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## ***Gender Mainstreaming in Legal and Constitutional Affairs***

Background Paper prepared by  
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### ***Gender Mainstreaming in Legal and Constitutional Affairs***

1. **Why should the Judiciary pay attention to Gender Equality and Equity?**

If women and men are not only to enjoy their human rights, but are to participate fully in national development, access to justice by all is critical. Respect for human rights lies at the heart of the UN Charter and the International Bill of Rights. While these instruments clearly state that there should be no discrimination on the basis of sex, and while women's rights have been explicitly articulated as an integral part of international human rights in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by the UN General Assembly in 1979, gender-based discrimination persists internationally. Clear disparities between men and women remain in the administration of justice, with women benefiting least from the process. These disparities are heightened by tendencies within the human rights discourse to focus on the relationship between the state and the individual in the public arena, and unwillingness by states to assume responsibility for eliminating and punishing violations against women in the private sphere, where many such abuses take place.

Although in many Commonwealth countries the domestic legal system allows for the observance of international laws, many are not sufficiently well known. Legal training of lawyers has not always included adequate instruction in international and regional human rights norms, and case materials concerning these norms have not been readily available to judges and lawyers. While some enlightened judges have sought to interpret fundamental rights and obligations against the background of international and regional human rights norms and jurisprudence, their application has been limited. If gender biases are to be eradicated from judicial decision-making, and gender equality to be promoted through constitutional and legal affairs, members of the legal profession must be provided with necessary knowledge. Ongoing training on gender and human rights is a key means of addressing this issue. Gender balance in the composition of the bench, at all levels, and in all other court personnel, is also required.

## **2. The Commonwealth's Judicial Colloquia**

The Commonwealth has recognised that judges are strategically placed to play a leadership role in advancing the human rights of women and the girl child through the judiciary. Since 1994 the Secretariat, in collaboration with the CMJA and the Commonwealth Foundation, has organised four judicial colloquia to sensitise judges to the domestic application of international and regional human rights standards relevant to the human rights of women and the girl child. These were held for the

African region in Zimbabwe in 1994, at the Fourth UN World Conference on Women in Beijing in 1995, for Asia and the Pacific regions in Hong Kong in 1996, and in the Caribbean region in Guyana in 1997. Each was well attended by female and male Chief Justices, Judges of Supreme Courts, Courts of Appeal, High Courts and District Courts; judicial officers; lawyers; academics and researchers; representatives of UN agencies and regional organisations; and NGOs.

The *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women*, the *Hong Kong Conclusions*, and the *Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl Child* each resulted from these colloquia. Publications, including *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* (Byrnes, Connors and Bik, 1997), based on the Asia and Pacific colloquium; and *Gender Equality and the Judiciary* (Adams and Byrnes, 1999), based on the Caribbean colloquium, provide valuable resource material for judges, lawyers, human rights activists and NGOs working on women's human rights. Further to these, the Secretariat, with Cavendish Press, is about to publish a compilation of case laws from around the Commonwealth that address women's human rights issues.

### **3. Gender Mainstreaming in Legal and Constitutional Affairs**

In 1996, the Commonwealth Minister's Responsible for Women's Affairs mandated the Commonwealth Secretariat to develop the concept of the Gender Management System (GMS), a system-wide approach to promoting gender equality. It is a strategy for making women's as well as men's concerns and experiences an integral part of the design, implementation, monitoring and evaluation of all policies and development programmes in the political, economic and social spheres, to ensure that women and men benefit equally, and that inequality is not perpetuated. The ultimate goal of the gender management system is to achieve gender equality.

Many states have taken important steps in this direction through legislative provisions. Constitutional guarantees and legislative reforms are nevertheless insufficient unless they translate into positive commitments to women's advancement, empowerment and enjoyment of equal opportunities. Factors significant to achieving real change include political will, commitment of resources, development of concrete and realistic targets, and programmes grounded at the national level, based on local contexts and evaluation. A multi-pronged approach,

including a programme of law reform, is essential to gender mainstreaming and transforming gender relations in particular societal contexts. To assist countries with this process, the Commonwealth Secretariat has published a reference manual entitled *Gender Mainstreaming in Legal and Constitutional Affairs*.

## **Obstacles to Gender Equality and Equity in Legal and Constitutional Affairs**

Specific obstacles to gender equality in legal and constitutional affairs include:

- Lack of constitutional guarantees;
- State ratification of treaties with reservations;
- Discriminatory laws and legal practices;
- A multiplicity of laws (several legal systems and structures, including secular state, personal, religious and customary laws);
- Harsh criminal and civil law regimes (adultery);
- An informal sub-legal culture (quasi-legal bodies such as religious organisations, and village communities or elders);
- Limited political participation by women;
- Cultural acceptance of gender discrimination;
- Lack of or limited access to education;
- Legal illiteracy;
- Early or customary marriages;
- Lack of access to credit;
- Prohibitions on land ownership;
- Disparity between urban and rural women.

## **Possible steps in addressing the situation**

There is a need to review state legal systems, with due regard to all sources, structures and processes of law. Steps in such a review process could include:

- A gender analysis and audit of the content of existing laws and the political, economic and social position of women and men;
- Determining policy objectives and methods for achieving objectives (including **substantive**: law reform, need for new legislation, and repeal of existing laws; **structural**: court processes, legal aid, data collection in courts; **cultural**: widespread acceptance of discriminatory practices, judicial

insensitivity; **economic**: cost of legal services, cannot afford time away from work to attend court);

- Identification of stakeholders (legislators at national, provincial and local levels; law officers, including the Attorney-General and Solicitor General; law enforcement agencies, including prosecutors, prison service, police, probation and social services; the judiciary; parliamentary drafters; human rights commissions; local officials, administrators and councillors; military personnel; ombudspersons; civil society in its broadest usage).

### **Substantive Issues to be Addressed through Constitutional and Legal Reform**

- **Public life** - the need for gender balance at all levels of government and decision-making, particularly in parliament;
- **Nationality laws** - equal rights with respect to acquisition, change or retention of nationality; elimination of discrimination against women who marry non-nationals, and restrictions on women passing their nationality to their children;
- **Labour laws** - non-discriminatory labour recruitment, promotion and retention policies; equal pay for equal work; minimum wage; maternity protection; sexual harassment policies; family friendly environments;
- **Health and reproductive rights** - decriminalisation of abortion and husband's consent required for women to access family planning information, supplies or services;
- **Violence against women** - the elimination of violence against women, a Commonwealth priority for action;
- **Family law** - age of marriage; consent to marriage; registration of marriage; regimes for marital and separate property; rights and duties with respect to children; responsibilities in marriage; grounds for dissolution and annulment; custody and maintenance provisions.

## **4. Conclusions**

Access to justice by all is critical if women and men are not only to enjoy their human rights, but to participate fully in national development. What can law ministers do to make this a reality? They can encourage:

- Constitutional and legislative audits and reform;
- States to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), without reservations;
- Countries to take an integrated approach to combating violence against women, involving all stakeholders;
- Gender-training programmes as part of the core training received by all personnel in the legal system: as continuing training programmes for legal policy and decision-makers at all levels, including judges and magistrates; and for judicial and law enforcement officials, including police, who have a critical role to play in protecting and promoting the human rights of women and girls.
- Greater collaboration between the state, judiciary and civil society.