States Parties shall accord to women equality with men before the law. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.”; cited in *In re Wachokire*, Succession Cause No. 192 of 2000, Chief Magistrate’s Court at Thika, August 19, 2002; *Mtefu v. Mtefu*, Civil Appeal No. 214 of 2000, High Court of Tanzania at Dar Es Salaam, Jan. 20, 2003; *Mohamed v. Makamo*, Civil Appeal No. 45 of 2001, High Court of Tanzania at Dar Es Salaam, June 8, 2001.

98 “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations...”; cited in *Chilla v. Chilla*, Civil Appeal No. 188 of 2000, High Court of Tanzania at Dar Es Salaam, Jan. 6, 2004; *Jonathan v. Republic*, Criminal Appeal No. 53 of 2001, High Court of Tanzania at Moshi, Sept. 21, 2001.

99 AHRLR 236 (TzHC 1990).



Table 2: Table of East African Cases referencing Regional and International Instruments

Kenya Cases	Year	Matter type
In re ole Ntutu, (2008) e K.L.R. 1, 5-9 (H.C.K.) <sup>100</sup>	2008	Inheritance
M.A.O. v. Attorney General, HC Nairobi, Petition 562 of 2012 <sup>101</sup>	2015	Right to health
Rono v. Rono, Court of Appeal at Eldoret, Civil Appeal 66 of 2002, 29 April 2005 <sup>102</sup>	2005	Inheritance
Olweny v. Attorney General, Env & Land Court Kisumu, Petition No. 27 of 2014 <sup>103</sup>	2016	Eviction
Federation of Women Lawyers of Kenya (FIDA) v. Attorney General, HC Nairobi, Petition 266 of 2015 <sup>104</sup>	2016	Abortion
Centre for Rights Education and Awareness (CREAW) & 2 others v. Speaker the National Assembly & 6 others, HC Nairobi, Petition No. 371 OF 2016 <sup>105</sup>	2017	Affirmative action
National Gender and Equality Commission (NGEC) v. Independent Election and Boundaries Commission (IEBC), HC Nairobi, Petition No. 147 of 2013 <sup>106</sup>	2013	Affirmative action
National Gender and Equality Commission (NGEC) & Another v. Judicial Service Commission (JSC) & 2 Others, Petition 446 & 456 of 2016 (Consolidated) <sup>107</sup>	2017	Affirmative action
In Re Achokire, Succession Cause No. 192 of 2000, Chief Magistrate's Court at Thika (August 19, 2002) <sup>108</sup>	2002	Inheritance
In re Musyoka, Succession Cause 3030 of 1998, HC at Machakos <sup>109</sup>	2005	Inheritance
J.A.O. v. Homepark Caterers Ltd. et al, Civil Case No. 38 of 2003, High Court of Kenya at Nairobi, Sept. 2004 <sup>110</sup>	2004	HIV status
Okeyo v. Ogwayi, Civil Suit No. 66 of 2001, Senior Resident Magistrate's Court at Homa Bay, June 13, 2002 <sup>111</sup>	2002	Wife inheritance
Federation of Women Lawyers of Kenya (FIDA) & 5 Others v. Attorney General, HC Nairobi No. 102 of 2011 <sup>112</sup>	2011	Affirmative action
Tanzania Cases	Year	Matter type
Mtawa v. Risasi, Civil Appeal No. 12 of 2001, High Court at Dodoma <sup>113</sup>	2001	Widows rights
Kalalu v. Mashirima, Civil Appeal No. 145 of 2001, High Court at Dar es Salaam <sup>114</sup>	2001	Inheritance, widows rights
Mohamed v. Makamo, Civil Appeal No. 45 of 2001, High Court of Tanzania at Dar Es Salaam, June 8, 2001 <sup>115</sup>	2001	Matrimonial property
Njobeka v. Mkorogoro, P.C. Civil Appeal NA. 6 of 2001, High Court of Tanzania at Dar Es Salaam, July 13, 2001 <sup>116</sup>	2001	Matrimonial property
Mtefu v. Mtefu, Civil Appeal No. 214 of 2000, High Court of Tanzania at Dar Es Salaam, Jan. 20, 2003 <sup>117</sup>	2003	Matrimonial property

100 [http://kenyalaw.org/Downloads\\_FreeCases/SUCCESSION\\_CAUSE\\_No\\_1263%20OF%202000.pdf](http://kenyalaw.org/Downloads_FreeCases/SUCCESSION_CAUSE_No_1263%20OF%202000.pdf).

101 <http://kenyalaw.org/caselaw/cases/view/131104/>.

102 <http://www.chr.up.ac.za/index.php/browse-by-subject/332-kenya-rono-v-rono-2005-ahrlr-107-keca-2005.html>.

103 <http://kenyalaw.org/caselaw/cases/view/129363/>.

104 <http://kenyalaw.org/caselaw/cases/view/118523/>.

105 <http://kenyalaw.org/caselaw/cases/view/133439/>.

106 <http://kenyalaw.org/caselaw/cases/view/87523/>.

107 <http://kenyalaw.org/caselaw/cases/view/135563/>.

108 <http://www.iawj.org/JEPcases.html>

109 <http://kenyalaw.org/caselaw/cases/view/14756>.

110 <http://www.iawj.org/JEPcases.html>.

111 <http://www.iawj.org/JEPcases.html>

112 [http://kenyalaw.org/Downloads\\_FreeCases/83092.pdf](http://kenyalaw.org/Downloads_FreeCases/83092.pdf).

113 <http://www3.lawschool.cornell.edu/AvonResources/3.pdf>.

114 <http://www3.lawschool.cornell.edu/AvonResources/4.pdf>.

115 <http://www.iawj.org/JEPcases.html>.

116 <http://www.iawj.org/JEPcases.html>.

117 <http://www.iawj.org/JEPcases.html>.

Chilla v. Chilla, Civil Appeal No. 188 of 2000, High Court of Tanzania at Dar Es Salaam, Jan. 6, 2004 <sup>118</sup>	2004	Inheritance, child custody
Jonathan v. Republic, Criminal Appeal No. 53 of 2001, High Court of Tanzania at Moshi, Sept. 21, 2001 <sup>119</sup>	2001	Rape, right to marry
Ndossi v. Ndossi, Civil Appeal No. 13 of 2001, High Court of Tanzania at Dar Es Salaam, Feb. 13, 2002 <sup>120</sup>	2002	Inheritance
Juma v. Kifulefule, Civil Appeal No. 247 of 2001, High Court of Tanzania at Dar Es Salaam, Jan. 6, 2004 <sup>121</sup>	2004	Domestic violence, divorce
Marandu v. Marandu, Civil Case No. 33 of 2003, District Court of Moshi at Moshi, Oct. 10, 2003 <sup>122</sup>	2003	Widows rights
Alli v. Elphas, Civil Appeal No. 21 of 2002, District Court of Mwanga at Mwanga, December 21, 2002 <sup>123</sup>	2002	Inheritance, widows rights
Uganda Cases	Year	Matter type
Law and Advocacy for Women in Uganda v. Attorney General, HC of Uganda, Constitutional Petition No. 8 of 2007 <sup>124</sup>	2007	Female genital mutilation
Rwabinumi v. Bahimbisomwe, Civil Appeal No. 10 OF 2009) [2013] UGSC <sup>125</sup>	2013	Matrimonial property division
Ebiju & Anor v. Echodu, Civil Appeal No. 43 of 2012) [2015] UGHCCD <sup>126</sup>	2015	Inheritance, widows rights
Mifumi v. Attorney General, Constitutional Appeal No. 02 of 2014) [2015] UGSC <sup>127</sup>	2016	Bride price
Bakojja v. Bakojja, Divorce Cause No. 11 of 1998, High Court of Uganda at Kampala, Feb. 25, 2000 <sup>128</sup>	2000	Divorce
Lub v. Lub, Divorce Case No. 47 of 1997, High Court of Uganda at Kampala, Apr. 28, 2000 <sup>129</sup>	2000	Alimony
Owagage v. Mudhma, Civ. Suit No. 990 of 1998, High Court of Uganda at Kampala, Nov. 24, 2000 <sup>130</sup>	2000	Inheritance
CEHURD v. Mulago National Referral Hospital, No. 212 of 2013, HC Kampala <sup>131</sup>	2017	Right to family
Uganda v. Matovu (Sabwe), Criminal Session Case N. 146 OF 2001 [2002] UGHCCRD <sup>132</sup>	2002	Defilement
Uganda v. Musoke, Criminal Session Case No. 94 of 2001, High Court of Uganda at Mukono, June 19, 2001 <sup>133</sup>	2001	Defilement
Uganda v. Hamidu et al., Criminal Session Case of 2002, High Court of Uganda at Masaka, Feb. 9, 2004 <sup>134</sup>	2004	Right to marry
Otikor & Ors v Anya, Civil Appeal No. 38 OF 2012, [2016] UGHCLD <sup>135</sup>	2016	Inheritance

118 <http://www.iawj.org/JEPcases.html>.

119 <http://www.iawj.org/JEPcases.html>.

120 <http://www.iawj.org/JEPcases.html>.

121 <http://www.iawj.org/JEPcases.html>.

122 <http://www.iawj.org/JEPcases.html>.

123 <http://www.iawj.org/JEPcases.html>.

124 <https://ulii.org/node/15823>.

125 <https://www.ulii.org/ug/judgment/supreme-court/2013/5/>.

126 <https://www.ulii.org/ug/judgment/hc-civil-division/2015/122/>.

127 <https://www.ulii.org/ug/judgment/supreme-court/2015/13/>.

128 <http://www.iawj.org/JEPcases.html>.

129 <http://www.iawj.org/JEPcases.html>.

130 <http://www.iawj.org/JEPcases.html>.

131 <http://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/cehurd-v-mulago-national-referral-hospital-212-of-2013>.

132 <https://www.ulii.org/ug/judgment/hc-criminal-division/2002/14/>.

133 <http://www.iawj.org/JEPcases.html>.

134 <http://www.iawj.org/JEPcases.html>.

135 <https://www.ulii.org/ug/judgment/hc-land-division/2016/10/>.

## F.

## Strategies for Change – Good Practices from Around the Region

Judiciaries in the region have made significant progress in relation to gender equity in the past decades, though there remain gaps that require sustained, concerted effort and engagement by all stakeholders. Judicial stakeholders can learn from their neighbors in East Africa and exchange good practices on enhancing gender equality.

### 1. Affirmative-Action – Just the Beginning

Judiciaries in East Africa have been enhancing numeric gender equality over the past two decades through a combination of Constitutional directive, legislative mandate, policy directives and political goodwill. Judicial service commissions in the region are working effectively to bring female candidates into the judiciary - in each country, base numbers of women and men judges are approaching 50/50. However, there remain two key concerns; (1) appointment of women to higher courts and into leadership positions within the judiciary continues to lag, and (2) where appointment of women is discretionary, instead of mandated by law or policy, changes in the political environment can readily lead to backsliding.

Interviewees in both Uganda and Tanzania pointed to Kenya's constitutional affirmative action provision, which requires that no appointed or elective body be composed of more than 2/3 of the same gender, as a regional best practice. The Judicial Service Act in Kenya also specifically requires that the JSC take gender into consideration in its recruitment processes, among other diversity factors.

While the Kenyan affirmative action provision has been the subject of significant controversy, and indeed legal action in Kenya, it nevertheless is recognized to establish a minimum standard for gender equality that is not subject to the vagaries of political goodwill. While establishing quotas is a proven intervention from across the globe in many professional contexts, another established good practice takes minimum quotas a step further. Transparent dissemination of gender equality targets that go above and beyond minimum quotas provides important added incentive for continual improvement in gender equality and also allows for ready monitoring of progress. In the UK for example, the judicial appointments body publishes Equality Objectives on a regular basis to allow for public monitoring of achievements and gaps.<sup>118</sup>

### 2. Continuing Training and Sensitization

The importance of continuous judicial training, including induction and refresher training, was highlighted by all interviewees and is a recognized good practice.

As described above, judiciaries in the three countries under study all include gender sensitivity training in their training programs. The Maputo Protocol and its provisions for example are included in many of the training programs in the region. Organizations such as ICJ Kenya have invested significantly in implementing capacity development strategies in the region towards strengthening the understanding, appreciation and application of regional women's rights frameworks by different actors. These include trainings for judicial officers to effectively apply the provisions of the Maputo Protocol to their judicial decisions, trainings for litigators to understand and invoke regional instruments in their submissions in court as authoritative sources of law and trainings for media practitioners to appreciate the instruments enough to create more media platforms for sensitization of the public on the merits of the instruments. Many of these training programs are facilitated through judicial training institutes, women's judges and magistrates associations including Kenya Women Judges Association (KWJA), Kenya Magistrates and Judges Association (KMJA), East Africa Magistrates and Judges Association (EAMJA), National Association of Women Judges - Uganda (NAWJU) and Tanzania Women Judges Association (TAWJA) and are mostly supported at least in part by international partners, such as UN Women, International Association of Women Judges and other Civil Society organizations such as ICJ Kenya and Equality Now. However, study participants all highlighted the need for additional training in this area. The Kenyan Judiciary's Gender Policy for example recommends that materials produced by the Kenya Women Judges Association be integrated into the Judicial Training Institute's materials.

OECD. (2016). Background report - *Conference on improving women's access to leadership*.



The Tanzanian Women Judges Association (TAWJA) has been particularly effectively engaged in training on gender equality and in fact conducts the induction training sessions for the Tanzanian judicial training institute. IAWJ and TAWJA partnered from 2001-2003 on the Jurisprudence of Equality Program (JEP). The program was focused on judicial training to address issues of discrimination and violence against women by equipping judges and magistrates with knowledge and skills needed in resolving cases arising in the national courts which involve violence against women (VAW) and discrimination. TAWJA also partnered with IAWJ on the Jurisprudence on the Ground project, funded by the United Nations Democracy Fund (UNDEF). This project provided training for judges and magistrates on international conventions and regional charters on violence against women and human rights laws, particularly those relating to marriage, succession, custody, adoption and property rights. From 2009 to 2011, TAWJA and IAWJ partnered again on a training program focused on stopping Abuse of Power for Purposes of Sexual Exploitation. The program brought together judicial officers, non-judicial personnel, investigators, prosecutors, police, prison officers, and other law enforcement personnel to learn about sexual exploitation and extortion and to develop strategies to address it. Specifically, the project included training for sitting judges and magistrates in different regions of the country, seminars for magistrate trainees at the Institute of Judicial Administration, as well as seminars for non-judicial personnel in the Judiciary.

Moreover, TAWJA puts out a regular journal to distribute articles focused on key issues in gender equity, and highlighting important case law on the theme of women's rights<sup>119</sup> and has also created briefing pamphlets for judges on key legal issues related to women's rights, such as inheritance and domestic violence. TAWJA's very active role and its effective integration into the system wide-training program for judicial officers in Tanzania can serve as a strong model for its neighbors in the region.

Judiciaries in East Africa are already following international best practice by ensuring that training related to gender equality is included both in induction curricula and as part of additional continual education trainings offered to judges and magistrates. However, there remains room for improvement to ensure that these trainings are need-based, take place as scheduled and that the entire judiciary is actively engaged. Moreover, there is a need for more male trainers to take part in these processes, to act as gender equality champions. In Uganda for example, Hon. Justice David Batema of the High Court is a well-known male advocate of gender equality who is in consistent demand as a trainer. Increasing the involvement of male trainers helps to undermine the stereotype that gender equality is only a women's issue.

Creation and dissemination of gender bench books also constitute a form of ongoing training for the judiciary. The Commonwealth Judicial Bench book on Violence against Women and Girls in East Africa<sup>120</sup>, launched in Nairobi in 2016, is a key resource in this area. Dissemination of the bench book use of the bench book as a training tool however could be enhanced throughout the region.

The Ugandan Judiciary, in collaboration with UN Women, has developed its own gender bench book which has been disseminated in hard copy and online to judicial officers in Uganda and across the region. The Ugandan bench book covers Basics of Women's Access to Justice, Family Relations, Sexual and Gender-Based Violence, Employment, Property Rights, Sexual and Reproductive Health Rights, and Administration of Justice.<sup>121</sup> Given the expressed preference of judges in East Africa to draw on their own case law, sometimes to the exclusion of international instruments or law from other jurisdictions, the development of country specific bench books is a good practice for ensuring that positive case law on gender-based violence is made directly relevant to judicial stakeholders.

### 3. Clear Policy Guidelines

The adoption and dissemination of a well-considered, stakeholder-driven gender policy is one of the key best practices for the region. It is critical however, that such a gender policy be broadly conceived so as to include, not just access to justice for women and girls as court-users, but also gender equity issues within the institution of the judiciary itself, such as clear policies on sexual harassment. The Ugandan Judiciary has adopted a gender policy, and Kenya has a draft policy under consideration. Tanzania does not have a gender policy in place, but gender is addressed in the judiciary's strategic plan.

The Uganda policy is primarily focused on access to justice, but has several provisions that relate to enhancing gender equity in the judiciary, specifically in its capacity building strategies which include:

- Continue to have a session on Gender and the Law as a key part of induction training.
- Encourage judicial officers to attend the JSI course in Gender and the law. The JSI should also be provided with adequate resources to monitor the extent to which trainees apply the knowledge and skills from the training, including the courses on gender.

<sup>119</sup> E.g., Journal of the Tanzania Women Judges Association (TAWJA) (May, 2015).

<sup>120</sup> Available at <https://books.thecommonwealth.org/judicial-bench-book-violence-against-women-commonwealth-east-africa-paperback>.

<sup>121</sup> The Judiciary of Uganda, The Gender Benchbook – Women's Access to Justice in Uganda (2016), at [http://www.uls.or.ug/site/assets/files/1318/un\\_women\\_-\\_gender\\_bench\\_book\\_2016.pdf](http://www.uls.or.ug/site/assets/files/1318/un_women_-_gender_bench_book_2016.pdf).

- Training in gender awareness, discrimination and sensitivity should also be provided to non-judicial staff because the non-judicial staff are the first point of contact for court users and they should be sensitive about how gender and the context influences the way people behave and communicate
- Develop a bench book with guidance on how to ensure that judgments are gender sensitive. This bench book should have clear guidelines on possible gender issues, and some examples of gender sensitive judgments.
- Hold regular practice dialogues at the District Coordination Committees (DCCs) and where possible at national level during which judicial officers can share their experiences of addressing gender in their work.
- Have a specific mentoring program for new judicial officers, during which the new judicial officers will be mentored and supported by more experienced judicial officers to understand how the context (especially gender) influences their work.
- Where resources allow, have a specific internship/placement for new judicial officers to judges for at least six months, to enable them to learn the practical aspects of their work including how to be gender sensitive during proceedings, as well as when making judicial rulings.<sup>122</sup>

While not all of these policy directives have been achieved, several have been implemented or are in process, and interviewees noted that the existence of the policy, in combination with the national gender policy, has enhanced awareness within the Ugandan judiciary and generated improved conditions for women working within the institution. This is consistent with international best practice which highlights the fact that all steps to enhance gender equality support the deep cultural change that is an ongoing process in countries around the world.<sup>123</sup>

Kenya's draft gender policy for the judiciary addresses internal human resources matters more directly than Uganda's, but it does not include specific details as to how the policy prescriptions should be implemented. It is an important model however for the region, in that it addresses key areas that research globally has identified as critical for enhancing gender equity. A specific sexual harassment policy, whether included as a component of the gender policy, or a standalone policy document also is a best practice that has been highlighted around the world for institutions to promote gender equality.

Interviewees in Kenya also suggested that a key intervention would be policy designed to address the family-related concerns of all judicial officers and staff. A policy to address all employees in their role as members of families would support work-life balance for men and women. For instance, personnel policies within the judiciary now permit women employees to combine maternity leave and annual leave, which employees cited as very helpful. However, there is no comparable policy to assist new fathers.

## 4. Transforming Management of Human Capital

Research from around the globe indicates that there are several key practices that help enhance women's leadership equality in public institutions, specifically (1) strengthening work-life balance, (2) establishing support networks, (3) developing targeted recruitment campaigns, and (4) providing leadership development opportunities.<sup>124</sup>

Enhancing work-life balance is a critical intervention to support women's leadership. Measures such as more flexible work schedules, enhanced use of ICT, and transparent, supportive leave policies are all key interventions. For judiciaries in East Africa, addressing the twin issues of workload and judicial transfers is a top priority to enhance work-life balance for women and men. The proposed Kenya Judiciary Gender Policy addressed transfers with the following language: "Unless they request it, pregnant employees shall not be transferred; Unless they request it, employees shall not be transferred during the period when they are on maternity or paternity leave, or on leave granted to newly adoptive parents; As far as practicable the Judiciary will not transfer employees who are married to other Judiciary employees to different regions."

While this is a very important minimum standard related to transfers, what was clear from stakeholder interviews was the need for transparent, rational guidelines related to all transfers so as to remove the imbalance between those who have the power to impose transfers and those who are to be transferred. Some flexibility certainly is needed in the transfer system to ensure that the needs of the public can be met as circumstances arise, but allowing transfers to be implemented at the complete discretion of managers within the judiciary creates an atmosphere where gender stereotypes and inequities can flourish.

<sup>122</sup> Judiciary Gender Policy and Strategy: Attaining gender equality in access and treatment by the judiciary (The Judiciary of the Republic of Uganda, 2012), p. 28-29.

<sup>123</sup> OECD. (2016). Background report - *Conference on improving women's access to leadership*.

<sup>124</sup> Id.

## Mentorship and Support Programs

Research and interviewees both confirm that establishing support networks for women judicial officers is an important good practice for enhancing leadership. Throughout the East Africa region, the existence of women's judges and magistrates associations, along with international networks established through the International Association of Women Judges, are providing vital supportive networks for women in judiciaries. Not only have these associations been instrumental in providing supportive networks for women, but they have contributed to the training of judges and magistrates throughout the region, as described above. According to the president of the Kenya Women Judges Association, the association undertakes an innovative program of practice interviews to help prepare women magistrates for interviews for higher level judicial positions.<sup>125</sup>

A gap that was identified in all three countries was formalized mentoring programs. Given the immense demands on judges and magistrates' time, the absence of these types of intensive mentoring programs is entirely understandable, but it is worth revisiting the issue to determine whether sufficient support can be found to develop such programs as they have been shown to be of particular importance in the continuous development of women's leadership in public institutions.<sup>126</sup>

Formal mentoring involves the systematic training and advising of junior, often younger colleagues. Formal mentoring programs have several advantages over informal or ad hoc mentoring in that such a program can:

- Benefit from official sanction, allowing judges to set aside work time for mentoring meetings and activities,
- Allow for resource allocation to the program,
- Effectively match mentors and mentees to maximize the value of the relationship to each party and to ensure that individual mentors do not become overwhelmed,
- Involve the dissemination of resources to mentors and mentees that have been tried and tested, and
- Proactively develop the next generation of mentors, to ensure continuity of the program.

## Targeted recruitment campaigns

Targeted recruitment of women did not appear to be a significant concern in the East African context. Women are completing legal training in numbers comparable to – or exceeding that – of men and are readily applying for positions in the judiciary. Transparency in recruitment, however, was a concern. Interviewees often noted that women applicants felt they did not have an understanding of the systems through which they could ensure that their application was given equal consideration. Ensuring that hiring practices are merit-based, that policies for evaluation of applicants are readily available to all, and that a mechanism for inquiries and complaints about hiring processes is readily available to all applicants are good practices that can be integrated throughout the region. Moreover, around the world it has been demonstrated that when judicial officers are selected using recruitment exams, women tend to be represented in higher numbers. In France for example, where examinations are used to select judges, more than 50% of judicial officers are women.<sup>127</sup>

## Leadership development

Global best practice highlights the important role of leadership development on women's equality in public institutions. One strong example of such an opportunity comes from the Virtue Foundation's Pipeline Initiative which seeks to identify obstacles and offer practical solutions to increasing women's participation in judiciaries throughout the world. The Virtue Foundation Institute for Innovation and Philanthropy in Ghana, in collaboration with the Leitner Center and the Office of Court Administration of New York, implemented an intensive training and shadowing program. The Program provided Ghanaian women judges an opportunity to access conduct research in the US and to participate in judicial training sessions with U.S. colleagues. Judges were then supported to establish a specialized family court within the judicial system in Ghana.<sup>128</sup>

<sup>125</sup> Participant, Kenya Judges and Magistrates Roundtable (Oct. 11, 2017; Nairobi).

<sup>126</sup> OECD. (2016). Background report - *Conference on improving women's access to leadership*.

<sup>127</sup> Kalantry, Sital. "Women in Robes." *Americas Quarterly*, 2012.

<sup>128</sup> "National Association of Women Judges Partnership." Virtue Foundation. Accessed July 16, 2017. <https://virtuefoundation.org/project/national-association-of-women-judges-nawj/>.

## 5. Role of Civil Society

Civil society organizations in East Africa have played, and can continue to play, a strong role in supporting gender equality in the region's judiciaries. These organizations are important conduits for bringing cases and legal arguments based on international legal principles to the courts. Moreover, civil society organizations have formed important networks to lobby for the appointment of women in the region's judiciaries.

In addition, these organizations create an important framework of recognition for those judges who are champions for gender equality. Civil society organizations give awards and promote the jurisprudence of individual judges and magistrates who deliver decisions with positive impact on gender equality in the region. These practices can continue to be enhanced through partnerships with international donor partners.

## 6. Role of Donor Partners

Donor partners have played a critical role in providing support for gender equality programming in the region. In particular, development partners have been instrumental in (1) supporting training development and delivery, (2) assisting with development of policy documents, and (3) providing support to civil society organizations to bring gender equity cases before the courts.

Training on the Maputo Protocol and its implementation is a key area where development partners, civil society organizations, and the judiciary can enhance their work together. Interviewees from all sectors identified additional training on the Protocol as a key intervention and highlighted the need for the training to reach broadly through the judiciary (both judicial and non-judicial officers) and across the justice sector as well as into the community.

Development partners can also work closely with partners in the judiciary to enhance opportunities for mentorship and leadership development targeted specifically at women.

## CONCLUSION AND RECOMMENDATIONS

East African judiciaries continue to make substantial progress in relation to gender equity. Significant commitments from government, civil society, and judiciaries themselves have significantly improved the role and status of women in East Africa's judiciaries as compared to previous decades. East African judiciaries can learn much from each other as they continue to enhance gender equity. Kenya has led the way in relation to implementation of Constitutional directives on gender quotas and on integration of international legal principles into judgments. Tanzania has strong requirements for training on gender equity, led by a very active women judges association, and continues to implement innovative training programs across the justice sector. Uganda is the only judiciary to have officially adopted a gender policy and has developed unique programs including a country-specific gender bench book, a strong system of judicial practice roundtables, and a close working relationship with civil society.

Despite this progress, gaps and opportunities for continuing progress remain in relation to policy development and implementation, training, human capital management, and support systems for gender champions within judiciaries. As highlighted by the CEDAW Committee, "The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality...In order, however, to overcome centuries of male domination of the public sphere, women also require the encouragement and support of all sectors of society to achieve full and effective participation, encouragement which must be led by States parties to the Convention..."<sup>129</sup> The following recommendations can help to address some of these gaps and challenges:

<sup>129</sup> CEDAW General Recommendation No. 23: Political and Public Life Adopted at the Sixteenth Session of the Committee on the Elimination of Discrimination against Women, in 1997, UN Doc. A/52/38.

## To all regional judiciaries

- Consider development of a standardized model gender policy for regional judiciaries, incorporating regional and international best practices.
- Develop opportunities for women judges to be formally mentored by experienced judges, both male and female.
- Work with partners to ensure that women judges can participate in targeted leadership development training.
- Work with partners to make training on the Maputo Protocol available to all judicial officers and staff.
- Hold regular practice dialogues during which judicial officers can share their experiences of addressing gender in their work.
- Enhance dissemination of bench books on gender issues, such as the Commonwealth's bench book or country-specific bench books.
- Work with partners to develop and implement training programs using the Commonwealth or other bench books.
- Ensure that hiring procedures and policies for evaluation of applicants are readily available to all.
- Ensure that a mechanism for inquiries and complaints about hiring processes is readily available to all applicants.
- Consider integration of a recruitment exam to select judicial officers, as these have been shown to enhance numerical equality.
- Ensure that women judges associations play a substantive role in training their peers on gender equity.
- Recruit and actively engage male judges to act as trainers on gender equity.
- Create a regional support network of gender equity champions to share challenges and success and provide creative thinking on solutions.
- Consider development of a family policy to enhance work-life balance for all employees.

## To Civil Society

- Collaborate with women judges associations to develop long-term plans for identifying women candidates and lobbying in relation to key judicial appointments.
- Continue to monitor gender equality in regional judiciaries, through a network of like-minded organizations sharing information on a regular basis.
- Continue to present cases and arguments before the judiciary that rely on provisions of the Maputo Protocol.
- Develop or enhance recognition frameworks for judges and magistrates who advance gender equity in their judgments and/or courtroom practice.
- Continue to partner with judiciaries to offer training on gender equity for judges, magistrates and judicial staff.



## To International Development Partners

- Continue to support training for judiciaries and other justice sector stakeholders on gender equity and the Maputo Protocol specifically.
- Facilitate information sharing on content and lessons learned from training in the region, to avoid duplication of efforts and enhance impact.
- Provide support to a regional network of judiciary gender champions to share best practices for addressing ongoing challenges.
- Continue to raise women's role and status within the judiciary as a critical concern during diplomatic engagements and international forums.

## To the Kenyan Judiciary

- Fast-track adoption of the Sexual Harassment Policy and the Gender Policy.
- Enhance effective implementation of the Transfers Policy.
- Require all judges to participate in gender equity training during each calendar year.
- Include gender equity measures as part of the Judiciary's revised staff performance measurement indicators.
- Integrate materials produced by the Kenya Women Judges Association into the Judicial Training Institute's official curriculum.
- Ensure that all judicial officers receive induction training and that such training includes gender equity components.

## To the Tanzanian Judiciary

- Advocate for legislation mandating a quota for women's appointment to judicial positions.
- Enhance judicial officers' and staff understanding of the gender provisions of the Judiciary's strategic plan.
- Develop a specific Gender Policy based on regional and international models.
- Develop a specific sexual harassment policy, including a dedicated institutional mechanism for investigation and resolution of complaints.

## To the Ugandan Judiciary

- Enhance judicial officers and staff understanding of the Judiciary's Gender Policy.
- Review the Gender Policy and consider enhancing the policy's focus on human capital management within the judiciary.
- Develop a specific sexual harassment policy, including a dedicated institutional mechanism for investigation and resolution of complaints.
- Ensure that all judicial officers receive induction training and that such training includes gender equity components.
- Fast track dissemination of the Uganda Gender Bench Book and develop training for judicial officers on this material.

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## APPENDIX A:

### INTERVIEWEE LIST

#### Uganda

1. Judge, High Court of Uganda at Soroti
2. Judge, High Court of Uganda at Kampala
3. Judge, High Court of Uganda at Mbale
4. Law Reporting Officer, Uganda Judiciary
5. Registrar, Uganda Judiciary
6. Representative (1), Uganda Law Society
7. Representative (2), Uganda Law Society
8. Representative (1), Uganda Association of Women Lawyers (FIDA Uganda)
9. Representative (2), Uganda Association of Women Lawyers (FIDA Uganda)
10. Representative (3), Uganda Association of Women Lawyers (FIDA Uganda)
11. Legal Researcher (1), Uganda Judiciary
12. Legal Researcher (2), Uganda Judiciary

#### Tanzania

1. Judge Member (1), Tanzania Women Judges Association
2. Judge Member (2), Tanzania Women Judges Association
3. Judge Member (3), Tanzania Women Judges Association
4. Judge Member (4), Tanzania Women Judges Association
5. Judge Member (5), Tanzania Women Judges Association
6. Magistrate Member, Tanzania Women Judges Association
7. Registrar Member, Tanzania Women Judges Association
8. Representative, Centre for Widows and Children Assistance (CWCA)
9. Representative, Legal and Human Rights Center (LHRC)
10. Representative, Legal Services Facility
11. Representative, Tanzania Network of Legal Aid Providers (TANLAP)
12. Representative, Tanzania Women Lawyers Association

## Kenya

1. Judge, Milimani High Court, Kenya Judiciary
2. Magistrate, Milimani, Kenya Judiciary
3. Judge, Milimani High Court, Kenya Judiciary
4. Registrar, Kibera Station, Kenya Judiciary
5. Representative, Kenya Judges and Magistrates Association
6. Judge, Court of Appeal, Kenya Judiciary
7. Member, ICJ Council
8. Magistrate, Milimani High Court, Kenya Judiciary
9. Representative (2), Kenya Judges and Magistrates Association
10. Magistrate, Nyeri Station, Kenya Judiciary
11. Magistrate, Nyeri Station, Kenya Judiciary
12. Representative, Muranga Station, Judiciary of Kenya
13. Senior Principal Magistrate, Kenya Judiciary
14. Representative, Kenya Judicial Training Institute
15. Legal Researcher, Kenya Judiciary

## APPENDIX B:

### INTERVIEW GUIDE

Interviewer (s):	Unique Identifier:
Name of Informant:	Interview Date:
Informant Title:	Location:
Informant Email:	Tel:
Informant Institution:	
Interviewer comments:	
<div>Interviewee requested to remain anonymous?</div> <div>YES      NO</div>	
Interviewee is:    Male    Female	



## Introduction (to be read by interviewer):

Thank you for agreeing to participate in this research study carried out by the International Commission of Jurists. I am a consultant from ProRights, a firm based in Nairobi, that has been asked by ICJ to assist with this research study. The purpose of this study is to gather information about the current status of women in judiciaries in East Africa, as well as the impact that they are having in relation to advancing gender equality. The outcome of the research will be a published report that will highlight important trends, challenges, and best practices for enhancing the representation of women in judiciaries.

We have some open-ended questions about your experiences and opinions in relation to this issue. If at any time you don't feel comfortable answering a question, please just let us know and we will move on. If you wish to remain anonymous, we are happy to keep your responses confidential and will identify you using only a number in the final report.

We are happy to notify you when the final report is complete and available to the public. Would you like us to notify you via email when the report is ready?                      YES                      NO

Do you have any questions for us before we get started?

Open-ended questions

<p>In general, how is the judiciary addressing issues of gender equality, in service delivery, decision-making, hiring, etc.?</p> <p>Does the Maputo Protocol play a role in guiding these processes?</p>	
<p>What are the key challenges you believe are currently confronting women in the judiciary in your country?</p> <p>Across Africa?</p>	
<p>What is the proportion of women in the judiciary in this country?</p> <p>Does the representation of women differ across different levels or units within the judiciary?</p>	
<p>Are there differences in retention and/or attrition between men and women in the judiciary?</p>	
<p>Have there been recent policy or legal changes that have enhanced or undermined the representation of women in the judiciary?</p>	

<p>Are there key policy or procedural changes that you believe should be implemented to enhance the representation and impact of women in the judiciary?</p> <p>Who are the key actors responsible for carrying out those changes?</p>	
<p>Does the system of legal education encourage women to enter judicial careers?</p> <p>What changes in that system could provide more encouragement?</p>	
<p>Do international actors have a role to play in enhancing representation of women in the judiciary?</p> <p>What role can civil society play in enhancing representation of women in the judiciary?</p>	
<p>What is the level of application or understanding of the Maputo Protocol within the judiciary?</p> <p>Do men and women judges understand it differently?</p>	
<p>Do the women in the judiciary in this country have an impact on judicial practice and/or decision-making? Please describe.</p>	
<p>What would equality of women in the judiciary look like?</p> <p>What steps are needed to achieve that vision of equality?</p>	

That concludes our questions. Do you have any questions for us?

Thank you for participating in this research. Based on our discussion, are you willing to allow us to use your name and title and quote you in the final report? Or would you prefer to remain anonymous, in which case we will refer to you only using a randomly assigned number code?

## Footnotes:

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