

**REPORT ON THE KENYA WOMEN JUDGES ASSOCIATION ROUNDTABLE DIALOGUE ON THE
LEGAL PROTECTION OF REPRODUCTIVE RIGHTS IN KENYA**

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Background

The Kenya Women Judges Association (KWJA), in partnership with the Center for Reproductive Rights and the Kenyan Section of the International Commission of Jurists (ICJ Kenya) held a round table dialogue on the legal protection of reproductive rights in Kenya on the 1st and 2nd of July 2017 at the Whitesands Sarova Hotel in Mombasa, Kenya.

The Judiciary plays an integral role in addressing historical inequalities and discrimination, including those that continue to deny women their ability to participate fully in public and political life, pursue educational and economic opportunities, and exercise their equal citizenship.

All individuals have reproductive rights which are grounded in a constellation of fundamental human rights guarantees. These guarantees are found in the Convention on the Rights of the Child; the International Covenant on Economic, Social and Cultural Rights; the African Charter on Human and Peoples' Rights (African Charter); the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); and the African Charter on the Rights and Welfare of the Child, among others. These guarantees include the right to safe and healthy pregnancies and delivery; the right to comprehensive reproductive health care services provided free of discrimination, coercion and violence; the right to equal access to reproductive health care for women facing social and economic barriers; the right to be free from practices that harm women and girls; the right to a full range of safe and affordable contraception; and the right to safe, accessible and legal abortion, within the confines of the law.

The Constitution of Kenya makes international law part of the country's normative framework by virtue of Article 2 (5) and (6). It also contains an explicit provision on the right to the highest attainable standard of health including reproductive health at Article 43 (1).

Purpose of the meeting

The dialogue sought to enhance knowledge about reproductive rights, including reproductive rights jurisprudence, thus providing the tools for judicial officers to become reproductive rights champions. The training also sought to cultivate greater sensitivity and the ability to socially contextualise issues related to reproductive rights, thus also addressing stigmatisation of some reproductive rights issues.

The expected results of the meeting were:

- a) Appreciation of the Judiciary's role in the protection of reproductive rights in Kenya.
- b) Clarity around the factors that hinder the enjoyment of reproductive health and rights in Kenya and how the law impacts them.
- c) An understanding of how key reproductive rights issues have been considered by regional and international human rights mechanisms.
- d) An understanding of how courts in other jurisdictions have addressed reproductive rights.

The issues covered during the dialogue included:

- Overview of key reproductive rights challenges in Kenya.
- National, regional and International human rights framework on reproductive rights.
- Developments relating to the legal protection of reproductive rights in Africa.
- Comparative jurisprudence on enforcement of reproductive rights in Latin America.

Meeting Participants

The meeting brought together thirty-two [32] female Judicial officers, including the Deputy Chief Justice and Vice President of the Supreme Court, Her Lady ship the Hon. Lady Justice Philomena Mwilu, who officially opened the meeting; three [3] Court of Appeal Judges; seventeen [17] High Court Judges and eleven [11] Magistrates.

Methodology

The roundtable employed a participatory learning methodology that provided ample opportunity for the judges to engage with the issues. Presentations were made by the Center; members of the KWJA; Hon Justice Aida Kemelmajer, former Justice of the Supreme Court of the State of Mendoza in Argentina, who gave a presentation on the reproductive rights landscape in Argentina; and Hon Lady Justice Effie Owuor, a retired Court of Appeal Judge of Kenya who made a presentation on judicial stereotyping.

MEETING PROCEEDINGS

DAY 1

Opening Ceremony

The meeting began with opening remarks from representatives of each of the organising partners, including Teresa Mutua, Programme Officer, Access to Justice Programme of the International Community of Jurists (ICJ) Kenya; Evelyn Opondo, Regional Director, Center for Reproductive Rights; and Hon and Lady Justice Roselyne Nambuye, Judge of Appeal, speaking on behalf of the KWJA.

Ms Mutua began her address by noting with gratitude that the number of women in positions of power in Kenya is growing and communities are starting to see this as a norm. Ms. Mutua greeted participants on behalf of the ICJ Kenya Executive Director, Mr. Sam Muhochi, and the entire ICJ Kenya fraternity.

She gave a brief background to International Commission of Jurists and noted that its mission is to promote human rights, justice and democracy in Kenya and around Africa through the application of legal expertise and international best practices. Noting that the judicial officers' employer, *Wanjiku*, has bestowed upon them the authority to protect and promote rights, she recognized that there is a national, regional and international legal framework that provides for the protection, promotion and enforcement of reproductive rights in Kenya, while on the other hand, there institutional, legal and policy challenges; social, economic, cultural and political obstacles that stand in the way of full realization of reproductive rights. In this regard, it is incumbent upon judicial officers and civil society to bridge the gap between legal frameworks that promote and protect reproductive rights and the reality of women in Kenya, moving "from theory to practice". She noted the privileged position of judicial officers and that to whom much is given, much is expected. She challenged all participants to honestly reflect on how far we have come on judicial enforcement of reproductive rights, borrow best practices from similar jurisdictions, and commit to doing better- for our children and our children's children.

Ms. Opondo began her remarks by outlining the mission of the Center for Reproductive Rights as a global legal NGO dedicated to advancing women's reproductive health, self-determination, and dignity. She highlighted that the Center works to advance reproductive health and rights as fundamental human rights that all governments around the world are legally obligated to protect, respect, and fulfill and has its offices in Africa, Asia, Europe, Latin America, and the United States. In recognizing that human rights discourse and practice has been dominated by attention to certain civil and political rights such as rights to freedom of expression, and political and civic association, and freedom from torture, cruel, inhuman and degrading treatment, she noted that economic, social and cultural rights are much less well known, and only rarely do they

form the subject of concerted political action. She noted that in the Constitution of Kenya and in the international and regional human rights frameworks, the two categories of rights are placed on an equal footing, with an emphasis on their indivisibility, interconnection, and interrelationship. She further noted that even within social and economic rights, reproductive rights are overlooked and highly stigmatized, with human rights defenders and health professionals working on these issues perpetually facing harassment, intimidation and physical violence in many parts of the world.

Hon. Lady Justice Nambuye, JA, who spoke on behalf of the Chairperson of the KWJA, expressed her great pleasure to be addressing the gathering and noted her pride in all of the women who have already espoused the national values enshrined in the Constitution.

She further noted the seriousness of the meeting, indicating that it was intended to enable the participants to engage in meaningful dialogue that would ensure that the litigants that sought justice in the courts accessed and enjoyed their rights. Justice Nambuye also shared her pride at being a woman and emphatically declared that reproductive right is a woman's right, asserting to the participants that they were gathered in Mombasa to stand up and defend the right to access and enjoy reproductive rights.

She recognized that the meeting's agenda was indicative of the fact that violations of reproductive rights occurred globally and were not only peculiar to Kenya. She stressed that these violations occurred despite the existence of international, regional and national legal policies and institutional frameworks aimed at safeguarding against such transgressions and denials.

She further recognized Kenya's fortunate to have a robust constitution and encouraged the participants to be courageous and not to shy away from practicing judicial activism as they grappled with how to best interpret and apply the generous provisions on reproductive rights. She concluded by observing that with the continuous exchange of ideas in such forums, she was confident that the KWJA would become well versed in constitutional construction and interpretation and that we would reach the full enjoyment of reproductive rights.

Hon. Lady Justice Philomena Mbete Mwilu, Deputy Chief Justice and Vice President of the Supreme Court, Kenya officially opened the dialogue. She began her remarks by outlining her career in the judiciary, noting that she joined the judiciary in 2007 and was trained by the KWJA in the Jurisprudence of Equality programme, which enabled her to do her work. She commended the KWJA for its work highlighting the impact of KWJA's training, which ensured her preparedness for her job and also awakened her passion for gender justice. She commended KWJA for its strong partnerships and collaborations, as the organization empowers itself to protect rights pertinent to the organization. The Hon. DCJ and Vice President of the Supreme

Court also recognized the role of the ICJ and its long history in building the capacity of the judiciary.

Turning to the Constitution, the Hon. DCJ and Vice President of the Supreme Court described the 2010 Constitution of Kenya as a game changer in issues of equality, but noted that there is need to go beyond celebrating what is in the Constitution to start implementing it. She invited the participants to deal with the issues of women's rights from a point of knowledge and to ensure that they continued to strive for this knowledge. She also highlighted that knowledge must be accompanied by sensitivity and empathy, and opined that as women judges, they need to look at issues from a lens of positive discrimination and affirmative action.

She further recognized that women's issues are societal issues and the advancement of women resulted in the advancement of communities. In concluding, she thanked the Center and ICJ and noted that this exchange would help female jurists deal better with cases before them and become better jurists. She then officially opened the meeting and wished all the participants fruitful deliberations.

Session One: Overview of Reproductive Rights in Kenya: Issues and Challenges

The presenters for this panel were Hon. Lady Justice Jessie Lesiit and Evelyne Opondo, who gave perspectives from the bar and the bench on the key reproductive rights issues in Kenya. The session was chaired by Hon. Roselyne Wendoh.

Justice Lesiit's presentation evaluated judicial decisions with intent to study the concept and practice of reproductive rights in Kenya, the challenges in attaining the same, and the current and future opportunities within Kenya's legal framework. She further highlighted the role of the court in advancing reproductive rights.

In defining reproductive rights, Justice Lesiit referred to the Black's Law Dictionary, identifying reproductive rights as a person's rights relating to the control of his or her procreative activities. She highlighted that the scope of reproductive health has broadened beyond the traditional notions of maternity care and family planning to encompass a range of other related issues, including harmful traditional practices, abortion and the impact of violence and environmental insults upon the reproductive health and fertility of both men and women.

Justice Lesiit highlighted the relevant legal framework governing reproductive rights in Kenya, before discussing cases under different categories of reproductive rights issues.

In discussing cases brought before the Kenyan courts on contraception and family planning, she highlighted *AAA v Registered Trustees – (Aga Khan University Hospital, Nairobi)* and *ERO -vs- Board of Trustees Family Planning Association of Kenya, Nairobi*, both civil claims against hospitals for failed contraceptive procedures. On abortion, she highlighted the ongoing case of *Republic v. Jackson Namunya Tali*.

On the reproductive rights of children and adolescents, she highlighted that the issues falling within this umbrella include protection of adolescents from sexual abuse, early marriages, and female genital mutilation. On sexual abuse, she highlighted the case of *W.J & another v Astarikoh Henry Amkoah & 9 others*, a petition that raised the issue of the liability of state and state organs in the education sector, where an educator violated the rights of children placed under their care. On early marriages/pregnancy, she highlighted *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others*, where the petitioners were charged with the offence of subjecting a 16-year-old girl to harmful cultural practices by arranging for her early marriage, as well as comparative jurisprudence on early marriage from Zimbabwe and South Africa. On FGM, she recognized that most of the cases have been dealt with as criminal offences and raised the need for such cases to address issues of victim compensation and the psychosocial and psychological trauma caused by the FGM, such as through creative litigation.

On the right to health care, Justice Lesiit identified that the right to health is based on four essential and interrelated elements: Availability, Accessibility (both physical and affordability), Acceptability, and Quality. She emphasized the role of the court in the attainment of the right to

reproductive health, positing that the court is tasked with scrutinizing government action and policy, especially where they fall short of the constitution. However, notwithstanding that the judicial process is essential in the realization of reproductive rights, she cautioned that litigation has been noted to be one of the health service's most pressing concerns. Specifically, obstetric litigation which has resulted in an increase in the practice of defensive medicine and destruction of patient-doctor relationships.

She then evaluated Kenya's jurisprudence on the right to health concerning the availability, accessibility, acceptability and quality of public health-care facilities. She highlighted the Kenyan cases of *Luco Njagi & 21 others v Ministry of Health & 2 others*, *Millicent Awuor Omuya alias Maimuna Awuor and Another v. The Attorney General and Four Others*, *Isaac Ngugi v The Nairobi Hospital & 2 others*, *PAO and Two Others v. Attorney General* and *Mathew Okwanda v Minister of Health and Medical Services & 3 others*.

On sexual orientation and gender identity, Justice Lesiit highlighted the cases of *Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others*, *Eric Gitari v Non-Governmental Organizations Co-ordination Board & 4 others* and *RM v. the Attorney General and Four Others*.

Ms. Opondo's presentation began by defining reproductive rights as the right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and the right to attain the highest standards of sexual and reproductive health. It also includes the right to make decisions on reproduction free from discrimination, coercion, and violence.

She identified examples of key reproductive rights issues, including access to safe and affordable contraception; coercive sterilization of HIV+ women & women with disabilities; sexual violence; access to assisted reproductive technologies; access to accurate, and evidence-based health-related information; virginity testing; safe, legal abortion; and harmful traditional practices.

She then provided examples of human rights violations, such as physical and verbal abuse, neglect, and detention in hospitals when women seek services. She also described infrastructural barriers to quality reproductive health services, such as understaffing and lack of supplies/facilities. She went on to discuss adolescent pregnancy in schools and issues around forced pregnancy testing and expulsion from school. On child marriages, she discussed the regional statistics, as well as the complex drivers and consequences of child marriage. Finally, she highlighted the intersection of violations of sexual and reproductive health rights and HIV and the repercussions of discrimination and coercion in health facilities.

Session Two: Legal Enforcement of Reproductive Rights in Kenya and Regional and International Frameworks

In this session, Hon. Lady Justice Ruth Sitati, Presiding Judge, Kakamega presented on the practical application of the national framework on reproductive rights, while Hon. Christine Njagi, Senior Resident Magistrate from the Chief Magistrate's Court, Milimani Law Court and Secretary of KWJA presented on the regional and international frameworks for the enforcement of reproductive rights.

Hon. Lady Justice Sitati's presentation provided an overview of the legal framework in Kenya by highlighting the Constitutional, legal and policy provisions relevant to reproductive rights.

She highlighted Article 43 of the Constitution on the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care, as well as Article 43 (2), which clarifies that "a person shall not be denied emergency medical treatment." She further highlighted section 26 (2) and (4), which permit abortion when "in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law". She also recognized that the Constitution protects a range of other relevant rights, including:

- Equality and non-discrimination – Article 27
- Family – Article 45
- Human Dignity – Article 28
- Freedom and security of the person – Article 29
- Privacy – Article 31
- Freedom from torture and cruel, inhumane, and degrading treatment or punishment – Article 29

She highlighted the following examples of relevant legal frameworks on sexual and reproductive rights in Kenya: the Penal Code, the Children Act (2001), the Sexual Offences Act (2006), the HIV/AIDS Prevention, Control, and Management Act (2006), the Counter-Trafficking in Persons Act (2010), the Prohibition of Female Genital Mutilation Act (2011) and the Health Act. She highlighted examples of policy frameworks, such as the National Reproductive Health Policy (2007), the withdrawn Standards and Guidelines for reducing morbidity and mortality as a result of unsafe abortion in Kenya (2012-2013), the Presidential Directive on Access to Maternity Services (June 2013) and the Adolescent Sexual and Reproductive Health Policy (2015).

She then discussed jurisprudence from Kenyan courts on select law and policy issues, focusing on sexual violence, maternal health, and contraception.

Regarding sexual violence, she highlighted the case of *C.K. (A Child) through Ripples International as her guardian and Next Friend & 11 Others*, wherein eleven survivors of sexual abuse brought a

case against Kenyan law enforcement for the failure to investigate their complaints and act. In that case, the High Court at Meru found that police violated their rights to equality and freedom from discrimination, human dignity, freedom and security of the person, among other rights. The Court affirmed that the state can be liable for failing to take appropriate actions and that once a report is made, the police have a duty to take the appropriate steps and actions to investigate and apprehend the perpetrators. She also highlighted the significance of *W.J. and Another v. Astarikoh Henry Amkoah and 9 Others* (highlighted by Justice Lesiit in the previous session), wherein a school, the Teacher's Service Commission, and the state were found liable for acts of sexual abuse perpetrated by a teacher against two minor students. In this case, the Court ruled that imposing criminal penalties after the fact does not fully address sexual abuse; instead the burden rests on the state to protect students from harm and prevent such abuse from happening.

On maternal health, Hon. Lady Justice Sitati also referred to *Millicent Awuor Omuya and Another v. The Attorney General and Four Others* and *AAA v. Registered Trustees (Aga Khan University Hospital)* on contraception.

Moving to challenges the Courts face in enforcing reproductive rights, Hon. Lady Justice Sitati highlighted four key points:

- *Constitutional and statutory limitation* – a judge's passion for effectuating human rights is crippled by legal limitations, such as limitation of rights in the constitution other law; lack of clarity on a right; lack of provision for a right (*Baby 'A' (suing through her mother E.A.) and The Cradle, the Children Foundation v. Attorney General, Kenyatta National Hospital and the Registrar of Births and Deaths*, where the courts held that the law did not recognize intersex persons)
- *Separation of powers* – the gender representation case
- *Juris limitation vs. mental independence of the courts* – political body language can have an impact on the mind of the court, especially in economic, social and cultural rights cases; and
- *Judicial restraint as opposed to judicial activism* – extremes of which indicate the need for balance – *Mumo Matemu* case.

Hon. Christine Njagi began by reemphasizing that sexual and reproductive rights are grounded in human rights guarantees that are protected in international and regional human rights treaties, national laws, and constitutions. These human rights guarantees include the rights to life and health; education and information; equality and non-discrimination; decide the number and spacing of children; privacy and dignity; freedom from torture or other cruel, inhuman, and degrading treatment; freedom from sexual and gender based violence; practices that harm women and girls; and an effective remedy.

She outlined that in international human rights law, the state has obligations to respect rights (meaning to refrain from interfering with the enjoyment of human rights), protect individuals and groups against human rights abuses, and fulfill rights (meaning to take positive action to facilitate the enjoyment of basic human rights).

Hon. Njagi then went on to define the four essential elements to the right to health, as follows:

- *Accessibility*: The state must ensure that access to health services includes access to information, is nondiscriminatory, and physically and economically accessible.
- *Availability*: The state must ensure that there are an adequate number of functioning health care facilities, services, goods, and programs to serve the population.
- *Acceptability*: Health facilities, services, and goods must be designed to respect medical ethics, as well as the culture and needs of individuals.
- *Quality*: Reproductive healthcare must be scientifically and medically appropriate

Hon. Njagi recognized that General Comments provide authoritative interpretative guidance to states in their implementation of human rights. In particular, she highlighted General Comment 22 to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the Right to Sexual and Reproductive Health, which calls on states to ensure all educational institutions provide comprehensive sexuality education; recognizes misinformation and restrictions on individuals' right to access sexual and reproductive health information as a human rights violation, and recognizes that the right to sexual and reproductive health must be justiciable at the national level.

She also emphasized CRC General Comments on the right to health and adolescents. CRC calls on states to ensure that adolescents have access to short-and long-term contraceptive methods, maternal health services, safe abortion, and post-abortion care and consider introducing a legal presumption that adolescents are competent to seek sexual and reproductive health services.

She then outlined that through the ratification of Optional Protocols, UN Treaty Monitoring Bodies have established procedures for adjudicating individual complaints alleging violations of the respective treaty and that there have been several UN treaty body decisions on reproductive rights. She explained that although Kenya has not yet ratified any Optional Protocols, the decisions issued in these cases still provide authoritative interpretations of states' obligations under these treaties.

She then went on to discuss two examples of individual complaints brought before and decided by UN Treaty Monitoring Bodies. In *Alyne v. Brazil*, wherein an Afro-Brazilian woman was denied emergency obstetric care after being turned away from her local health care clinic, leading to her death from pregnancy-related complications, the CEDAW Committee found that her rights to health, nondiscrimination, and an appropriate remedy were violated and affirmed that the state is responsible for ensuring private health clinics do not violate human rights.

In the case of *AS v. Hungary* a Hungarian woman of Roma origin was coercively sterilized in a state hospital, and the CEDAW Committee called on the state to ensure informed consent aligns with international human rights and medical standards. The Committee Against Torture has further indicated that coerced sterilization is a form of cruel and inhuman treatment.

Moving to regional mechanisms, Hon. Njagi, stated that the African Charter's uniqueness in providing for the 3 generations of rights: civil and political; economic, social and cultural; and group rights. She indicated that it provides for the right to health, and is reinforced by the Protocol to the African Charter on the Rights of Women in Africa (also known as the Maputo Protocol/the Women's Rights Protocol). The Maputo Protocol prohibits harmful practices, such as female genital mutilation and child marriage, and is also the only human rights treaty that explicitly articulates the right to abortion in cases of sexual assault, rape, incest, and where pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. Hon. Njagi, however, reminded the group of Kenya's reservation to this provision.

In conclusion, Hon. Njagi discussed the African Commission on Human and People's Rights General Comments, highlighting General Comment number 2, which deals with issues of contraception, abortion and comprehensive sexuality education, as well as General Comment 4 on *the right to redress for torture and cruel inhumane and degrading treatment (CIDT)*, which requires states to note "the gendered nature of torture and other ill-treatment, including the particular effects of sexual and gender based violence".

During the plenary discussions following the presentations in the morning, several participants raised issues related to the intersection between poverty and violations of reproductive rights, questioning how these concerns could best be addressed. For example, the issue of payment of young girls in cases of sexual violence was highlighted. A suggestion was given that where possible courts should also address issues of poverty and empowerment, especially of young girls, even when handling criminal cases.

In addition, the challenges brought up by the cultural, religious and other practices were raised as issues of deep concern examples cited being in the context of female genital mutilation (FGM) and child marriages. It was also suggested the KWJA could adopt FGM and child marriage issues as sensitization issues.

On FGM, one judicial officer noted that there is a need for legal intervention to go beyond just criminalization of FGM, but also address issues of impact on the victim, including physical and psychosocial impact as well as redress for victims. She challenged both judicial officers and civil society on the issue of addressing the needs of women as discussed in the sexual violence case relating to the Teacher Service Commission.

Participants also sought clarification on issues related to sexual orientation and gender identity and Justice Aida highlighted comparative discussions on this issue in the Latin America and the

Caribbean. It was highlighted that judicial officers need to understand transgender and intersex issues to ensure justice.

Assisted reproduction was highlighted as a new and confusing area of reproductive rights which judicial officers noted limited knowledge around and requested further interventions around.

A participant highlighted the importance of reporting on cases for increased access to justice, commenting that even they as judicial officers had not been previously aware of some of the cases highlighted by the presentation. This then led to a suggestion that a compendium on reproductive rights cases in Kenya would be a useful tool for judicial officers.

The question of horizontal application of human rights and dealing with the private sector was raised particularly as it related to quality of care, access to services and detention in health facilities.

Session Three: Enforcement of Reproductive Rights: Comparative Jurisprudence

After the lunch break Hon. Justice Aida Kemelmajer, former Justice of the Supreme Court of the State of Mendoza, in Argentina, shared some experiences on enforcement of reproductive rights in Argentina.

Hon. Justice Kemelmajer began her presentation by tracing how far the woman's rights movement has come in the struggle for equality, recognizing the amount of fundamental rights which historically were recognized to men and denied to women, such as the right to vote, to be witness in a public document, to work, and to own property. She reminded the audience that these inequalities between men and women were previously argued to be based "*on the natural order of things*".

She noted that women's rights are now recognized and guaranteed in many international human rights instruments, highlighting the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol.

She also specifically noted the Universal Declaration on Bioethics and Human Rights, which in article 12 provides for respect for cultural diversity and pluralism. She noted the importance of cultural diversity and pluralism, while emphasizing that the Declaration also notes that such considerations are however, not to be invoked to infringe upon human dignity, human rights and fundamental freedoms, nor upon the principles set out in the Declaration, or to limit their scope. She also highlighted that many of the international and regional Conventions relating to the rights of women declare that these rights are inalienable, interdependent and indivisible. She further noted that equality in domestic laws and international documents is not enough if

discriminatory practices are still found in society. This factual inequality between the sexes is a consequence of a stereotyped role allocated to men and women derived from a complex interplay of rules and a great variety of religious, legal, political, social, economic, historical and cultural structures.

She cited jurisprudence the Inter-American Court of Human Rights, which in 1984 in an Advisory Opinion declared that “the notion of equality is linked to the essential dignity of the individual. That principle is irreconcilable with the notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified”. She also highlighted that the Supreme Court of Justice of Argentina recognizes that “the relations of power between men and women have been historically unequal. While major changes occurred in the last generations, women remain, in multiple contexts, a disadvantaged group against men.” She noted that one of these multiple contexts concerns reproductive and sexual rights, emphasizing that in this field, the issue is not whether men and women should have equal rights, as the debate focuses on whether women have, in addition, “specific rights, rights that should be attributed by the fact of being a woman”, especially, because, until now, only persons with female organs may be pregnant.

In contextualizing her presentation, Hon. Justice Kemelmajer reminded that Kenyan Courts have quoted both the European Court of Human Rights and the Inter-American Court of Human Rights as persuasive authority in previous cases such as *C.K. (A Child) through Ripples International as her guardian and Next Friend & 11 Others*, the High Court at Meru decision that has been cited by Hon. Lady Justice Sitati in her presentation.

She emphasized that sexual and reproductive rights imply, among other things, State obligations to protect children and adolescents from sexual abuse. They also imply obligations to provide education, information, and services to enable young people to realize sexual and reproductive health.

Moving to the comparative jurisprudence, Hon. Justice Kemelmajer identified three cases from Argentina¹, Paraguay² and Nicaragua³ where the Inter-American Court and Commission

¹AR/JUR/18808/2013. The Court required the State of El Salvador to ensure that physicians treating a woman who suffered nasciturus anencephalic, a disease qualified as a severe maternal risk, adopt medical measures that are considered appropriate and suitable to ensure adequate protection of the rights enshrined in the arts. 4 and 5 of the American Charter on Human Rights and thus, avoid damage that could be irreparable to the woman's rights to life and personal integrity and health.

² n° 178/15, 8/6/2015 involved a 10-year-old girl who was pregnant.

³The Nicaragua case was an agreement between President Ortega and the Catholic Church. On February 26, 2010, the Interamerican Commission on Human Rights adopted urgent precautionary measures on behalf of Amalia, a 27-year-old Nicaraguan woman with metastatic cancer who was being denied treatment because she was pregnant. In its ruling, the IACHR called on the government of Nicaragua to ensure that Amalia has access to appropriate medical treatment for her condition, and undertake this treatment in consultation with Amalia and her designated representatives.

respectively, adopted urgent precautionary measures on behalf two women to receive emergency treatment related to reproductive health services.

On access to abortion, she discussed a 2016 decision from Brazil, where there was a *habeas corpus* in favor of persons working in a health center in a case where the abortion performed with the consent of the woman. It was alleged that the decision of preventive prison was not motivated. In his decision, Judge Marco Aurélio Barroso held that decision was not valid as the legal rule that banned abortion in the three first month of pregnancy was against the Constitution. Borrowing extensively from the reasoning in a 2006 Colombian decision⁴, he reasoned that the rule:

- *Penalizes the personal autonomy of the woman.* He noted that a woman is not a simple instrument of reproduction of human species; so it is not possible to impose on her, against her freedom, to be just a tool to procreation. He went on to highlight that individual rights must be protected, even against "collective goals" which the State can formulate, if this goal implies that the person becomes one simple instrument of another concluding in short that "if the woman wants to be this instrument for a new life, she can be; but if she does not want it, a decent treatment involves guaranteeing the right to terminate that pregnancy.
- *Penalizes the woman physical and mental integrity* yet the right to health as a personal value of constitutional significance is a limit to the legislator as it excludes criminal measures that undermine the health of the people, even if it is to preserve the public interest or the interests of third parties.
- *Penalizes the sexual and reproductive rights of the woman* and because the burden of pregnancy is only on women, their will and their rights should be protected with greater intensity. The State should protect women who want to have a child and women who do not want it; in both cases, the State must take care of their health.
- *Impacts disproportionately on poor women* as criminalization does not affect women having economic possibilities but only poor women who do not have access to private health facilities and; in the situation of special vulnerability, they are forced to take the risk of injuries, mutilation and even death thus penalizing poverty and not the termination of pregnancy.
- *Ignores the special situation of vulnerable adolescents;* by highlighting that the assertion according to which the foetus is a child and the International Convention on the rights of the child protects his/her interests so that potential life may never be affected denies the conflict involving the pregnancy of a minor, usually result of intrafamilial rape.

⁴ C-355/2006 Colombian Court.

In providing some broader context on Argentina, Hon. Justice Kemelmajer outlined that Argentina is progressive in Latin America, particularly in the protection of the human rights of minorities. It allows for same sex marriage; has the most liberal law protecting transsexual people; has practically no incidence of child marriages or female genital mutilation; low maternal death rates and fairly good quality free services in public hospitals.

However, she noted that sexual and reproductive health rights remain one of the weakest areas of human rights in Argentina. She highlighted that Argentina retains a restrictive abortion law and highlighted one court case on Article 86 Criminal Code.⁵ In that case a 14-year-old adolescent was pregnant by a member of her family and he judge authorized the abortion but the Public Ministry appealed to the Supreme Court on behalf of the unborn child.⁶ The case is important because the Court decided the case, the case was technically moot as the abortion had already been performed. However, the Court decided it was important to issue the decision considering that the rights of all women were involved.

In the decision, the Court recognized that all women, not only those with intellectual disabilities, have the right to abortion in the context of rape and highlighted that the local health system must provide the necessary medical assistance to a woman saying that she has been raped, and that it is not necessary to go first to the police or the judicial power. Local health systems were invited to issue health protocols to this effect but unfortunately, most of the provinces have not done so.

Hon. Justice Kemelmajer as noted that sexual violence and sexual exploitation are a significant problem in Argentina and that some groups of native people continue harmful traditional practices, including one where a father initiates his daughter into the sexual life.

In conclusion, she noted that poor quality reproductive health care, especially for women, is not an inevitability of nature but rather a result of socio-economic choices governments have made, emphasizing that the greatest impact of these choices is felt by poor women. Finally, she noted that while Court have a role to play, in a democracy, the task of ensuring human rights protections cannot be left to the courts alone and civil society has a crucial role to play.

During the plenary discussions, one participant asked Hon. Justice Kemelmajer if in her opinion, the gender composition of the bench affected decisions in Latin America. The response was that this has differed training and sensitization of the bench and has resulted in more progressive jurisprudence not just gender.

⁵ The section provides that abortion performed by a physician with the consent of the pregnant woman is not punishable: if it has been done in order to avoid a risk to the life or health of the mother and if this danger cannot be avoided by other means or if the pregnancy is the result of a rape or an attack committed on a “female idiot or insane”. In this case, the consent of her legal representative shall be required for the abortion.

⁶ Supreme Court of the Nation, F.A.L. 13/3/2012

Responding to a question on abortion and balancing the right to life with the right to abortion services, Hon. Justice Kemelmajer outlined the proportionality case that has been applied in many countries in Latin America including Spain.

Responding to a question on why Argentina is progressive on minority rights, Hon. Justice Kemelmajer emphasized the importance of judicial sensitization, highlighting that even with good laws, hearts and minds of judicial officers need to be addressed. She opined that this is partly why there has been progress on sexual orientation and gender identity, as it may have been easier to shift mindsets on issues, as opposed to deeply entrenched positions around women's autonomy.

Finally, a discussion on the role of the law in transforming communities also ensued. Hon. Justice Kemelmajer noted that even though civic engagement is important and the law alone cannot transform societal attitudes, including traditions and customs, sometimes the law has a pedagogical function, which has the impact of shifting societal norms. She opined that this has partly been the case with sexual minority and gender identity issues in Argentina, where despite the context being conservative, the law has ensured non-discrimination and is slowly resulting in a better understanding of the issues as they are no longer as taboo to discuss. She noted that the law has had similar impact in other contexts, particularly on harmful cultural practices.

Session Four: Case studies

The day ended with judicial officers working through case studies on reproductive rights. The purpose of the session was to allow the judicial officers an opportunity to apply the concepts that had been shared during the earlier sessions as well as share their own experiences and challenges they have been presented with in informal roundtables.

The participants were divided into four groups of 8 each, with two groups dealing with a case study on teenage pregnancy, while the other dealt with a case study on access to legal abortion services. (See case studies in appendix one to this report).

During the discussions, the judicial officers could identify not only the sexual reproductive rights issues but also the complexities of the law and contend with the need to balance the rights of different groups. The case study on pregnancy in schools resulted in some dissenting thoughts as some participants felt that protection of pregnant girls should not interfere with learning.

On remedies, all groups appropriately considered remedies that covered the individual but also tried to address the systemic concerns through orders directing the amendment of policy to comply with constitutional standards.

DAY 2

Session Five: The Legal Enforcement of Reproductive Rights in Africa

The morning began with a presentation outlining African jurisprudence on the enforcement of reproductive rights by Ms. Lucy Minayo, Capacity Building Manager at the Center for Reproductive Rights.

Ms. Minayo highlighted African cases under the headings of maternal health, child marriage, forced sterilization, female genital mutilation, adolescent consensual sex and abortion access.

She began by outlining the Ugandan case of *Center for Health, Human Rights and Development and 4 Others v. Nakaseke District Local Administration*, which was about a woman who was taken to hospital after onset of labour. During labour, she was diagnosed with obstructed labour necessitating intervention of a trained medical personnel. The only trained officer was a doctor who was on duty but was absent at the time of her admission and the woman was kept waiting for 8 hours during which time she developed complications and died. The plaintiffs in the case were the deceased's spouse and 3 daughters and a health rights NGO. The court found that the surviving children were denied their mother's care and companionship which was an infringement of their rights, and thus the constitutional rights of the deceased as well as those of the surviving children and spouse had been violated. The local authority was found to be vicariously liable for the death of the woman and her baby and general damages amounting to USD 10,000 were awarded.

On child marriage Ms. Minayo outlined the Tanzanian case of *Rebecca Z. Gyumi v. AG* which challenged provisions of the Tanzanian Marriage Act which prescribed different ages of marriage 14/ 15 and 18 for girls and boys respectively. Parental consent was required in the case of girls below 18. The petitioner claimed that the Act's provisions were unconstitutional and that the requirement of parental consent contravened the right to equality, expression and information. The court found that section 13 and 17 of the Marriage Act were unconstitutional and set the minimum age of marriage at 18. The Attorney General was directed to regularize the anomaly in section 13 and 17 within a year of the judgement. The Tanzanian High Court applied Article 6 of the Maputo Protocol, which states that marriages are to be contracted with free will and full consent of parties and directs States to set the minimum age of marriage at 18 years, as well as referred extensively to comparative jurisprudence from Zimbabwe on a similar matter.

On forced sterilization, she highlighted the case of *LM & Others v. Government of the Republic of Namibia*, a case about three women living with HIV who were sterilized without their informed consent in public hospitals in Namibia. The women claimed that the act violated their rights to life, liberty, human dignity, equality and non-discrimination, and family. In distinguishing between written consent and informed consent, the court found though the patients appeared to have signed consent, it was not informed.

Moving to FGM, Ms Minayo discussed the Ugandan case of *Law and Advocacy for Women in Uganda v. The Attorney General*. The petition challenged the custom and practice of FGM by several tribes in Uganda as being inconsistent with the constitution and sought court orders declaring FGM unconstitutional for violating rights to life, dignity and protection from inhuman treatment, privacy and rights of women. The court found in the petitioners' favour.

On 'consensual' sex between minors, she highlighted the South African case of *Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another*. The case filed in the High Court and confirmed by the Constitutional Court, challenged the constitutionality of Criminal Law (Sexual Offences and Related Matters) Amendment Act, which criminalized consensual sexual activities between children of certain ages. The Court found the provisions complained of to be unconstitutional as they infringed on the best interest's principle by subjecting adolescents to harm and risk, for instance by driving adolescent behavior underground and undermining the guidance they need from adults and care givers. The Court opined that there were less restrictive means to achieve the intended purpose than criminalizing wide-ranging behavior, including behavior that would be regarded as normal. The Minister of Justice and Constitutional Development were ordered to expunge from the National Register for Sex Offenders details of a child below the age of 16 convicted under the invalidated provisions and of a child who was issued a diversion order following a charge under the invalidated provisions.

In closing Ms. Minayo, addressed jurisprudence on access to health services in the context of sexual violence. She highlighted the case of *Mildred Mapingure vs. Minister of Home Affairs and 2 others*, which related to a woman who was raped in her home. She immediately reported the matter to the police and requested to be taken to a medical practitioner to access medication to prevent pregnancy and STIs. At the hospital, the medical doctor indicated he could only provide emergency contraception in the presence of a police officer. The police officer accompanied her to hospital after the 72 hours recommended for provision of emergency contraceptives, by which time the medical practitioner indicated he could not treat her. The woman was eventually confirmed pregnant and sought an abortion. The prosecutions office erroneously advised her that she would require a pregnancy termination order, which the courts could not provide until the trial on the sexual assault was complete. She obtained the order when she was about 5 months pregnant, at which stage the matron assigned to perform the termination felt it was no longer safe to carry out the procedure and declined to do so. The High Court found in favor of the State, while in the Supreme Court, the appeal was allowed partially. The court found that there was negligence on the part of the doctor and the police for failure to ensure that the pregnancy was prevented, also finding that the woman suffered actionable harm which could entitle her to damages. The Minister of Health and Minister of Home Affairs were found vicariously liable for the omissions of the doctor and police, respectively. Despite conceding that the law on termination lacked clarity, the Court did not find state liability on the failure to terminate the pregnancy.

During the plenary discussion, the issues of adolescent sexual conduct were the subject of debate. The stickiest point was around the implication of acknowledging 'consensual' sex. Judicial officers argued that minors cannot consent to sex and therefore the only issue was enforcement of the Children's Act to ensure that minors in conflict with the law are dealt with appropriately. Some of the participants argued that the diversion system was adequate to address the issues, others felt that the Sexual Offences Act needed to be clear that it did not intend to criminalize 'normal' behavior between 'consenting' minors. There was debate on whether it was the role of the judiciary to intervene in this issue or the role of parliament. Some participants felt the appropriate response was to simply do away with the minimum sentencing requirements for the offence.

Recent cases brought before the courts such as *G.O. v Republic*, where the High Court in Siaya overturned the conviction of a minor who had been sentenced to serve 15 years in prison after being found guilty of defiling a 17-year-old girl were discussed. The court held the conviction to be illegal and contrary to the Children Act, the Constitution and the Sexual Offences Act. The court found further that the act of charging and convicting the male child amounted to discrimination, suggesting that both minors should have been charged and holding that "indeed the complainant was senior to the appellant and the blame should not have been wholly shifted to the appellant but should have been apportioned against both the complainant and the appellant, and both being minors, they need protection against harmful sexual activities and none should have been sent to prison."

One participant insisted that more judicial officers needed to support this judgement even if in obiter, arguing that if judges continuously raised the issue, in similar cases, it would raise the profile of the problem and potentially force parliament to act.

In another matter in which a minor convicted on a charge of defilement challenged the provisions in the Sexual Offences Act that criminalized consensual sex between adolescents, the court disagreed with the petitioner's claims on discrimination. Specifically, the petitioner had asserted that the decision to charge him alone was discriminatory. On the question of whether the act complained of was consensual, the Court asserted that the question of consent could not arise as minors had no legal capacity to grant such consent to sexual intercourse. The petition was dismissed.

It was clear from the conversations that judicial officers needed further platforms to discuss issues related to adolescent sexual and reproductive rights as well as to understand international standards. Some of the judges also highlighted the importance of judicial exchanges. A few of the participants had interacted with judges from South Africa and had an appreciation of the South African case *Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another* case.

The plenary also discussed the issues around limitations of vicarious liability of the State for acts by their employees. This discussion picked up on the conversation from the previous day on the *W.J & another v Astarikoh Henry Amkoah & 9 others*, where the court found the Teacher Services Commission liable for the actions of an educator who violated the rights of children on the school property. This case is currently under appeal, and while in the Zimbabwean case of *Mildred Mapingure vs. Minister of Home Affairs and 2 others* the vicarious liability was clear, in the TSC case, the question at hand is the interpretation of 'during the scope of employment,' as the TSC partly argues that an educator whose business is teaching is on a frolic of his own if he sexually molests students.

The participants also raised questions around quantification of damages in the *Uganda Center for Health, Human Rights and Development and 4 Others v. Nakaseke District Local Administration* case and the *W.J & another v Astarikoh Henry Amkoah & 9 others* cases.

Session Six: Gender Stereotyping and Access to Justice

The final presentation for the dialogue on judicial stereotyping and its impact on access to justice for women was presented by Hon. Lady Justice Effie Owuor, J.A. (C.A. Rtd).

Her presentation began by defining judicial stereotyping and reminding us about how women and men are expected to behave is socially developed and not determined biologically. She defined gender stereotyping as the social and cultural construction of men and women, due to their different physical, biological, sexual, and social functions. Which results in restrictive generalizations instead ignoring individual's needs, abilities, and circumstances.

She then went on to define different stereotypes including sex stereotypes, sexual stereotypes, sex role stereotypes and compounded stereotypes.

She defined sex stereotypes as the generalized view concerning physical, biological attributes or characteristics possessed by men and women. For example, that men are physically stronger than women and women are weak, vulnerable and fragile in need of protection. She referred to the example of the case of *Tanja Kreil v. Federal Republic of Germany*, where the European Court of Justice required Germany to allow a woman electrician to work in weapon electronics, holding that the law did not allow women to be excluded from certain types of employment. The essence of the finding is that it is wrong to stereotype that women, as opposed to men, are vulnerable, and therefore require laws to protect them against physical dangers.

Moving to sexual stereotypes, she described these as endowing men and women with specific sexual characteristics prescribing reasons for acceptable sexual partnerships and types of sexual behavior. For example, women's sexuality is reserved for procreation, relationships, marriage or family, while men are sexually stronger than women. Hon. Lady Justice Owuor referred to the case of *Law & Advocacy for Women in Uganda v. Attorney General*, which argued that s154 of

the Penal Code Act was discriminatory against women violating constitutional provisions on the right to equality and the right to dignity and protection from inhuman treatment. Under s154 of the Penal Code Act, married men having sex with unmarried women were not considered to have committed adultery, whereas married women committed adultery if they have sex with unmarried men. The Attorney General argued that s 154 did not discriminate on the ground of sex. This was because the different treatment between men and women under the section was justifiable under Article 43[8] of the Constitution to foster the sanctity of marriage. The Attorney General also argued that striking out s154 would encourage immorality and promiscuity, which were contrary to public policy and the spirit of the Constitution. The court held that the provisions were unconstitutional.

She also referred to cases on marital rape which held that husbands could not rape their wife's but highlighted that under most jurisdictions, marital rape is now a crime. She however, highlighted decisions in South Africa (such as *S v. Moipolai [2004]* and *S v Modise [2007]*) where even though the law is clear on marital rape, prior to sentencing guidelines judicial officers tended to resort to stereotypes which resulted in lower sentences in cases of marital rape.

Moving to sex role stereotypes, she described these as a normative or statistical view regarding appropriate roles or behavior for men and women, for example, women should be mothers, housewives and caregivers, while men are primary breadwinners for the family.

She then went on to describe the stereotype that women's natural role in society is primarily as a mother and caregiver and how this prescriptive stereotypes ascribes motherhood as an essential attribute of being a woman by using examples of two cases.

In *Mellet v. Ireland*, the UN Human Rights Committee discussed that the stereotype holds that "women should continue their pregnancies regardless of the circumstances, their needs and wishes, because their primary role is to be mothers and self-sacrificing caregivers." The case relates a challenge to Ireland's abortion laws, which are among the most restrictive in the world. Abortion is permitted only when there is a risk to the life of a pregnant woman. In every other circumstance abortion is a serious crime. In 2011, Amanda Mellet learned during the course of her pregnancy that the foetus had a fatal foetal impairment. She knew she could not continue with the pregnancy and asked her doctors for an abortion. However, because Ireland outlaws' abortion in almost all circumstances, she was forced to travel to the United Kingdom to end the pregnancy.

In *L.C. v. Peru*, the CEDAW Committee said that this stereotype, "understands the exercise of a woman's reproductive capacity as a duty rather than a right." The Committee noted that this stereotype suggests that the protection of a foetus is paramount to a woman's and girl's personal interests and needs, and relegates her to a reproductive instrument. Furthermore, it leads to the subordination of women and girls since they are seen only as reproductive instruments and not as full human beings and members of society. L.C. was sexually abused by a

34-year-old man. At the age of 13, she became pregnant and attempted suicide by jumping from atop a building. The trauma from the jump required surgery to reduce the risk of L.C. losing all use of her limbs. However, her doctors refused to perform the surgery when they found out she was pregnant. L.C. requested a therapeutic abortion, given the fact that the pregnancy was preventing her from getting the operation, and risking her life and recovery, but the request was denied by the hospital authorities. She attempted to appeal this decision but was denied. She later miscarried, and could have the surgery, but with a delay of several months later. She was left paralyzed from the neck down. The mother of L.C. submitted a complaint on her behalf to the CEDAW Committee alleging that the doctors' refusal to perform the therapeutic abortion requested by the girl constitute a violation of L.C.'s right to health, dignity and freedom from discrimination under CEDAW. The Committee said that the State failed to show any other reason for which L.C.'s surgery was cancelled, therefore, it considered it be a direct consequence of the hospital discovering her pregnancy. The Committee found that part of the reasoning behind the decision to deny L.C.'s right to a therapeutic abortion put more emphasis on the health of the foetus and not on L.C.'s own health, which was clearly risking total paralysis, alongside increasing mental health issues, the longer she waited for the operation on her spine and the abortion. Therefore, the Committee concluded that, due to her condition as a pregnant woman, L.C. did not have access to an effective and accessible procedure to exercise her right to healthcare, which includes both access to the spinal surgery and to the therapeutic abortion.

In showing how these stereotypes apply to men as well Hon. Lady Justice Owuor referred to the case of *President of the Republic of South Africa v. Hugo*. In that case President Mandela remitted the sentences of mothers with children below 12 years. Mr. John Hugo, a sole care giver of his son, would have qualified for remission of his sentence had he been a mother. Hugo complained of discrimination. The court observed that "through reliance upon stereotypes regarding child care responsibilities, society has denied fathers the opportunity to participate in child rearing, which is detrimental to both the fathers and their children".

On the role of women as wives more broadly, Hon. Lady Justice Owuor highlighted the Kenyan case of *David Munga Maina v Republic* in which the Appellant was charged with murder of wife. His defense was one of intoxication and provocation, specifically that his wife returned home drunk and upon being asked how she could take care of children in such a state responded tauntingly to the appellant that it was not the duty of women to educate children. Trial judge rejected both defenses but Court of Appeal on provocation held *inter alia* that the learned judge had not considered the response of the deceased to the Appellants question with the background of the rural folk still intent on maintaining men's supremacy over their wives and if she had done so would have perhaps arrived at a different conclusion.

Moving to the impact of stereotypes in sexual offences. Hon. Lady Justice Owuor, highlighted the CEDAW Committee case of *Karen Tayag Vertido v. The Philippines*, where the Committee stated that stereotyping affects women's right to a fair and just trial and that the Judiciary must take caution not to create inflexible standards of what women or girls should be or what they should

have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.

Hon. Lady Justice Owuor then highlighted the Kenyan case of *Martin Charo vs. R*. In that case the Appellant a 23-year-old was convicted on a charge of defilement and sentenced to twenty years in prison. The complainant was 14 years. In reaching a decision to uphold the appeal, the presiding officer concluded that she was a ‘mature lady’ because she was experiencing her menstrual periods.” He also went on to state that “where the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, the court ought to treat such a child as a grown-up who knows what she is doing.... It would be unfair to have the appellant serve 20 years behind bars yet PW1 was after sex from him”. He argued that the circumstances of the case did not paint a picture of someone who was defiled because the complainant did not report the defilement immediately after the incident and she was not threatened after the incident.

Moving to compounded stereotypes, Hon. Lady Justice Owuor described these as stereotypes concerned with traits of women such as age, race, ethnicity, ability or disability, sexual orientation, social class or group status, nationality or immigrant status. Compounded stereotypes of subgroups of women often contain certain ideological messages about that subgroup's proper role in society, for example lesbians cannot be good mothers. See the European Court of Human Rights case of *E.B v France*.

In conclusion Hon. Lady Justice Owuor, gave recommendations on the role that judicial officers can play. These included naming stereotypes to raise the consciousness of the socially pervasive and persistent gender stereotypes and recognizing that the law has power and authority and can publicly proclaim and transform an unacknowledged harmful experience into one recognised at law as harmful and one requiring redress.

During the plenary discussion, judicial officers acknowledged their own stereotypes particularly around issues of sexual orientation and gender identity. Judicial officers also noted that education was a powerful way of addressing stereotypes, highlighting that platform like the dialogue and others often resulted in them confronting themselves. One of the participants acknowledged prejudices as a form of social control and suggested that the starting point should be to look at everyone as a human being and then look at their needs. The issue of the need for further engagement on sexual orientation came up again even as the participants engaged in a discussion around whether parents of intersex children should be able choose the sex of a child.

One participant spoke to the fact that although her own beliefs made the subject of abortion difficult, with more knowledge she appreciated the need to allow for abortions in certain circumstances.

Participants recognized the need to acknowledge to oneself both biases and values and then continuously assess how this was affecting decisions one made. There was some discussion around the fact that being influenced by values, such as gender equality were not always wrong.

Key Outcomes of the dialogue:

In closing, a few more general remarks were made. One participant was concerned that the discussion had not adequately addressed the interconnection between sexual health and pleasure, arguing that enjoyment of sex is at the core of the discussion of reproductive rights and judicial officers need to be comfortable with the issue of sex.

One participant highlighted that Judicial officers should never wait for a sufficient legal framework to make decisions. She argued that the law is never perfect and it is the jurists job to sharpen it. The participant urged women judges to read in whatever is possible if there is leeway to do so, to ensure gender justice. Another participant echoed the same sentiment, challenging particularly High Court Judges to make ambitious well-reasoned decisions.

Finally, the participants reminded each other to use their positions to influence change, on and off the bench, including in their families as nations are changed through families to communities and then to nations.

The following were the key outcomes of the dialogue:

1. The judges were concerned that the Tanzanian President, Hon. John Magufuli has recently publicly declared that all pregnant girls would be expelled from schools and not be allowed entry back and would instead be channeled into vocational schools to undertake trainings such as cookery and tailoring. The Kenya Women Judges Association therefore requested for an opportunity to dialogue with the Tanzanian Women Judges Association to strategize on how to approach the Tanzanian president to changes his stand on the issue of pregnant girls' education.

The center confirmed that it would be able to convene a meeting of the Kenyan and Tanzanian judges for the said purposes. It was also confirmed that the current chair of the Kenya Women Judges Association is also the sitting chair of the Africa Women Judges Association and it would therefore not be difficult to approach the Tanzanian Women Judge Association since it already falls under the Africa women Judges Association.

2. KWJA identified the need for a compilation of a compendium on reproductive rights cases in Kenya and reached out to the Center to facilitate this.
3. KWJA identified the need to cascade similar training to all Judicial officers throughout Kenya.

4. KWJA stressed on the need for a training that would enable Judicial officers to deconstruct gender and judicial stereotypes. This could be conducted by KWJA through the Judicial Training Institute (JTI) in the Magistrates and Judges annual colloquiums.
5. The Judicial officers shared the challenges they have been experiencing on cases around consensual sex between adolescents and highlighted the need to further engagement with support from partners like the Center. The Center shared that this is an issue that we are currently assessing jointly with FIDA Kenya and it would be our pleasure to have KWJA as part of the team.

The research could also give policy recommendations on the review of the Sexual Offences Act, Act No. 3 of 2006, Laws of Kenya.

6. One of the judges challenged KWJA and the Center to take advantage of the Court Users' Committees Forum to disseminate Reproductive Rights information.
7. There is need to have cross-regional dialogues on reproductive rights issues and needs.

Next steps:

1. Explore facilitation of a meeting of Kenya Women Judges and Tanzanian Women Judges on mandatory expulsion of pregnant girls from schools.
2. Meet with the Judicial Training Institute to discuss opportunities for training for the wider judicial body and assess possibility for inclusion in their annual work plan.
3. Assess possibility of compiling Kenya-specific Reproductive Rights (RR) compendium.
4. Include KWJA in the research with FIDA Kenya on adolescent consensual sex.
5. Explore the suggestion to use the Court Users' Committees Forum to disseminate reproductive rights information.

Annex 1: Concept Note

Roundtable Discussion with The Kenya Women Judges Association: The Legal Protection of Reproductive Rights in Kenya

Introduction and Background Information

All individuals have reproductive rights which are grounded in a constellation of fundamental human rights guarantees. These guarantees are found in the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples' Rights (African Charter), the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), and the African Charter on the Rights and Welfare of the Child, among others. These guarantees include: the right to safe and healthy pregnancies and delivery; the right to comprehensive reproductive health care services provided free of discrimination, coercion and violence; the right to equal access to reproductive health care for women facing social and economic barriers; the right to be free from practices that harm women and girls; the right to a full range of safe and affordable contraception; and the right to safe, accessible and legal abortion, within the confines of the law.

The Constitution makes international law part of the country's normative framework by virtue of Article 2 (5) and (6). It also contains an explicit provision on the right to the highest attainable standard of health including reproductive health at Article 43 (1).

About the Center

The Center for Reproductive Rights (The Center), with headquarters in New York, and offices in Nairobi, Kathmandu, Bogota, Geneva, and Washington, D.C, uses the law to secure women's reproductive rights. It has worked closely with national courts across the globe, as well as the African, Inter-American and European human rights systems, and with the United Nations human rights mechanisms to strengthen advocacy on, and seek accountability for, reproductive rights violations worldwide. The Center has also successfully litigated a wide range of reproductive rights violations including preventable maternal mortality, coercive sterilization, and the abuse, neglect, and detention of women seeking maternity services.

The Center also works to build the field by developing legal and policy capacity and progressive leadership on reproductive rights through engaging with different stakeholders such as the judiciary, law schools, lawyers and experts. In 2015, in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), the Center organized a judicial roundtable for the African Court on Human and People's Rights on the legal protection of reproductive rights in Africa. This was followed up by engagement with Judges of the Court of Appeal and Supreme Court in Uganda during which we explored the enforcement of reproductive rights in Uganda. A second roundtable for High Court Judges and Magistrates in Uganda is scheduled for July this year. In addition, earlier this year, the Center was invited to present at a judicial exchange for the Women Judges Association of Malawi and the South African Chapter of the International Association of Women Judges. Our presentation highlighted recent reproductive rights cases litigated in the region.

Purpose

In collaboration with the International Commission of Jurists, Kenya (ICJ Kenya) and the OHCHR, the Center wishes to hold a roundtable on the legal protection of reproductive rights in Kenya between 30th June and 2nd July 2017. The meeting will bring together members of the Kenya Women Judges Association and will explore the link between reproductive rights and other human rights and identify some of the key reproductive rights challenges in Kenya. To enable peer learning, the meeting will also bring judges from similarly situated jurisdictions to discuss comparative experiences on enforcement of reproductive rights.

Expected results of the meeting include:

- a) Appreciation of the judiciary's role in the protection of reproductive rights in Kenya.
- b) Clarity around the factors that hinder the enjoyment of reproductive health and rights in Kenya and how the law impacts them.
- c) An understanding of how key reproductive rights issues have been considered by regional and international human rights mechanisms.
- d) Understanding of how courts in other jurisdictions have addressed reproductive rights.

Proposed areas of discussion

Below are some of the issues that will be covered during the briefing:

- Overview of key reproductive rights challenges in Kenya.
- National, regional and International human rights framework on reproductive rights.
- Developments relating to the legal protection of reproductive rights in Africa.
- Comparative jurisprudence on enforcement of reproductive rights in Asia and Latin America.

Methodology

The roundtable will employ a participatory learning methodology that will provide ample opportunity for the judges to engage with the issues. Faculty will be drawn from the Center, OHCHR, ICJ Kenya and Judges from other jurisdictions to enrich the discussions.

Duration of the meeting

The meeting will be held for one and a half days.

Annex 2: Agenda

ROUNDTABLE DIALOGUE WITH THE KENYA WOMEN JUDGES ASSOCIATION: THE LEGAL PROTECTION OF REPRODUCTIVE RIGHTS IN KENYA

KENYA WOMEN JUDGES ASSOCIATION, CENTER FOR REPRODUCTIVE RIGHTS AND ICJ KENYA

KENYA 1ST - 2ND JULY 2017 AGENDA

Date	Time	Theme	Session Moderator
1 st July 2017	8.30 – 9.00	<p>Welcome remarks</p> <ul style="list-style-type: none"> • ICJ Kenya (5 minutes) • Evelyne Opondo, Regional Director, Center for Reproductive Rights (5 minutes) • Hon. Lady Justice Roselyne Nambuye, Judge of Appeal (5 minutes) • Hon. Lady Justice Philomena Mbete Mwilu, Deputy Chief Justice and Vice President of the Supreme Court, Kenya (15 minutes) 	Hon. Lady Justice Agnes Murgor, JA
	9.00 – 9.30	Introduction	Nyasha Chingore-Munazvo, Center for Reproductive Rights
	9.30-11.00	<p>Session 1: Overview of reproductive rights in Kenya: Issues and Challenges</p> <p><i>Perspectives from the Bar, Evelyne Opondo, Regional Director, Center for Reproductive Rights (20 minutes)</i></p> <p><i>Perspectives from the Bench – Hon. Lady Justice Jessie Lesiit, Presiding Judge, Criminal Division, Milimani, Vice Chair, KWJA (20 minutes)</i></p> <p>Plenary (40 minutes)</p>	Hon. Lady Justice Roselyne Wendoh, J
	<p>11.00-11.20 Tea/ Coffee Break</p>		
	11.20-	Session 2: Legal Enforcement of Reproductive	Hon. Lady Justice

Date	Time	Theme	Session Moderator
	12.20	Rights in Kenya <i>Practical application of the national framework on reproductive rights, Hon. Lady Justice Ruth Sitati, Presiding Judge, Kakamega (25 minutes)</i> Plenary (35 minutes)	<i>Fatuma Sichale, JA</i>
	12.20-1.20	Session 3: Regional and International Frameworks for the Enforcement of Reproductive Rights <i>The regional and international framework on reproductive rights, Hon. Christine Njagi, RM, Chief Magistrate's Court, Milimani Law Courts, Secretary, KWJA (25 minutes)</i> Plenary (35 minutes)	<i>Hon. Rose Makhungu, Registrar, ELC Court</i>
	1.20-2.30 Lunch break		
	2.30-3.30	Session 4: Enforcement of Reproductive Rights: Comparative Jurisprudence <i>Experience from Argentina, Hon. Justice Aida Kemelmajer, former Justice of the Supreme Court of the State of Mendoza, Argentina (30 minutes)</i> Plenary (30 minutes)	<i>Hon. Lady Justice Grace Ngenye, J</i>
	3.30-4.30	Case study	<i>Nyasha Ching'ore Munazvo</i>
4.30 – 5.00 Tea/ Coffee Break			
2nd July 2017	9.00-10.00	Session 5: The Legal Enforcement of Reproductive Rights in Africa <i>African jurisprudence on the enforcement of reproductive rights, Lucy Minayo, Center for Reproductive Rights (25 minutes)</i> Plenary (35 minutes)	<i>Hon. Christine Njagi, RM</i>
	10.30-11.00 Tea/ Coffee Break		
	11.00-12.00	Session 6: Gender and Access to Justice <i>Judicial stereotyping and its impact on access to</i>	<i>Hon. Dr. Julie Oseko, CM</i>

Date	Time	Theme	Session Moderator
		<i>justice for women, Hon. Lady Justice Effie Owuor, J.A. (C.A. Rtd) (30 minutes)</i> Plenary (30 minutes)	
	12.00-12.30	Discussion and Proposals for Further Engagements	<i>Hon. Lady Justice Jessie Lesiit, J</i>
	12.30 – 1.00	Closing Remarks <i>ICJ Kenya Center for Reproductive rights Kenya Women Judges Association</i>	<i>Lucy Minayo, CRR</i>
1.00 – 2.30 Lunch Break			

Annex 3: List of Participants



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	NAME	COURT STATION
1.	Hon. Lady Justice Philomena Mwilu, DCJ	Supreme Court
2.	Hon. Lady Justice Roselyne Nambuye	Court of Appeal
3.	Hon. Lady Justice Fatuma Sichale, JA	Court of Appeal
4.	Hon. Lady Justice Agnes Murgor	Court of Appeal
5.	Hon. Lady Justice Jessie Lesiit	High Court, Milimani
6.	Hon. Lady Justice Grace Ngenye	High Court, Milimani
7.	Hon. Lady Justice Lucy Gitari	High Court, Kerugoya
8.	Hon. Lady Justice Teresia Matheka	High Court, Nyeri
9.	Hon. Lady Justice Racheal Ng'etich	High Court, Milimani
10.	Hon. Lady Justice Lucy Njuguna	High Court, Milimani
11.	Hon. Lady Justice Abigael Mshila	High Court, Nyeri
12.	Hon. Lady Justice Roseline Wendoh	High Court, Nyahururu
13.	Hon. Lady Justice Ruth Sitati	High Court, Kakamega
14.	Hon. Lady Justice Hedwig Ong'udi	High Court, Milimani
15.	Hon. Lady Justice Rose Ougo	High Court, Milimani
16.	Hon. Lady Justice Millicent Odeny	High Court, Eldoret
17.	Hon Lady Justice Farah Amin	High Court, Milimani
18.	Hon. Lady Justice Mary Oundo	High Court, Nyeri
19.	Hon. Lady Justice Jacqueline Kamau	High Court, Voi
20.	Hon Lady Justice Lucy Mbugua	High Court, Meru
21.	Hon. Lady Justice Anne Omollo	Land and Environment, Mombasa
22.	Hon. Dr. Julie Oseko (E.C)	Malindi Law Courts
23.	Hon. Elizabeth Juma (E.C)	Kibera Law Courts
24.	Hon. Rose Makungu (E.C)	Milimani Law Courts
25.	Hon. Christine Njagi (E.C)	Milimani Law Courts
26.	Hon. Njeri Thuku	Lamu Law Courts
27.	Hon. Leah Njambi	Kaloleni Law Courts
28.	Hon. Betty Koech	Kwale Law Courts
29.	Hon. Ivy Wasike	Mombasa Law Courts
30.	Hon Wilbroda Juma	Narok Law Court
31.	Hon. Monica Munyendo	Judicial Training Institute
32.	Hon. Becky Cheloti	Judicial Training Institute