1 Introduction

Gender and judging across Africa: A case of old wine in new skins or new wine in old skins?

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Every society has multiple and often intersecting ordering principles. Research has shown that gender is one major socially constructed ordering principle that has found its way into what we perceive as law and how we interpret, apply, and enforce these laws. Societal ordering principles are intrinsically present in institutions, and the judiciary is no exception. Judiciaries are institutions that are slow to adapt to change. Judiciaries across Africa, like those in other parts of the world, continue to evolve, albeit at a much slower pace than the lawyers and litigants who use these courts would like.

Across Africa, the emergence of judiciaries as we know them today is linked to the colonially imposed imported legal systems and traditions, which radically disrupted and replaced existing systems, understandings, and manifestations of justice and human rights (An’Naim, 2002; Juma, 2002; Murungi, 2013; Pimentel, 2011). The presumptive roles of women and men in these societies were also affected and re-engineered, leading to new forms of gendered division of labor, revised societal expectations, and ultimately, new and reimagined rights and obligations (Steady, 2011; Tamale, 2020). African legal systems are currently anchored in, and operating largely within, pluralistic normative legal structures. African legal systems are derivatives of imported legal systems and living customary laws, a combination that sometimes has deleterious effects on human rights and on women’s rights (Banda, 2005; Ndulo, 2011).

The role of women and the gendered expectations of women in society continue to evolve across the continent in time and space. These evolutionary patterns can be traced through the precolonial, colonial, and independence movement phases, leading up to the current phase of the post-democratic period (Achebe, 2020; Chukwu, 2002; Tamale, 2020). These shifts in gender constructs and the ensuing rights and freedoms women enjoy have taken different forms under political transitions that span everything from military and quasi-authoritarian dictatorships to democratic systems in the wake of the fourth wave of democratization (Mama & Okazawa-Rey, 2012). Closely linked to the fourth wave of democratization across Africa was the promulgation of new constitutions promising, among other things, liberalization, freedoms, rights, and equal representation. Democratization introduced various changes in judicial functions; some were subtle, whereas others were abrupt—such as the total overhaul

and expansion of existing fundamental notions of equality (Fombad, 2011; Klug, 2010; Ndulo, 2001).

Democratic constitutions promised fundamental changes, but the extent to which these promises have materialized over time varies. The failure to implement these principles of good governance has led to an abdication of the executive's role of enforcing constitutionally guaranteed human rights and freedoms (Ndulo, 2001). Consequently, most African constitutions exist on a skeletal phantom of many unmet rights, resulting in a poor translation of the letter of the constitution (text) into the spirit of constitutionalism (actual guarantees and protections) (Okoth-Ogendo, 1988; Prempeh, 2007). Across Africa, constitutional changes and the ongoing legal transformations vary from one country to another and from one political regime to another. Constitutional transformation projects must juggle competing constituency interests such as religion, ethnicity, disability, and gender (Ndulo, 2001). Race is an extra consideration in the context of countries in Southern Africa, and in South Africa, to be precise (Klug, 2010). In most of these countries, gender is often not prioritized in discussions of human rights, or more specifically, of women's rights (Banda, 2005).

Notwithstanding the seismic constitutional changes that gained ground in the mid-1990s, the question of gender as a defining feature of many African constitutional transformation projects holds less primacy in the larger discourse on judicial politics in Africa (Andrews, 2001; Cassola et al., 2014; Tripp, 2016). Often, in popular parlance and even in written discourse, gender is confused with sex, leading most analysts, policymakers, and laypersons to think and act in ways that promote the ideology that "gender" is a women's issue and to therefore dismiss "gender" as a woman "problem." For the purposes of the discussions in this book, I conceptualize gender as the socially constructed ideas, beliefs, and practices of societal expectations regarding women and men. This conceptualization locates and challenges the prevailing binary distinctions between the normative question of "what ought to be," translated as *how women ought to behave or be*, against the empirical question of "what is"—in other words, *what is the status of women?* Normativity does not operate in a vacuum but is built on a matrix of historical, cultural, social, and political trajectories—which often intersect while being powering and disempowering for different constituents. In this matrix is located the question of how gender is constructed, reconstructed, and exported across time and space.

As a social construct, gender lends itself to multiple interpretations based on the historical, cultural, political, class, and social structures across different temporal spaces. Definitively, what are perceived as the "rights" of women differ from one community to the next. African feminist/womanist perspectives on gender and judging must be formed from a premise cognizant of the matrix of gender visibility/inclusion or invisibility/exclusion in negotiating constitutional transformations. Any discussion of the historical development of legal and judicial systems, and of subsequent constitutional transformation projects propelled by the tide of democratization, must be analyzed against the backdrop of how socially

constructed gender norms affect what is perceived as gender equity or equality by the law, the courts, and judges.

Kenney (2013, p. 24) captures the essence of gender and judging when she notes, “Gender differences thus do not flow inevitably from sex differences; rather, gendering is the process by which we attach meaning to sex differences, most often to devalue whatever society associates with women.” Using gender as a measure of value makes sense when one examines the gendered outcomes of laws on multiple issues, such as women’s access to sexual and reproductive health, divorce, alimony, and equal pay. However, Kenney’s qualified assertion that gender is “most often” used to devalue requires a nuanced examination in a plethora of matriarchal traditional African systems and customs replete with examples of gender constructs that accord women value and respect (Steady, 2011; Tamale, 2020; Tripp et al., 2009). Therefore, in the process of reimagining law and gender, more research is needed to understand the ways in which traditional notions of womanhood, often couched as “motherhood,” can be harnessed to inform legal practices and judicial decision-making.

Focusing on gender as an integral part of the judging process, the chapters in this volume are guided by two interrelated questions: *To what extent does gender matter in the construction of law?* and *What role does gender play in judicial interpretation of the law?* The first question broadly explores questions regarding how laws (such as constitutions and treaties) are crafted and whether their crafters consider the gendered aspects of social expectations and the attendant legal and judicial outcomes for women. The second question examines the extent to which the courts have applied a gendered lens in their interpretative role when deciding cases.

Empirical and normative assumptions regarding what the law is and what the law *ought to be* have traditionally been excluded from theorizing on how law functions (Kenney, 2013). Therefore, it is imperative for any discussion on the connections between law and gender to acknowledge the role of gender constructs in the making of laws by legislatures, interpretation of the laws by the courts, and enforcement of such laws by the executive. Judicial outcomes require a nuanced approach that examines not only the existence of laws but also their effect on promoting rights. The chapters in this book engage with these nuances from different perspectives and with a focus on the relationship between laws and judicial outcomes for women.

Setting the context: Gender and judging

The nexus between gender and judicial outcomes (judging) has been explored by many studies, conducted largely in the global north. For ease of classification, I focus on three broad categories emerging out of this rich body of scholarship. First is the category of *gender and judicial diversity*—which has tended to focus on the question of “why not women?” Led primarily by socio-legal scholars, the analyses were driven by the noticeably paltry number of women acting as judges (Malleon, 2006). These studies centered on the issue of symbolic representation,

often advocating for the appointment of women to the bench as emblematic of democratic values of equality, institutional legitimacy, and representation. Thus, although representation was the driving force behind the initial questions, the discussion was not so much about women's value-addition to justice but rather, about the right of women to serve as judges.

Subsequent studies expanded the issue of judicial diversity beyond symbolic representation of women to include how women judges substantively represent the needs of women. This category of studies focused on *gender* and *difference*. Drawing largely from sociologist Carol Gilligan's (1982) work on the "ethic of care," these studies sought to "justify" the demands for diversity on the bench by advocating the "difference" women judges bring to judicial decision-making processes (Boyd et al., 2010; Coontz, 2000; Cowan, 2013; Kenney, 2013; Miller & Maier, 2008; Wilson, 1990). The debate moved from a focus on symbolic representation grounded in equality of representation to addressing substantive representation of women's issues on the bench. In other words, what do women do differently that justifies adding them to the bench? The authors of these studies examined the gendered outcomes of judicial-making processes to determine whether women judged cases differently from men. The case studies ranged from gender-specific cases of marriage, divorce, and alimony to other issues less related to gender, such as criminal cases, immigration, and the environment (Coontz, 2000; Hunter, 2015; Songer & Crews-Meyer, 2000). Most of these studies were inconclusive: most of them found no discernable gendered pattern in decision-making and little or no evidence suggesting that women were genetically or socially predisposed to ruling in a certain way. It soon became apparent that arguing that women should be present on the bench because they would make a difference was a false start and a limited entry point for making the case for judicial diversity (Malleon, 2003; Rackley, 2013; Hunter, 2008, 2015).

The third category of *gender and judicial outcomes* moved beyond women's roles as judges to an expansive inclusion of male judges by disaggregating the framing and understanding of gender in judicial decision-making (Boyd et al., 2010; Sherry, 1986). This category may be considered a more viable body of scholarship in that it moves from the normative aspects of justifying "why" women ought to be on the bench to a more empirical and inclusive analysis of "what" the courts ought to do to advance the rights of minority groups (in this case, women). Within this category, most of the studies examined how, and whether, judges—both female and male—apply a gendered analysis (whether consciously or unconsciously) to the interpretation of law to determine the rights of women, men, and other genders (Albertyn & Bonthuys, 2016; Baines & Rubio-Marín, 2005; Cowan, 2013).

The chapters in this volume touch on each of the three gender-related categories: *representation*, *difference*, and *judicial outcomes*. However, it is within the third category of *gender and judicial outcomes* that this book is framed. By examining the centrality of gender as a social construct and unpacking how it affects judging, this book adds to the emerging scholarship on gender and judging in Africa

pioneered by *Gender and the Judiciary in Africa: From Obscurity to Parity* (Bauer & Dawuni, 2016), the first edited volume on women in African judiciaries.

Collectively, the chapters in this book touch on four central issues. First, the book recognizes that although laws are central to advancing gender-equitable outcomes, the role of courts (and judges) in interpreting and breathing life into gender equity requires an understanding of how gender constructs affect law-making and judicial interpretation processes. Second, gender-equitable judicial outcomes and achieving gender equality should be the duty of all judges—both men and women—as is seen in the cases on maternal mortality in Uganda, matrimonial cases in Ghana, and land issues in Kenya, where male judges were pro-women in their rulings. Third, it underscores the need for judicial training on gender to be a centralized component of legal education curriculum generally and should specifically be embedded as a core aspect of continuous judicial training for judges, with appropriate monitoring and evaluation. Fourth, African judiciaries need to stay ahead of the curve in providing access to justice, especially for women, during times of crises. The current COVID-19 global pandemic has demonstrated how fragile judiciaries remain in Africa and the impact of such fragility on further restricting women's access to justice through the courts.

Progress, process, and prospects for gender-equitable judicial outcomes

The chapters in this book are guided by three main questions. First, what *progress* has been made in crafting gender-inclusive laws? Second, what role does gender play in judicial interpretation *processes*? Third, what are the *prospects* for centralizing gender as an integral part of judicial decision-making and appointment processes? In principle, the aspiration that constitutions will promote gender equality has been enthusiastically received by women and gender rights activists. However, the record shows mixed outcomes on how the courts have interpreted the constitutional rules on equality to promote gender equity. On the one hand is the question of whether constitutions have gone far enough in making gender-specific judicial provisions for issues affecting women and other minorities. On the other hand is the question of what judiciaries are doing to sensitize judicial officers to the role of gender as a social construct in existing laws and in the interpretation of such laws. In the ensuing section, I discuss the four key themes running through the book: legal instruments as *progress* toward achieving gender equality; judicial interpretation as a *process* for achieving gender equality; judicial training as a *prospect* for gender equality; and judicial appointments and gender diversity as *progress*, *process*, and *prospect* for gender-equitable outcomes.

Legal instruments as *progress* toward gender equity

The third wave of democratization, which began in the 1990s, saw countries across Africa adopting new constitutions that granted varying levels of freedoms and rights (Ferejohn & Pasquino, 2003). Legal scholars have long debated the

role of law in achieving equity, justice, and order in societies. Law has traditionally been assumed to embody norms grounded in neutrality, impartiality, and rationality (Murphy, 1991). If these assumptions are taken to be true, then there is an expectation that these principles would lead courts to accord women the same rights as men. By examining three legal instruments—constitutions, legislative acts, and treaties—this section analyzes the potential and challenges of using these legal instruments to achieve gender equity. Whereas domestic and international legal instruments have provisions seeking to protect and safeguard against gender-based discrimination, the analyses in these chapters demonstrate that the *progress* made through the enactment of laws is only the first step toward achieving gender equality.

As part of its post-apartheid democratic aspirations, South Africa embarked on an ambitious project of judicial transformation. The Constitution of South Africa (1996) has been hailed globally as a progressive constitution with provisions for achieving equality and justice for all. As in all other constitution-making projects, at the center of the constitutional debates in South Africa were questions about how to achieve diversity and equality across all aspects of South African institutions and practices. Achieving diversity and equality was a mechanism to correct the past injustices inflicted by racial oppression in the country (Klug, 2010).

Although racial equity was a primary focus, women's rights groups made a strong case for including gender diversity in the Bill of Rights as a fundamental tool for achieving diversity and equality (Albertyn, 2009; Andrews, 2001). Despite the inclusion of constitutional provisions in efforts to transform the judiciary, including the establishment of the Judicial Service Commission (JSC) in Section 178, the pace at which women have been appointed to the judiciary has been much slower than anticipated. The path for black women and other women of color has been particularly narrow (Masengu, 2016).

In Kenya, Article 27 of the 2010 Constitution of Kenya (Kenya Constitution, 2010) aims to correct past discrimination against minority groups. Of interest to this discussion is Article 27 (6), which obligates the state to use affirmative action policies to correct past wrongs. Additionally, Article 27 (8) provides that no more than two-thirds of one sex shall hold any particular public office, a provision commonly referred to as the two-thirds rule for gender equality (Aura-Odhiambo, 2018). Some progress has been made in the Kenyan judiciary, with a narrowing of the gap between women and men; but much remains to be done to create a gender-inclusive institutional culture that accepts women as equal to men in the context of judicial leadership (Dawuni, 2020).

The Constitution of Ghana (1992) does not have a specific provision on affirmative action for gender equality to correct past gender-discriminatory practices. The rights of women can be inferred broadly from Chapter 5 of the constitution, which guarantees human rights generally. Article 17 (2) states: "A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status." Another general provision on nondiscrimination based on sex is Article 35 (6)(b), which obligates the state to

“respond appropriately to achieve reasonable gender balance in the recruitment and appointment to public offices,” and a third is Article 27 (3), which guarantees women “equal rights to training and promotion without any impediments from any person.” The Directive Principles of State in Chapter 6 of the constitution shift the obligation to the legislature and other organs of government to pass laws and policies that promote gender equality. The Directive Principles of State provided the grounds for the advocacy and eventual passage of the Domestic Violence Act (Act 732) of 2007. These principles have also been used by women’s groups to advocate for the Affirmative Action Bill, which was stalled in parliament for several years (Skinner, 2020; Tsikata, 2009).

Constitutions are often the supreme law of the land, safeguarding, among other things, the principles of fairness, equality, justice, and representation. Evidence from judicial interpretation often shows the contrary, lending support to the argument that constitutions without constitutionalism are an empty promise of the law (Fombad, 2014; Ndulo, 2001; Prempeh, 2007). Consequently, constitutions depend on courts to set the wheels of justice rolling. As the fundamental law of the land, constitutions can either promote or impede the rights of women and other minority groups. Further, constitutions can provide radical shifts for gender-equitable opportunities through gender-sensitive constitution-making processes, a point discussed later in the chapter.

As research examining the role of women in constitution-making has shown, constitutions have the potential to reproduce and create new gender inequities when gender-responsive actors, women, and gender-neutral processes are not central to the constitution-making processes (Maingi, 2011; Tripp, 2016). The prospect for the constitutional realization of gender-equitable outcomes is closely linked to gender-inclusive constitution-making. The United Nations Women Global Gender Equality Constitution Database provides a comprehensive overview of countries whose constitutions contain provisions on women’s equality and for the protection of women’s rights (UN Women, 2016). These “women-responsive” constitutional provisions are closely linked to the active participation of women’s groups in constitution-making processes (Andrews, 2001; Cassola et al., 2014; Ezeifeka & Osakwe, 2013; Jagwanth & Murray, 2005).

From a legislative perspective, acts of parliament are generally binding sources of law. Parliaments can pass laws to address loopholes in existing laws or create new ones where no law exists on a subject matter. Globally, more than 140 countries have passed some form of law related to domestic and gender-based violence (Htun & Weldon, 2012; Klugman, 2017). Yet, available data indicate that across the globe, domestic violence cases continue to rise (Tavares & Wodon, 2018). In many countries where domestic violence and sexual harassment laws have been passed, Richards and Haglund (2015) find, an effective enforcement mechanism is crucial to ensuring that the rights are protected. The chapter in this volume by Addadzi-Koom on revenge pornography in Ghana demonstrates the current shortcomings of using the Domestic Violence Act 2007 (732) to protect women victims of technology-induced violence. In the Nigerian context, Obani’s chapter shows how the Same Sex Marriage Prohibition Act 2014 is used

to effectively deny sexual minority rights. As I write this chapter, the novel coronavirus pandemic is still raging across the world, and the continent of Africa has not been spared from the rise in domestic violence cases (Mlambo-Ngcuka, n.d.). Tibatemwa-Ekirikubinza's chapter on sexual violence in Uganda and Ndulo's comparative study of judiciaries during the global pandemic collectively demonstrate the inadequacy of laws to protect women *before* and *during* times of crisis.

Operating within the African regional context, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003 (the Maputo Protocol) is hailed as a regional legal instrument critical to grounding the equality of women across Africa. To date, it remains the most comprehensive body of law at the African regional level led by women, and for women, in addressing women's issues across a broad spectrum of rights and freedoms. Across Africa, women have demanded their right to participate in the lawmaking processes—in national constituent assemblies or in treaty-making processes (Eziefeka, 2013; Mutua, 2006; Tripp, 2016). Advocacy by women's organizations in the mid-1990s for women's inclusion in constitution-making processes demonstrated unequivocally that when given the chance to participate, women generate and support gender-responsive constitutions (Bond, 2008). Women's groups have made demands for women-inclusive provisions and in some cases have radically rejected less optimal outcomes (Maingi, 2011; Tripp, 2016). As the chapter by Ojigho on two regional courts demonstrates, regional treaties on women's rights require gender-sensitive judicial interpretation if they are to move beyond their mere existence. Alapini-Gansou's chapter on the African Commission on Human and Peoples' Rights provides a potent analysis of women commissioners' roles in capitalizing on available legal instruments to advance human rights generally.

These three categories of legal instruments—constitutions, acts of parliament, and international treaties—provide glimpses into the progress made in passing laws that address gender inequities at the national and regional levels. Notwithstanding these developments, this chapter offers three conditions for their effectiveness. In the first place, these three legal instruments collectively highlight the need to center the experiences and voices of all minority groups in the lawmaking processes. These voices should be allowed not only to be present but also to be heard. As the United Nations Security Council Resolution on Women, Peace and Security, Resolution 1325 (2000), has shown, women must be included as active agents in finding solutions to peace and security. Furthermore, involving women in the lawmaking processes should not be mere window dressing, as we have seen in the context of the domestic violence laws passed by African countries. These laws must be backed by strong enforcement mechanisms through budgetary allocation and the training of judicial and police staff. Finally, laws passed in the international and African regional contexts should be used by courts in judicial decision-making processes. Judicial use of treaty instruments requires the implementation of active and ongoing judicial training mechanisms to ground international and regional laws in domestic legal and judicial practices.

Studies conducted in Argentina, Chile, South Africa, and Botswana strongly suggest that gender-specific provisions in constitutions provide women's advocacy groups with stronger entry points for demanding women's rights (Lambert & Scribner, 2018). Through gender-responsive constitutional transformation, some countries, such as South Africa, Rwanda, Kenya, and Uganda, have lifted the veil of gender neutrality and gender blindness by inserting specific provisions in their constitutions that support gender equality, yet the full realization of these provisions is yet to be seen (Kabira, 2012; Mutua, 2006).

Judicial interpretation as a *process* for gender equity

Central to the aspirations driving the discourse and support for democratic change is the hope that constitutional transformation will lead to substantive equality for all citizens. Although these liberal constitutional aspirations may sound idealistic to some, they nonetheless provide the guarantees and safeguards for citizens to advocate for equitable opportunities for all (Abbate et al., 2018; Mbondenyi & Ojienda, 2013). The drafting of constitutions, legislative instruments, and international treaties is not an automatic guarantee of women's rights. The inherent continuity of the lawmaking process holds a legacy in common law countries, where judges have a bigger role in lawmaking through their setting of precedents that are binding on lower courts. However, which cases will make it to the highest courts probably depends on the prioritization of the appeal process by the higher or superior courts; the salience for the public of the issues at stake; and the existence of strong pressure groups, such as civil society. In Benin, Kang and Wing (2021) find that more civil and political issues and fewer economic and social issues affecting women make it to the Constitutional Court. Judicial interpretation of existing laws can lead to progressivity in gendered realities via decisions that advance women and the rights of gender minorities—or it could lead to a regression or stagnation of women and gender rights. I conceptualize this dichotomy as old wine in new skins versus new wine in old skins.

A case of old wine in new skins or new wine in old skins?

Constitutional transformations are of no use if the old methods of judicial function and judicial interpretation have not changed to fit the letter and the spirit of new circumstances and aspirations for democratic equality. In this analogy, constitutional changes and transformations are the new skins—promising, among other things, equality, fairness, and justice. As alluded to earlier, where constitution-making processes fail to involve women as contributors or listen to the concerns of gender minority groups, it can lead to a case of old wine—the reproduction of existing gender inequities. The old wine scenario arises through carrying over archaic, hegemonic imperialistic colonial rules or laws and discriminatory cultural practices that are often presented as principles of customary law and advanced as cultural relativist arguments to protect the “cultures” of non-Western societies (Bond, 2008; Obiora, 1997).

The South African Constitution of 1996 and the Kenyan Constitution of 2010 have been heralded as progressive constitutions with provisions for achieving gender-equitable outcomes (Andrews, 2001; Kabira, 2012). At the regional level, the Maputo Protocol is significantly symbolic as a progressive instrument for women's empowerment at the continental level. To what extent have these laws moved the scales of justice toward gender-equitable judicial outcomes? Pouring new wine (new constitutions) into old wineskins—in this case, stagnant judicial interpretation processes—does not provide optimal outcomes for achieving the spirit of constitutional gender equality. The paradox of constitutions without constitutionalism is highlighted in several chapters in this book. Baraza on Kenya and Mensa-Bonsu and Mensa-Bonsu on Ghana, respectively, examine a litany of cases on women's rights and find instances where the courts failed to pronounce on women's constitutional rights. In the context of Nigeria, Obani characterizes the persistent violation of sexual minority rights as a blatant violation of the Nigerian constitution. And Kyobiika shows how judges in Uganda are beginning to acknowledge maternal and infant mortality as a constitutional issue.

A systematic review of how judiciaries are using laws to decide gender-based cases is important in ascertaining the progress being made or the lack thereof. The litany of constitutional cases discussed by the various chapters in this book is by no means exhaustive of all the constitutional cases across the continent or even in one country. The cases in this book present mixed outcomes. The chapters on Kenya and Uganda highlight progressive developments in advancing women's rights in land and in health, respectively. On the other hand, in both Kenya and Ghana, we witness the current failure of the courts to pronounce on important emerging issues such as technology-enabled gender-based violence. To push the issue onto the judicial agenda, Addadzi-Koom in this volume challenges the courts in Ghana to recognize revenge pornography as a form of gender-based violence, often perpetrated against women, with debilitating effects, including the loss of life.

As the chapters in this book demonstrate, reversing the stagnation of old wine in new skins places an obligation on judiciaries to hear and pronounce on emerging gender-related cases, such as those involving social media-induced violence in Kenya and Ghana. Ironically, the substance of these cases is by no means new; these forms of violence have always been perpetrated against women. What may be new and therefore justifies their being classified as "emerging" is the increased frequency of their occurrence as they become more violent and widespread. If gender is to be centered in judicial interpretation, judges—both men and women—must be sensitized to the gendered dimensions of the cases they adjudicate. I turn to the issue of judicial training, presented as a prospect for achieving gender-equitable judging.

Judicial training as a *prospect* for gender equity

How do socially constructed gender norms influence the law? To what extent does the social conditioning of judges affect judicial interpretation processes?

Existing studies suggest that these and many other questions surrounding gender as a social construct and an ordering principle in law appear not to have been prioritized by judiciaries across Africa (Bauer & Dawuni, 2016).

Judicial training is necessary to keep judicial officers abreast of new laws and procedural rules. In most instances, judges receive their first judicial training when they are inducted into the judiciary. These trainings are often carried out by Judicial Training Institutes (JTIs) or via on-the-bench training through attachment to other judges (Goldbach, 2016). Judicial training may be offered as part of continuous judicial training by the judiciary or through individual activities and initiatives such as conference participation and acceptance of invitations to dialogues and seminars (Oxner, 2001). The World Bank has incorporated judicial training as part of the broader goal of justice sector reform (Laver, 2012).

Judicial training programs have also been carried out by international organizations, such as the United Nations Office on Drugs and Crime (UNODC) Global Judicial Integrity Network (GJIN). The GJIN provides training to supplement or complement what is offered at the national levels. Additional judicial training programs involving African judiciaries are implemented through collaborative site visits to the U.S. Federal Judicial Center, The Hague in the Netherlands, and other countries in the global north. The Judicial Institute for Africa (JIFA), based at the University of Cape Town, South Africa, is one of the few regional hubs that cut across national jurisdictions, even though most of the work is carried out in the Southern Africa region. With a plethora of issues to be covered during judicial training programs, judiciaries across the globe are becoming aware of the need for gender-sensitive judicial training; but this awakening has not come without its own challenges (Schafran, 2001). In Germany, Schultz (2013, p. 597) observes that “deficits in the initial legal education than in further training” are to blame for the difficulty in infusing gender into the judicial decision-making process.

In the Philippines, Miwa (2013) credits the relative success of gender-sensitive training to judicial leadership and to extra mechanisms such as the Gender Justice Award for judges who produce gender-sensitive decisions and demonstrate gender sensitivity to women litigants. Minamino’s (2014) study of employment discrimination cases in Japan elucidates how systematic gender bias is reproduced in judicial decision-making when judges follow social mores that position men as the “male breadwinners” in the family. Minamino (2014) notes that democratic principles of openness and transparency in judicial decision-making processes can be fulfilled if judicial education programs and training opportunities challenge the gendered aspects of the law.

Judicial training efforts across Africa have been anchored within the larger democratic development discourse on the need for judicial reform as a precursor to promoting democratic values and development. Driven by the law and development discourse that emerged in the late 1980s, the push for judicial reforms has been spearheaded by development agencies, multilateral financial organizations such as the World Bank, and philanthropic organizations such as the Ford Foundation (Trubeck, 2006). These externally funded and often externally led

trainings tended to focus on strengthening judiciaries to promote liberal democratic values and were largely driven by capitalist norms of trade liberalization (World Bank, 2012). Feminist critiques of development policies nestled within the Women and Development (WAD) and Gender and Development (GAD) discourses provide better insights into how gender and women's issues had traditionally not been prioritized in these law and development and judicial transformational processes (Nyamu-Musembi, 2006).

To be effective, judicial training must be localized and practical. Judicial training requires resources, but judicial leaders across Africa are saddled with meager budgets; for that reason, deciding what topics to prioritize in judicial training becomes an issue. In addition, the problem of resource allocation means that judiciaries are susceptible to external pressures and influence by funding agencies, meaning that those agencies often determine what topics should be covered (Trubeck, 2006).

As the chapters by Masabo on Tanzania and Rukuba-Ngaiza on Uganda and Kenya, respectively, show, gender has not been prioritized in judicial training programs. The idea that the law is rational and that judges will remain neutral, unbiased, and impartial may partly explain the continuity of a blind gaze on the role of gender constructs in decision-making processes. Correcting the "gender-blind gaze" requires an investigation into how judicial training can be made gender responsive. Masabo's outline of the history of judicial education and judicial training in Tanzania shows a longstanding absence of gender concerns in all judicial training programs. Masabo argues that although gender can be introduced as a stand-alone course in training programs, the gendered aspects of judicial decision-making should be incorporated into all other judicial training topics.

As Masabo notes in her chapter, the failure of judiciaries to provide gender sensitization training to judges has not been lost on women judges' associations, because it has reproduced the "double care burden" of women's issues on women judges—a situation where women must do the double work of care at home and at work. The Tanzania Women Judges Association has taken on an extra burden of care work by providing gender-sensitive training to members of the judiciary and the public. Other studies confirm the double burden of care; for instance, in Ghana, the women judges' association has provided gender sensitization training to members of the judiciary and has raised awareness of women's rights among members of society (Dawuni, 2016). To foreground the understanding of gender issues and to lessen the burden placed on women judges in leading the fight for gender equality, Masabo advocates for making courses on gender mandatory in the law school curriculum rather than mere electives. Using the examples of Kenya and Uganda, Rukuba-Ngaiza demonstrates how judicial training on gender-related issues has not been provided by the judiciary, partly because of budgetary constraints but also a result of low prioritization. She argues that inclusion of gender training in the performance contracts of judicial officers is imperative and robust evaluation of the limited gender training and the effectiveness of the JTIs is necessary to justify a continuous investment in both. Nevertheless, through the chapters on Tanzania, Uganda, and Kenya, we do find that judges

who received gender-sensitive training testified to the impact of that training on their later rendering of gender-sensitive decisions.

Training of judges regarding unconscious gender bias will help to illuminate the gender-blind spots in judicial decision-making. The absence of judicial training on the impact of gender bias will invariably reproduce existing gender inequities in society. As Ojigho potently argues, in the Economic Community of West African States (ECOWAS) and African Court scenarios, of the few cases that were decided in favor of women, the judges did not focus on gender as a defining feature of the reliefs sought. Rather, the decisions were located within the larger human rights framework. Although the decisions need to be commended, the fact that the courts are failing to prioritize gender as a determinative factor in the biases and discrimination women suffer in society requires urgent attention. For the sake of reversing the gender gaze, I argue for the necessity of shifting the duty of understanding gender as the burden of “women” judges to understanding it as a (hu)man-made problem requiring sensitivity on the part of both female and male judges.

Consequently, dismantling the masculinist practices, beliefs, and privileges that contributed to producing these inequitable gender constructs should equally be the responsibility of men. A key strategy for alleviating the problem requires intentionality in adhering to gender-focused judicial training that aims to deconstruct inequitable gender norms through the lawmaking and judicial interpretation processes. To borrow from Audre Lorde (1984), the “master’s tools will not dismantle the master’s house.” In the analogy as used here, the master’s house refers to the existing gender inequities in law, and the master’s tools represent the usual judicial training programs that do not incorporate gender sensitivity. These chapters insist that gender-sensitive judicial training must become the new tools for gender-conscious judicial interpretation. Thus, gender sensitivity training can be the sledgehammer used to break down the master’s house.

Gender-sensitive judicial training increases the prospects for gender-equitable judicial outcomes. However, gender-sensitive judicial training is not a sufficient condition; nor can it singularly ordain gender-responsive and progressive outcomes. Other intervening factors are at play, including the level of executive interference in judiciaries, along with the presence of an active civil society and media creating awareness of gender cases that come to the judiciary. Additionally, an active public interest litigation bar that brings gender cases to court and an engaged public that scrutinizes and reacts to judicial decisions are key players. Discerning the impact of these factors requires further research.

To draw the curtain on this discussion, I postulate that judicial training is one tool that is largely within the control of national judiciaries, which gives them enormous leeway in deciding what trainings are offered to judges. Gender-awareness training can illuminate gender gaps in the law, which could in turn lead to gender-responsive judicial outcomes. This trajectory is by no means linear, as externalities such as a judge’s predisposition to change can alter the course of the linear projection presented. Nevertheless, providing gender-inclusive judicial training is still a good way to start.

Gender diversity as *progress, process and prospect*

In this section, I briefly discuss the importance of gender parity and gender diversity as necessary conditions for inclusive and progressive judging. Across Africa, a body of scholarship on women in African judiciaries is emerging (Bauer & Dawuni, 2016; Cowan, 2013; Kamau, 2013; Klibi, 2016; Masengu, 2016). Notwithstanding the progress made in some countries, the process for appointing women and their promotion to higher courts remains contested in some jurisdictions, including Egypt, Algeria, Namibia, and Sudan. Even in countries where women have made gains as judges, as Masengu's chapter brings home, the reality is that lingering societal perceptions of gender bias have led to perceptions of women judges as being illegitimate occupiers of the bench.

Considering the emergence of the postcolonial state in the mid- to late 1950s, available studies suggest that across the continent, women judges have made tremendous progress at domestic (Bauer & Dawuni, 2016) and international courts (Dawuni & Kuenyehia, 2018). In addition to their progression in judicial appointments, women judges have made commendable gains as leaders of judiciaries across both civil and common law countries (Dawuni & Kang, 2015). In tracing women's access to the bench in Nigeria, Uzebu-Imarhiagbe concludes that

the history of women in the legal profession is not a history of exclusion but of reception and advancement. In the admission and appointment of women lawyers into the bar and the bench, there was no deliberate consensus or policy by government to achieve gender integration. The driving force was need, the need for qualified legal practitioners.

(Uzebu-Imarhiagbe, 2020, p. 11)

In a few countries, such as Egypt, women continue to fight for their right to be judges (Hamad, 2016). In Uganda, although women represent more than 40% of the judiciary, access to the highest judicial office as Chief Justice has yet to be realized, with women going only as far as occupying the deputy Chief Justice position (Dawuni, 2020). Despite the progress women have made in becoming judges, women judges are not immune to gender-based discrimination during judicial appointment commission hearings, as the chapters by Andrews and Masengu show. Andrews provides evidence showing how in South Africa the intersectional nature of historical racial discrimination against blacks and "colored" people, and of gender discrimination against women, is slowing the opportunities for black women to be appointed as judges.

Similarly, Masengu's chapter sounds the alarm on the unfounded perceptions of illegitimacy women judges in Zambia continue to face. Media representations of women judges during appointment processes tend to reinforce the perception that women are "outsiders" coming to the bench, a perception that leads to harsher lines of questioning by appointing bodies (Escobar-Lemmon et al., 2016).

Masengu's chapter is by no means invoking "the difference women make" argument for women's appointment to the bench, as doing so would lead us down the slippery road of essentialism—the idea that all women are the same and will make a difference for all women (Kenney, 2013). Evidence from Constitutional Court decisions has shown that women judges on constitutional courts have effectively adjudicated cases that advance the rights of both women and men (Baines & Rubio-Marín, 2005). The chapter by Andrews shows that despite being few, women judges on the Constitutional Court of South Africa have delivered some progressive judgements on women's rights issues.

Diversity in the composition of the bench matters for promoting democratic principles of equality, representation, and inclusion. Zambia and Zimbabwe have achieved gender parity, with more than 50% representation of women within all levels of the judiciary. Yet, other Southern African states are struggling, including Namibia, which, at the time of this writing, has no woman on the Supreme Court. These examples, though relatively few when compared across all 54 states, do signal that we cannot yet conclude that sex diversity does not matter. More studies are needed to understand the changing dynamics in different countries and the struggles women face in judicial appointment processes.

Although progress has been made in diversifying the sex composition of some benches, the process of making judicial appointments should be closely and constantly monitored. Women judges have made valuable contributions to the bench through jurisprudence, socialization of male colleagues on gender-related matters, and challenges to enshrined male institutional structures (Dawuni, 2016). Gender diversity on the bench signals *progress* toward gender equity in representation. Women and men should have equal access and opportunity to be judges and to adjudicate cases; because when they do, understanding of the *process* of using gender as an ordering principle in judicial appointments increases, as do the prospects for gender-responsive judging.

Contributions of the book

The selected essays in this book make important contributions to theory, practice, and policy by broadening our understanding of the nexus between gender and judging within the African context. Additionally, the findings are relevant for policymakers interested in understanding how laws affect women's rights and women's access to justice through the judiciary. These policy implications are instrumental in expanding the Women in Law and Business project of the World Bank by moving the discussion beyond examining the existence of laws to taking a closer look, by measuring judicial outcomes, at what these laws mean for women.

Additionally, the contributions in this volume provide important entry points for the operation of the World Bank and other development agencies by highlighting the need to reform the justice sector and to prioritize institutional reforms that are gender inclusive. These changes can be implemented through

programs aimed at promoting gender-inclusive lawmaking and gender-inclusive judicial training.

Taken individually and collectively, the chapters in this book cover several important debates by providing contextualized analyses within specific countries. First is the lingering question of what happens to women's rights after the promulgation of constitutions. Second, how are courts handling emerging gender issues such as the use of social media to inflict gender violence? Third, some chapters focus on the need to develop an expansive judicial interpretation that allows inclusivity in the definition of "gender" to protect non-gender binaries. Fourth, the trans-nationalization of gender beyond domestic courts is evident in the chapters on the African Commission and the ECOWAS Court, where we witness the roles women play in justice delivery, and how gender is constructed in judicial decisions, respectively. Fifth, two chapters—Tanzania, and Kenya and Uganda—underscore the importance of putting gender on the agenda of judicial training. Sixth, the chapters on Zambia and South Africa highlight the continued significance of promoting gender diversity in judicial appointments. Seventh, the chapters on the COVID-19 pandemic drive home the need for courts to be well equipped to deal with cases of violence against women, both during times of peace and more so during times of crises.

Organization of the book

The chapters in this book bring together socio-legal academic scholars, members of the judiciary, human rights defenders, and development policy analysts to examine a broad range of issues on gender and judging. All the chapters are grounded in different theoretical and methodology frameworks. Some are written from a highly academic perspective, and others are more policy oriented. Woven through each narrative are policy, judicial, and legal recommendations. Together, these chapters provide specific case studies from which patterns emerge for further exploration and for extrapolation to appropriate contexts. Although these case studies may not be, and do not claim to be, generalizable across the continent, this book is the first volume to provide a selection of comprehensive studies on gender and judging within the African context—and that is a significant contribution.

The 14 chapters in this volume have opened new frontiers for research on gender and judging across Africa. By emphasizing how gender as an ordering principle affects judicial interpretation processes within domestic and regional courts, this book has broadened the discussion on gender and the judiciary beyond a narrow focus on the symbolic representation of women as judges in African judiciaries. In examining judicial decision-making processes and outcomes, the chapters have queried the centering or decentering of gender in court cases, judicial training, and judicial appointments. Through the case analyses, we see both what happens when judges fail to recognize gender as an ordering principle in judicial decision-making processes and the critical role judicial training plays in making judges gender aware. The book is organized into four

interrelated categories. These categories are not mutually exclusive but cover themes that run concurrently across some chapters. The case studies in this book do not promise to exhaust the plethora of gender-related issues across the continent. Neither do they provide definitive answers to the complex questions concerning gender and judging. Instead, the book makes an important contribution to our understanding of gender and judging by highlighting the loop-back mechanism between the *process* of lawmaking as a necessary condition for gender-sensitive judicial decision-making, the essential elements for achieving *progress* in judicial interpretation of gender-sensitive cases, and the *prospects* for achieving gender equity by centering gender in judicial training of judges and promoting gender diversity on the bench. This book breaks new ground as the first volume to examine the nexus between gender and judging from African perspectives. The individual chapters presented will no doubt open new research avenues and generate more research questions about gender and judging across Africa. The findings will also inform judiciaries, policymakers, and judicial trainers about the need to pay closer attention to gender as an ordering principle of women's access to justice, equality before the law, and equitable representation in judicial decision-making.

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