

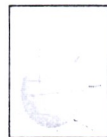
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# Gender and Justice

## GENDER MAINSTREAMING IN THE KENYAN JUDICIARY

A Handbook and Training Manual  
On Gender Equality In the Courts

ICJ KENYA



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ICJ

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On Gender Equality In the Courts

KENYA NATIONAL ASSEMBLY

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ICJ Kenya



UNDP



# Gender and Justice

GENDER MAINSTREAMING  
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## **Acknowledgement**

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<sup>1</sup> KMJA members Nyanza Region

## **KEY CONCEPTS**

### **Sex**

This refers to the biological difference between men and women.

### **Gender**

This describes all the socially-given attributes, roles and activities connected to ones sex, male or female in a given society. Gender is related to how we are perceived and expected to think and act as women and men because of the way society defines concepts of masculinity and femininity. Gender is also about who has power and does not refer to men or women, but to the relationship between them, their society and the way it is socially construed.

### **Gender Relations**

These are the social relationships between men as a sex and women as a sex that create and reproduce systematic differences in the positioning of men and women. The relations are both of connection and mutual support and of separation and competition, of difference and inequality.

They are also about the way that power is dealt with between the sexes; about the way that responsibilities and claims are allocated and about the way is given to each.

### **Gender Analysis**

This is a thorough analysis of the relations between men and women and the impact that certain policies have on both sexes.

### **Gender Equality**

This refers to giving men and women equal opportunities, rights and obligations in all spheres of life. It entails the concept that all human beings, both men and women are free to develop their personal skills and make choices without limitations set by stereotypes, rigid gender roles and prejudices. It also refers to the fact that different behaviours, aspirations and needs of women and men are considered, valued and favoured equally. Gender equality does not mean that women and men become the same, but that their rights, responsibilities and opportunities are not dictated by them being born men or female.

### **Gender Equity**

This refers to fair treatment of women and men, according to their respective needs. This may include equal treatment or treatment that is different but which is considered equivalent in terms of rights, benefits, obligations and opportunities.

### **Gender Mainstreaming**

Based on a gender analysis, mainstreaming is a strategy for making women's, as well as men's, concerns and experiences an integral dimension of design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres, so that women and men both benefit equally and inequality is not perpetuated, with the ultimate goal of achieving gender equality.<sup>2</sup>

### **Access and Control of Resources**

Access is the opportunity to make use of something whereas, control is the ability to decide its use and impose that definition on others.

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<sup>2</sup> UN's Economic and Social Council (ECOSOC) conclusions 1997/2

## **INTRODUCTION**

This publication aims to sensitise mainly judicial officers on gender aspects/bias within our judicial system, with a view of bringing the disadvantaged sex (mostly women) at par with the favoured (mostly men) in search of the ultimate goal of eliminating gender gaps that exist in the judicial system.

ICJ Kenya recognises that the main strategy of achieving this goal is through training. This involves gender training on various legal issues both local and international. However, in so doing, ICJ Kenya recognises that there are other factors which shape gender relations, and provide different opportunities and constraints for men and women which are broad and interrelated, and therefore, gender issues cannot be addressed effectively without incorporating and assessing other factors, such as;

- Community norms and social hierarchy, such as family/community power structure and religion;
- General economic conditions, such as poverty levels, inflation rates, income distribution, international terms of trade, infrastructure;
- Political events, both internal and external;
- Legal parameters;
- Training and education.

Gender training is increasingly viewed as a critical aspect of development training. In our gender training, we focus on personal dimensions as well as organizational systems, policies and procedures. On personal dimension, the training challenges attitudes and stereotypes about gender differences held by judicial officers within the Judiciary. This is aimed at raising the awareness of individuals judicial officers and identify inequalities in treatment and the consequences thereof.

The aim of this publication and the project as a whole is to ensure that policies that promote gender equity are devised and implemented. This is aimed at phasing out gender-blind policies which incorporate biases in favour of existing gender relations which usually tend to exclude women; and replace them with gender-aware policies that recognize that development actors are both men and women, and that they are constrained in different, often unequal ways, and that they may consequently have differing and sometimes conflicting needs, interests and priorities.

Within gender-aware policies, ICJ Kenya aims to devise policies that are;

- **Neutral**

These are the policies which use the knowledge of gender differences in a given context to overcome biases in delivery to ensure that they target and benefit both men and women effectively, in terms of their practical gender needs, and work within the existing gender division of resources and responsibilities.

- **Specific**

These are the policies which use the knowledge of gender differences in a given context to respond to the practical gender needs of a specific sex, and work within the existing gender division of resources and responsibilities.

- **Redistributive**

These are the policies that intend to transform existing distributions to create a more balanced relationship between the sexes, touching on strategic gender interests, and may target both men and women, or one or other sex specifically.

The main aim of this publication therefore is to;-

- ← Identify a suitable participatory learning methodology for judicial officers at all levels for their training in gender standards under domestic, international law and gender policy development by these offices and court administrators;
- ← Identify suitable procedures for checking gender inequity within the Judiciary;
- ← Prepare an elaborate training manual that is participant-centred and which incorporates gender standards and the relevant procedures. This is out of the recognition that education needs to be ongoing and is essential in the process of eliminating bias in the courts.

## Part I : Conduct Guidelines for all Judicial Staff

### Introduction

*‘In our system of government, it is imperative that all citizens have confidence in the fairness and neutrality of our judicial process. If participants in the judicial system, whether they be litigants, attorneys of the public at large, sense that one group is more credible, more powerful and more effective in the judicial arena than another group, then a system premised on the concept of equal rights and equal access to justice for all, is weakened.’<sup>3</sup>*

Kenya is bound by the following international legal instruments concerning equality before the law including equality on gender issues:-

- (i) 1948 Universal Declaration of Human Rights;
- (ii) 1979 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW);
- (iii) The UN Declaration on Violence against Women;
- (iv) 1995 Beijing Platform for Action (meant to support women empowerment to guarantee human right and to achieve gender equality in formulation of all Government Policies and Programmes).

That there is an endemic problem of gender bias within our judicial system is a fact that no one “in the know” about the mode of operations and activities within our courts can dispute. This unfortunate situation need not be so. For quite some time now, the ICJ Kenya has been concerned about this problem, as it endeavours to attain equal protection of rights for both men and women through the Judiciary.

The existence of gender bias in our Judiciary is a fact we have to acknowledge and address accordingly. The Judiciary has the primary responsibility of dealing with this in-house problem that is so glaringly part and parcel of its institutional operation. In collaboration with the various gender-interest groups, the legal fraternity and other concerned players and stakeholders, the Judiciary can do much to help check and or altogether stamp out the gender problem within its ranks. Through such joint ventures, a suitable Task Force on Gender Equity in the Judiciary (in all its dimensions) could effectively eradicate gender bias not only directed towards women judicial officers but also toward those of them who are court users such as advocates, litigants and witnesses. Such a Task Force could be established to examine:-

- ← Ways and means through which the Judicial Service Commission can address those needs.
- ← Whether the Judiciary should begin by giving official recognition to the fact that practices which reflect gender bias do occur in our courts and that the same must be addressed by the presiding judicial officers if the courts are to fulfil their role as the champions of individual rights and defenders against injustice of all kinds including gender bias.

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<sup>3</sup> 1987 Final Report of the Task Force on Women and the Legal Profession, State Bar of New Mexico, USA.

← Whether we need to pass an anti-discrimination legislation in Kenya, outlawing all forms of discriminatory practices before any tribunal or in the courts.

This Handbook & Training Manual has been developed in recognition of the fact that gender bias as a problem exists in our court system, and that we abhor that situation and hence our determination to eliminate it. In order to accomplish this objective, the starting point should be that all individuals involved in the court system should comply with the guidelines in this handbook. In addition to that, all persons involved in the court system should illustrate their commitment to help stamp out this menace by refusing to sanction or condone gender-biased behaviour in any form whatsoever. This requires that judicial officers at all levels clearly understand and appreciate the nature of and dimension taken by the gender problem within our judicial system, which aspect leads us to the next issue.

### **What is Gender Bias?**

Broadly speaking, bias can be considered as an attitude, prejudice or point of view that colours our judgments and decisions, often based on cultural assumptions, habit or tradition. Gender bias is thus a form of bias based on sexual stereotypes and culturally defined gender roles. Whatever the cause, be it intentional or unintentional, gender bias must be eliminated if we are to uphold the principles of fairness, equity for all, which are the hallmark of any modern judicial system which our own prides itself to be part of.

It is not difficult to identify gender bias when we encounter it within the Judiciary; common cultural assumptions, and hence biases, about women are that women and their work are less valuable than men and their work, that most women are and should be economically dependent upon men; and that behaviour different from traditional model of women as submissive, is unnatural. This is by no means to say that there are no bias shown towards men either for they have their share too albeit on a much lesser scale: a common bias about men is that they have a poor sense of endurance in the face of hardship or that they are less capable of caring for small children than women.

Because gender bias is based on long-standing, often inarticulate cultural assumptions, it has been difficult to eradicate. Common forms of speech have tended to make women invisible and to reinforce social pattern of male dominance. This aspect is for instance reflected in various publications of the judicial forms and precedents, regulations and statutes and other publications, all of which have been written in words and expressions that clearly exclude women or perpetuate the assumption that men form the basis for the norm. For our Judiciary to appear gender-sensitive, it requires that such words and expression be replaced with gender-neutral terms, which better reflect a world where men and women are treated with equal respect.

This Handbook & Training Manual is designed to address gender bias while at the same time recognizing that bias based on one's race, ethnicity, dialect/language, disability, age, economics and sexual orientation also do exist, and that none should have a place in the courtroom environment, or within the judicial system. Many of the guidelines in this handbook translate freely to such biases.

### Common illustrations of Courtroom Gender Bias:

Far too often, and without our conscious knowledge thereof, gender bias takes place in our courts in various manifestations which may include but are not limited to the following instances:-

*i) The tendency on the part of some judges and magistrates, mostly male ones, to treat female advocates with greater defence and courtesy than their male counterparts.*

Male advocates tend to see this behaviour as favouritism toward their female counterparts while female advocates may well find same condescending and paternalistic.

*ii) Lack of sensitivity in the types of questions asked.*

This problem is mainly severe in sexual offences, which more often than not leave victims of domestic abuse or sexual violence devastated. Questions to a battered spouse about “*what she did to provoke a beating, or why she returned to the home,*” reflect a judge’s or a magistrate’s biased assumptions. Again, this kind of scenario arises mainly where the presiding officer happens to be male. Therefore, it is important that judges and magistrates are sensitive to the types of questions they ask about women’s work, or feelings so that the nature of the women involved are not or do not appear demeaned. Work within the home is no less important than work outside the home.

*iii) Expression of spite, contempt and scorn towards women without the spoken word.*

Female members coming before the courts, whether as members of the judicial staff, litigants, witnesses, advocates and other court users are silent sufferers of this particular painful vice. Non-verbal cues can be significant manifestations of gender bias. Looking less alert and attentive, failing to take notes or assuming a bored posture or expression on the face when a woman speaks in a courtroom convey in a powerful way the message that women’s presentations are less important than those of men.

*iv) Hesitancy to decisively deal with incidences of gender bias on the spot.*

Many judges and magistrates, especially male, do not respond assertively to gender-biased misconduct that occur in their presence. If male advocates engage in blatant or subtle forms of gender bias toward female advocates, litigants or witnesses, it is important that the presiding judicial officer intervenes forthwith and stops this type of behaviour. Behaviour or statements that are demeaning to women must be excluded from the courtroom.<sup>4</sup> This is particularly necessary given the likelihood that a firm caution from the presiding judicial officer at the first instance of inappropriate behaviour will tend to stop it, without major disruption the proceedings or embarrassment to the woman.

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<sup>4</sup> See the Supreme Court New Mexico Statement concerning Gender Bias in the Courtroom, attached as Appendix A, which specifically prohibits this behaviour.

**Routing out Gender bias from the Judiciary :  
An obligation that requires concerted effort from all of us.**

Though the Judiciary and the general legal fraternity are the main players in the matter, the issue of eliminating gender bias from our judicial system does not rest with the courts alone. As is clear from the foregoing examples, the problem affects a cross-section of society and hence all concerned parties from within or outside the Judiciary should throw in their lot to help solve it. This can be done easily if the parties concerned appreciated and understood their respective roles, rights and responsibilities in this worthy course.

**The Role of the Judges and Magistrates as presiding judicial officer in eliminating Gender Bias.**

Judges and magistrates are the visible leadership of the judicial system and hence they are best placed to play an important role in eliminating gender bias. However in the absence of some well spelt-out written **Judicial Code of Conduct** which provides them with clear guidelines as to the expected mode of behaviour and the accepted standards to be attained, leaves the issue to their good senses which, ultimately may or may not prove good enough. Either way, no sanctions loom over them to compel conformance and all is left to chance. Perhaps rationalized, well-written **Judicial Code of Conduct** is urgently needed that would make it mandatory for all judges and magistrates to establish, maintain, observe and enforce high standards of conduct to ensure observance of gender sensitivity and fairness on their part so as to preserve the integrity of the Judiciary. Accordingly, such a Judicial Code of Conduct could lay it that as a judge or a magistrate, one has a reciprocal right and responsibility to:-

- ← Be treated with respect and courtesy;
- ← Expect non-biased treatment from court employees, litigants, witnesses and advocates and other court users;
- ← Object to gender or other sex-biased statement or remarks made by litigants, advocates, court employees and other users of court.
- ← Display leadership in setting a non-biased tone and demeanor for your courtroom and judicial operations;
- ← Take necessary steps to correct discriminatory attitudes or comments to ensure a bias-free court environment;
- ← Treat litigants, advocates, witnesses, court staffs and all other court users with fairness and courtesy;
- ← Avoid gender, sex-based or other forms of bias in your own decision making and court interactions.

**Judges and Magistrates as the principal judicial torchbearers in this campaign should:-****a) DO the following:-**

- < Treat all individuals with courtesy and respect.
- < Address women and men with gender neutral terms such as 'counsel' or 'ladies and gentlemen'
- < Address all individuals by last name and appropriate titles in the public setting, such as 'Mr' and 'Ms' unless 'Miss' or 'Mrs' is requested.
- < Recognize and acknowledge gender and other stereotypes, such as racial, ethnic, and so on and remove those biases from the courtroom.
- < Make sure that all communications, both written and verbal, are gender neutral.
- < Discuss biased actions with individuals who may be unaware of their behaviour and its impact, and stress that such behaviour will not be tolerated.
- < Provide all individuals equal treatment regardless of gender, racial or ethnic background, age, physical limitation, social class or ability to speak in any particular language, be it English or Kiswahili.
- < Recognize that all matters heard by the court are important and should be taken down in writing as far as possible.
- < Understand that the impact of biased behaviour on the receiver is more important than the intent of the speaker/actor.

**b) NOT DO the following:**

- < Use terms of endearment towards women, such as 'the lovely/beautiful one', 'sweetie', 'honey' or 'my dear' in courthouse interactions.
- < Make assumptions about individuals or their role in court based on stereotypes or without knowledge.
- < Subject victims of crime to unjust scrutiny because of the nature of the act(s) perpetrated against them, their gender, race, ethnicity or social class.
- < Subject individuals to comments, gestures, touching or other actions that can offend them or make them feel uncomfortable.
- < Make sexual jokes or remarks that play on sexual stereotypes in a courtroom setting.
- < Comment on the physical appearance of others, for such comments may be perceived as detracting from the integrity and importance of that person.

## **Rights and Responsibilities of other Court Staffers in eliminating Gender Bias in the Judiciary**

The campaign against gender bias in the Judiciary cannot succeed merely by casting the burden of carrying it through on the judges and magistrates alone. The involvement of other court personnel, especially the administrative department of the Judiciary is equally important. Employees that provide administrative support within the Judiciary are often the first and sometimes the only contact, members of the public have in the justice system. Because of this fact, their potential as a major contributing factor to the problem of gender bias should not be over-looked. Consequently, they should be duty-bound no less than the judges and the magistrates to observe and uphold the same standards on gender issues. By conveying respect and providing assistance to all without discrimination of any kind including gender, court employees can play an important role in eliminating gender bias in the administration of justice within our judicial system. This feat can be best achieved by having a **Code of Conduct for Court Employees** that clearly spells out their rights and responsibilities in this regard.

Such a Code could provide that as court employees, they have the right and responsibility to:-

- < Be treated with respect and courtesy.
- < Be provided with written personnel policies that prohibit discriminatory treatment and promote fairness to all.
- < Expect non-biased treatment from judges, magistrates, witnesses, litigants, advocates and all other court users.
- < Treat judges, magistrates, litigants, advocates, witnesses and all other court users with fairness, respect and courtesy.
- < Monitor own behaviour and attitudes to avoid discrimination due to a person's gender, sex, race, ethnicity, and so on.

## **The Role of Advocates as Members of the Legal Profession and Officers of the Court in Eliminating Gender Bias**

Advocates as officers of the court have an important role and obligation in maintaining the dignity and integrity of the court. Through their conduct, treatment of the presiding judicial officers, witnesses, litigants, court employees and other court users, they have a significant impact on the legal system and the pursuit of justice. Such an impact could well have far-reaching implications for the gender problem in the Judiciary and hence advocates too cannot escape their share of burden when it comes to fighting gender bias within the Judiciary. Their high and constant level of interaction with the Judiciary particularly endears them to effectively perform this worthy role. A Code of Conduct spelling out their rights and responsibilities in this regard would go along way in helping eradicate the problem of gender bias within the Judiciary.

Such a **Code of Conduct for Advocates** could lay it that as Counsel, they have the right and responsibility to:-

- ⟨ Be treated with fairness, courtesy and respect by judges and magistrates, court personnel, litigants, witnesses, fellow counsel and other court users.
- ⟨ Expect non-biased treatment from judges, magistrates and litigants.
- ⟨ Object to gender or racially biased statements or remarks made by judges, magistrates, litigants or court employees.
- ⟨ Treat the judge, magistrates, court employees, witnesses, litigants, fellow advocates and other court users with fairness, respect and courtesy.
- ⟨ Monitor their own behaviour, comments and attitudes to ensure that they do not display bias due to gender, race, ethnicity, and so on.

### **Gender Bias-Related Complaints Handling Mechanisms within the Legal System**

Having a well-defined code of conduct for all concerned players alone as heretofore suggested is not enough if the battle against gender discrimination within our judicial system is to be won. Experience in law enforcement within any jurisdiction clearly shows that even those with the best set of laws still record non-compliance by the subjects for such is the human nature. For this reason, a sound workable mechanism has to be designed to take care of cases of gender bias related complaints against the various parties concerned.

#### **Complaints against the Judges and Magistrates**

The Judicial Code of Conduct should provide standards for appropriate and inappropriate judicial behaviour on all matters including one relating to gender bias so that those with complaints about the conduct of a particular judge or magistrate can officially lodge the same, possibly by contacting:-

- The Hon Chief Justice
- Judicial Service Commission
- Or any other such institution that may be specified.

#### **Complaints about Court Policies and Procedures**

Likewise, if a person has a complaint about policies and procedures employed by a particular court regarding gender bias or any other discriminatory-related type of complaints, he or she should contact the local court administrator or supervisor, or:

- The Hon Chief Justice
- Judicial Service Commission
- Or any other such institution that may be specified, such as the Registrar

### **Complaints against Court Employees**

If a person has a complaint touching on gender issues as to the conduct of a court employee, he or she should contact the local court administrator or supervisor, or the Registrar of the High Court.

### **Complaints against Advocates**

The Rules of Professional Conduct provides standards for appropriate and inappropriate advocate behaviour. If a person has a complaint regarding the conduct of an advocate, he or she should contact:-

Law Society of Kenya (LSK)  
Professional Centre  
Parliament Road  
Nairobi

OR

The Complaints Commission  
Maendeleo House  
Monrovia Street,  
Nairobi

## **Part II : Training Manual**

### **General Guidelines to be applied**

#### Gender Issues and the Courts

All judicial staff should acknowledge the presence of gender bias in the Judiciary and a preliminary step towards solving the problem identified.

A general preliminary point to be noted is that the presence of gender bias in the culture, process and practices in our courts limits and erodes the ability of the judicial system to respond to the problems facing women in our society and this remains so whether such women are within the court as staffers or as court users or participants in various court activities eg as litigants or witnesses. A similar situation holds true for women affected by domestic violence, sexual harassment or other sex related offences such as rape, all of whom ultimately have to seek legal redress in courts of law. It is the responsibility of the Judiciary to address the question of general equality for all before the law and to raise awareness on gender issues in all aspects of judicial staff, of the existence of gender bias within the Judiciary as a necessary preliminary step towards tackling this problem.

#### The Judiciary and Gender bias

**Judicial staff should be involved and actively participate in the development of gender-sensitive policies within our judicial system**

The Judiciary must at all times be in a position to inspire confidence in the public that it serves. All studies previously carried in the last decade in jurisdiction such as the USA, Canada and Australia clearly identify gender bias as a pervasive systemic problem, which runs deep in many legal systems and ours is no exception. Such studies confirm that many people in the legal fraternity, from both the Bar and the Bench still adhere to traditional views about the supposed respective roles of women and men in society. Within the Judiciary, such attitude affects the recognition and consideration of women's experiences over the years thereby leaving them bare to all sorts of discrimination based on gender. The only difference between Kenya and those other jurisdictions referred to above is that whereas various gender sensitive initiatives have been taken and implemented in the latter, our situation remains unchanged to date and hence the persistence of gender bias in our judicial system. Our judicial staff should understand this factual situation.

It cannot be overemphasized that of all the places, the judicial system should be the last place where incidences of gender bias should so blatantly manifest themselves and where corrective policy action aimed at remedying such anomalies should be wanting or lacking altogether. The Judiciary is not only

a vital functionary of the various state organs but is also an important beacon of hope to members of the society that it serves, all of whom ought to feel free to turn to it without any fear, reservation or circumspection whenever their rights are threatened or abrogated. If and when members of the society perceive gender bias to exist within a legal system, they will invariably lose respect for that system as well as for the law itself, if they never get to suffer from it themselves. Such a perception deals a fatal blow to the rule of law and hence every step should be taken to ensure it is avoided at all costs. Our judicial staff has to be heavily committed to such a cause through their active participation to preserve the integrity of the Judiciary.

The notion of equality before the law, in all senses of that term, is a core tenet of our constitutional norm<sup>5</sup>. This is understood by the fact that our Bill of Rights guarantees the individual fundamental freedom and basic rights including the rights to equality before the law without discrimination on a number of grounds including gender. Although we have in Kenya no legislation on gender equality, we have the constitutional provision aforementioned. Even then, the same constitution is itself gender-insensitive in some respects such as in the case of its provisions on citizenship. There are also several pieces of legislation that are gender biased such as the Armed Forces Act and the Police Act which circumscribe the rights of women within the forces. It is to the Judiciary that all these aspects fall when it comes to the issues of interpretation and giving effect to such provisions of the law.

Naturally, for purposes of meeting gender-sensitivity requirements in the Judiciary, we need on the part of judges and magistrates some sort of judicial activism that is pro-gender such that the spirit of the constitutional provisions on equality above referred to can be given true meaning and full expression. Such a situation is only possible if our judges and magistrates are able to adopt appropriate gender sensitive attitudes that are consistent with our aspirations to attain a more balanced and fairly gender sensitive strides in that direction and continue to do even better. We in Kenya have done nothing or very little in this regard and hence we cannot afford to rest on our laurels but instead put all efforts aimed at bringing about greater gender equality as a matter of overriding priority.

It is in view of the foregoing that it becomes necessary that the Judiciary as an institution, together with all its staff, urgently takes the lead in initiating and supporting gender equality from within itself first, if it is to endear itself to all members of the society. To that end it is crucial that the Judiciary evolves relevant gender sensitive policy guidelines and entrench the same within its activities and processes so as to reflect this important imperative of our age; a policy in which inequality based on any ground including gender, should be met with zero tolerance. Our Judiciary should encourage a policy which would allow all men and women appearing before it to have equal conditions for the realization of their full human rights and potential in our society without any discrimination whatsoever and to be accorded the same chance to benefit fully from the fruits of such endeavours.

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<sup>5</sup> see the provisions relating to protection of basic rights and fundamental freedoms of the Kenya Constitution.

### Gender Bias within the Judiciary

Ensure that all judicial staff understand and appreciate gender bias and its implications to the rule of law and know what it is all about.

This is particularly crucial if we are to rely heavily on the judicial staff to help eradicate this menace. Previous attempts towards defining the problem and setting out its implications to the legal system could perhaps be instructive in this connection:-

#### Towards a definition

i) *As per the 1993 Australian Law Reform Commission Paper on Equality before the law:-*

“Bias is a prejudice or special influence that sways the mind. It can be predisposition or prejudice, which leads to a result, which is distorted, unfair or unequal. In the legal system, this predisposition or prejudice may be on the part of a court or tribunal, or it may actually form part of the law itself. In either case the bias can lead to discrimination”.

ii) *As per Justice Rosalie Silverman Abella, “Human Rights And the Judicial Role”, Australian Institute of Judicial Administration Annual Oration in Judicial Administration.*

It is fundamental that judges be:-

- < Free from inappropriate or undue influence;
- < Independent in fact and appearance, and;
- < Intellectually willing and able to hear the evidence and arguments with an open mind.

However, neutrality and impartiality do not and cannot mean the judge has prior conceptions, opinions or sensibilities about society’s values. It means only that those preconceptions ought not to close his or her mind to the evidence and arguments presented. In assessing how impartial the court is, the tendency to use labels or epithets instead of analysis is not particularly enlightening. Provocative phrases may all too easily become shorthand ways to avoid thinking through rights issues.

iii) *As per the dicta in United States – vs – De Gross 960 F. 2<sup>nd</sup> 1433, 1438(9<sup>th</sup> Cir. 992)*

“Gender discrimination in the judicial system is a stimulant to community prejudice which impedes equal justice for women”

In fact, gender bias as an acknowledged systemic form of discrimination in the legal system mostly arises unconsciously, based upon attitudes and stereotypes rather than deliberate decision. Proving this attitudinal bias is difficult, and hard to prevent and correct. Biased attitudes affecting individual cases can then affect the development of law and the treatment of women within the judicial system and in the society at large.

### Forms of Gender Bias within the Judiciary

**Ensure that all members of the judicial staff are well acquainted with the same.**

The relevance of such a requirement lies in the fact that only illustrating to judicial staff by way of real life common examples can one drive the point home easily. Gender bias within the Judiciary takes many dimensions, thus they are many and varied and can arise out of the following:-

- i) In actions or behaviour of individuals or in decision-making by participants in the justice system which is based, or reveals reliance on stereotypical attitudes about the supposed nature and roles of men and women or of their relative worth, rather than being based upon an independent valuation of individual ability, life experience and aspirations.
- ii) Myths and misconceptions about the social and economic realities encountered by both sexes.

It may also exist when:-

- iii) Issues are viewed only from the male perspective;
- iv) Problems of women are trivialized or over-simplified;
- v) Women are not taken seriously and granted the same credibility as men;
- vi) It forms part of the cultural traditions and in institutional practices;
- vii) The substance of law fails to reflect an integrated and balanced view of experiences in a historical perspective;
- viii) There is absence of appropriate laws geared towards altering gender bias, which apparently seems to be in-built into the nature and operation of law.

## **“Gender Sensitivity” Checklist on the question of Equity before the law in our Judiciary**

All judicial staff ought to ensure that they always remember and observe the following:

Attainment of gender equality in the Judiciary necessarily demands recognition that the present social, economic, cultural and political systems are gendered; that women’s unequal status is systemic’ that such pattern is further affected by gender considerations and that as a means of combating gender bias within the legal system, it is necessary to incorporate women’s specificity, priorities and values into all major social institutions including the Judiciary.

Achieving gender equality and fairness within the Judiciary will also require changes in institutional practices in course and in the social relations through which disparities are reinforced and sustained.

Gender equality is an important theme that should be integrated into all policies, programmes and projects within the Judiciary as a matter of priority.

The Judiciary is the last bastion against injustice of any sort including gender bias. Achieving social justice including gender equality requires recognition that every policy, programme and project affect women and men differently. Women and men have different perspectives, needs, interests and roles all of which may be affected by their gender but by no means should the same be used as a basis for developing gender-biased stereotypes and other forms of discrimination based on gender.

Achieving gender equality within the Judiciary requires specific measures that are aimed at addressing systemic discrimination. Such measures should be geared towards compensating for historical and social disadvantages that prevent women from otherwise operating on a level playing field with men. Under no circumstances should such measures be designed to make women and men same but merely to ensure that both sexes enjoy equal opportunities to make choices about their own lives. To achieve that objective within the Judiciary as an institution, requires a transformation of the various attitudes, policies, laws, procedures, norms and beliefs, which exemplify gender inequality.

The policy of Judicial Service Commission in matters of gender equality should be informed by and reflect the spirit of gender sensitive constitutional provisions<sup>6</sup> which outlaw discriminatory treatment of individuals on a number of grounds including gender. It is crucial that true meaning be given to such provisions rather than mere lip-service.

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<sup>6</sup> sec 82, Kenya Constitution.

Partnership between women and men is necessary in achieving gender equality. Changes ought to be effected in terms of attitudinal disposition and behavioral traits, which are out of tune with gender-equality within the judicial system. Under no circumstances, should there be tolerance to stereotyping of the supposed roles and responsibilities of men and women in various places, be it at home, at the workplace or within the community at large.

There should be recognition within the Judiciary that the advancement of women and the question of achieving parity between the sexes are matters of human rights and a necessary condition for social justice. Gender equality in the Judiciary is a necessary prerequisite for the attainment of all forms of security in the society, be it social, cultural, economic or political and hence it would be a worthwhile cause for the Judiciary to invest in.

Recognition should be given to the fact that there exists gender bias within the court system and that this fact poses a real danger not only to the rule of law but also to the general administration of justice within our legal system. Consequently, there is an urgent need for appropriate measure to be taken to deal with the problem. Such steps could include among others, setting up of a Gender Task Force consisting of membership from the Judiciary and all other interest groups such as the Law Society of Kenya (LSK), Federation of Kenyan Women Lawyers (FIDA), Kenyan Section of the International Commission of Jurists (ICJ-Kenya), the Law Reform Commission and various donors willing to extend technical and or financial support to such a cause.

The overriding responsibility of such a Task Force should be to raise awareness on gender issues within the Judiciary and recommend appropriate remedial measures which ought to be taken to bring about gender equality and fairness within the Judiciary. The Task Force could possibly begin by:-

- Identifying the various areas of gender bias within the Judiciary.
- Evolving a mechanism within the Judiciary for handling and decisively dealing with allegations of judicial misconduct taking the form of gender bias.
- Recommending to the Judiciary various ways of raising consciousness and sensitivity to gender issues, for example, through appropriate training methods aimed at inculcating gender fairness in all the judicial staff.
- Devising various gender fairness strategy programmes for collecting information on or about gender issues arising from time to time within the Judiciary, which issues require attention.
- Devising a mechanism for the implementation and continued monitoring of such measures as may be agreed on from time to time, aimed at fostering gender sensitivity within the Judiciary.

Need to evolve appropriate Rules of professional and judicial code of conduct that emphasis gender sensitivity and which outline the accepted standards of conduct to be observed by all cadres of judicial staff.

### **Role of Court Staff in Gender Bias**

**Devise gender sensitivity and awareness exercises amongst all staff serving in our judicial system.**

It is important that all members of our Judiciary whether judges, magistrates or other staffers are well informed about gender issues if progress is to be made in creating a culture of gender sensitivity and equality for all before the law within our Judiciary. The best way forward in this regard is to involve the staff in such activities as would achieve that objective.

#### **Methodology:**

- ⊙ Evolve in our courts formal initiatives concerning gender issues.
- ⊙ Commission experts to identify, study and research on various gender issues arising within the legal system which require attention.
- ⊙ Arrange within the Judiciary from time to time workshops and conferences in the context of continuing judicial gender awareness programmes as well as other training sessions or clinics during which adequate opportunity can be devoted to broader discussions on gender issues.

#### **Issues for consideration**

- ⊙ Invitation of suitable guest speakers to give keynote speeches and present discussion papers and the basis of which further discussion of gender based issues can be discussed with active participation of members of the Judiciary.
- ⊙ Making of attendance and active participation in such forum as necessary prerequisite for prospects of further advancement in one's career within the Judiciary.
- ⊙ Exploring what suitable gender awareness training programmes can be organized for judicial staff with a view to successfully redressing problems and perceptions of gender bias that are endemic within the Judiciary.
- ⊙ Identifying what gender related problems persist in relations to equal opportunity in employment and promotion within the administration of our courts.

- ⊙ Evolving suitable programmes that can be extended or designed to redress problems of gender bias within the courts.
- ⊙ Ensuring that the focus of such forum is devoted to the question of gender fairness and equity between the sexes within the Judiciary, with a view to attaining equality in the treatment of all judicial staff. A strategy of this kind can go along way towards eliminating discriminatory behaviour and help in developing policies targeted at eradicating all forms of gender bias within the Judiciary as a work place.

### **Other possible techniques and mechanism that could assist:**

- i) Evolution of an appropriate Workplace Diversity Plan that encapsulates such practices as are open and sensitive to gender issues.
- ii) Evolution of judicial recruitment policies, principles and guidelines, which embrace gender equity and equal employment opportunity. Such policies should address issues like gender discrimination, equal opportunities and sexual harassment within the Judiciary as a work place.
- iii) Putting in place a continuity gender support programmes that promote and encourage effective participation of women in the judicial workplace on equal terms with men.

### **Methodology**

- ⊙ The Judiciary should establish a committee on Gender Equality Issues & the Law Committee. Indeed such a committee is long overdue.
- ⊙ Such a step would be vital, as it would signify an increasing awareness in the Judiciary of gender issues and its relevance for the general administration of justice and the court's role in the management of such matters.
- ⊙ Central to the role of such a committee would be the mandate commensurate with the obligation of the court to do right according to law, to all manners of people appearing before or working within it.
- ⊙ Pursuant to such a mandate the committee should have a monitoring and informatory duty to the court of the various relevant gender issues that need to be addressed, and of ensuring that such necessary policies and procedures as are appropriate are put in place within the court to deal with those issues.

### **Use of Case studies:**

Involve judicial staff in such studies and illustrate to them by way of examples, instances of Gender Non-Sensitivity in our Judiciary, for example, as evidenced by lack of Judicial Support Services

A cursory survey of the existing structures and facilities within our courts reveal total lack of gender specific court-support services for women, which facilities are necessary for purposes of enhancing

their access to justice within our judicial system. This situation remains so despite the fact that the needs of women and men clearly differ.

This position is clear testimony of our judicial system's gender insensitivity and its non-recognition of the multi-faceted role that the vast majority of women in our society play and the experiences they go through, inter alia, as the:-

- i) Primary carers of our children, often with the sole responsibility for childcare within the family.
- ii) Victims of domestic violence
- iii) Victims of sex-related offences.
- iv) Victims of old age sex-based attitudinal stereotypes that depict them in less standings as compared to their male counterparts.

### Issues for consideration:-

- **What gender specific court support schemes do we need for women in the Judiciary?**

The solution to such a problem perhaps lies in the provision within the precinct of court of mothers' rooms, child care centres, private areas for feeding or changing infants, children's play facilities, social network or financial resource support schemes for indigent women, monitoring mechanisms to enhance safety of vulnerable women victims of domestic violence whenever they share sessions with their former partners.

- **What and how should the Judiciary provide or facilitate the provision of such services?**

Probably by looking into the question as to what are the requisite physical environments that fulfil the requirements of gender sensitivity, or perhaps by considering the possibility of offering continuing legal education geared towards fostering gender awareness, or making available various literature material guidelines on gender issues, among others.

- **What funding and planning issues should be considered in relation to the provision of such court based gender support schemes?**

Probably build new courts with childcare facilities and do likewise in the case of old buildings being refurbished as courthouses so that all courthouses reflect an element of gender sensitivity.

- **Is there need to re-examine hours available to various court users with a view to ensuring greater access to the court so as to make them gender sensitive?**

Perhaps alternative or more gender responsive approaches to court hours could be explored to accommodate women, due regard being given to the various roles that they play in society.

- **Is there need for a Handbook on Codes of Conduct and Practice Directions for all judicial staff as regards gender issues?**

Possible areas for emphasis in this connection could be about the following:-

- i) Assumptions about sex roles.
- ii) Forms of address.
- iii) Use of gender-neutral language.
- iv) Appreciation and accommodation of women's perspectives.

It is a factual point that our judicial system has no handbook on codes of conduct for judicial staff which factor may well have contributed to the woeful lack of gender sensitivity within our legal system. As heretofore noted elsewhere, it is necessary that urgent appropriate measure be taken to:-

- a) Develop and adopt a code of judicial conduct under which all judges and magistrates would be obligated to perform their judicial duties with neither prejudice nor bias of any kind.
- b) Ensure that such officers shall not, in the course of carrying out their judicial tasks, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon gender, race, religion, national origin, disability, age or other discriminatory considerations, subject to the court's directions and control to do so.
- c) Ensure that well established rules for the disqualification of judges or magistrates for real or apprehended bias are invoked by those aggrieved by the alleged instances of gender-biased judges or magistrates.
- d) In the alternative, ensure that judges or magistrates or other judicial staffers displaying gender bias are subjected to some form of complaints or disciplinary proceedings before a tribunal.
- e) Additionally, ensure that judges or magistrates with a long standing history of manifest gender bias in the course of discharging their duties are removed from office through the constitutionally established channel on the motion on the premise that such conduct in effect amounts to gross misconduct.

- **Is there a case for the development of appropriate gender sensitive practice notes on treatment of female staffers or users of the courts, inter alia, to:-**

- i) Protect a woman's right to choose the title by which she is to be known when being addressed while in court.
- ii) Ensure that her name is pronounced correctly while in court.
- iii) Ensure respect for any social cultural practice that she engages in
- iv) Ensure that adoption within the Judiciary of such gender-neutral titles as 'Honourable Justice or Magistrate'.

- v) Ensure the substitution and inclusion of all gender-biased terminology within our judicial system.

**Issues arising:**

- ⊙ What role Judicial Handbooks can fulfill in alerting judges and magistrates to matters of gender bias.
- ⊙ The scope and possible effectiveness of codes of conduct to deal with gender issues.
- ⊙ Whether or not our Judicial Service Commission can adequately deal with the problems of gender bias or would some form of alternative body such as an ombudsperson be needed.
- ⊙ What sanctions would be appropriate as against gender bias in the Judiciary.
- ⊙ Whether practice notes should be issued directing all judicial staff court users as to matters such as gender-neutral language, forms of address or other matters such as assumptions as to the supposed sex roles of men and women.

**The place of continuing Judicial/Legal Education:**

**Employ this time-tested enlightening device as tool for eradicating the problem of gender bias within the Judiciary by subjection of all staff to the same.**

It cannot be gainsaid that initiation of deliberate actively orchestrated programmes of continuing judicial legal education aimed at making judges or magistrates more aware of the presence and dimension of gender bias can go along way in dealing with systemic bias within our judicial system. Such education initiatives should seek to directly challenge both the conscious and unconscious practices in our judicial system. In fact, such programmes involving awareness of gender issues have been evolved in several jurisdictions in the Commonwealth such as Australia and Canada with marked success. Similar successes have also been registered in the United States of America and the European Union, and Kenya can gain from their experiences.

Though often perceived as threatening to the independence of the Judiciary, such programmes pose no threats at all if planned and implemented with the co-operation and involvement of judges or magistrates themselves for it is only under such a circumstance that they can truly characterize their perceptions of matters which come before traits of gender bias that characterize their perceptions of matters which come before them for deliberation from time to time. Judicial officers need not shy away from admitting their susceptibility to gender bias in the course of performing their duties for such a posture is sure to obstruct all efforts towards eradicating the problem from within.

Engaging them in open discussions on the issue of gender bias can help break the ice and so they should be encouraged to take part in as many activities as possible involving discussions of this nature. Indeed such participation has elicited quite some frank admissions from amongst the judges themselves of the existence of gender bias in the court system with a corresponding pledge of commitment by them of their resolve to eradicate it.

One such experience will suffice:-

1. As per Hon **Mr Justice Malcom**, "Gender Bias in the Administration of Justice" (1993 5(4) **Judicial Officers Bulletin p.25**

*"For me and very importantly, it was shown that judges unintentionally, unwillingly or unknowingly reflect a gender bias in their judgements. I must confess if felt immediately defensive when I heard this for the first time. I thought to myself, I am no chauvinist. My impartiality and sense of equality however, that this is my line of thinking revealed the existence of the problem. The comfortable self image of neutrality suppresses the very sensitivity which is necessary to achieve the necessary level of equality."*

#### **Issues arising:-**

- ⊙ How to introduce and use judicial education programmes and genders issues committees to successfully raise awareness of gender issues within our judicial system.
- ⊙ What appropriate content of these programmes and committees should be included to help achieve these objectives?
- ⊙ Whether gender awareness training should be voluntary or whether participation in such programmes should be made compulsory for all judicial staff.
- ⊙ Whether there is need to appoint more women to senior positions within the Judiciary in view of the fact that there is no doubt that there exists a strong historical relationship between gender bias and the low number of women in senior positions, both within the Judiciary and in the legal profession in general. This fact only serves to exacerbate the issue of gender bias within the judicial system.

#### **Dication of Gender bias in the Judiciary:**

**Encourage the participants to come forward with appropriate recommendations for the way forward after every discussion on various gender issues. Such recommendations may include but need not be limited to the following:-**

Though voluntary education programmes on gender awareness for judicial staff and changing appointment profiles involving recruitment of more women judicial officers into senior positions may be a step in the right direction, the same may not be adequate for purposes of addressing the endemic problem of gender bias in the Judiciary.

Accordingly, with the full participation and involvement of the judicial staff it should be possible to initiate appropriate measures that are geared towards attaining the following:-

- i) Mandatory gender awareness education for judicial officers and other court staffers with a view to eradicating gender bias within the Judiciary.

- ii) Establishing codes of conduct backed by clearly spelt out disciplinary procedures for expeditious dealing with instances of gender bias involving judicial officers and other court staffers.
- iii) Issuance of court practice direction by the Chief Justice from time to time to help guide all judicial officers and other court staffers on the appropriate model of address and behaviour within the Judiciary.
- iv) Putting up of gender sensitive support facilities and services within the courts or their environs to reflect judicial sensitivity to gender differentials.
- v) Carrying out of a comprehensive research as to what appropriate gender initiatives should be undertaken and implemented in the Judiciary with a view to addressing instances of gender inequality.
- vi) Put in place a monitoring and review mechanism to assess the impact and scope of such initiatives with a view to proposing where appropriate, such changes as may be necessary for successful implementation of the initiatives in question.

#### Methodology:

- ⊙ The Judiciary and the different donors and or other stakeholders with regard to gender related issues could seek the views and or comments on the various gender initiatives that need support for their implementation. Responses elicited through such an exercise could be relied on and used as the basis of future broader gender sensitive discussions.
- ⊙ The Judiciary in collaboration with professional groups within the legal fraternity such as the Law Society of Kenya, ICJ Kenya and Kenya Human Rights Commission, among others, could forge a suitable working alliance aimed at discussing broad gender issues to be conversed in the review.
- ⊙ Extensive gender literature and other relevant material on experiences in other jurisdictions which have dealt with the question of gender bias should be sourced and relied on to provide suitable models for our situation.
- ⊙ Draft discussion papers on such gender issues as may have been identified as deserving of being addressed should be released to the public and their comments and views sought before a final report and recommendation of the review made.

#### Issues Arising:-

- Is there official recognition by the Judiciary of the existence of overtly and systematic discrimination within our judicial system?
- What are the gender bias problems facing our courts today?
- What role can the Judiciary and other stakeholders in gender related issues play in promoting gender issues within the Judiciary?
- What are the steps that can be taken to increase advocacy of women's experiences and women rights issues in our courts?

**Gender Issues for the Judiciary and other Court Users:**

**Emphasize to all judicial staff the need to at all times take the following necessary precaution in the course of their duty as the way forward.**

- ⟨ Avoid adoption of inappropriate gender assumptions, stereotypes or “common sense” notions, or construction of arguments or exercise of powers based on such assumptions, stereotypes or notions, rather than on an evaluation of the evidence in the particular case. Such efforts should be particularly more exerted in the area of sexual assault trials, where gender myths and stereotypes have received the most prominent media attention.
- ⟨ Eliminate gender stereotyping through judicial education programmes, the central focus of which should be geared towards dealing with the way in which assumptions about gender roles can cause harm to court users, limit their access to legal redress and interfere with assessments of the credibility.
- ⟨ Issue and or revise all practice notes, court rules, court administrative directive, and other publications to ensure that language used therein is gender inclusive. Creation of “court conduct handbooks” which include the role of judicial officers and other court staffers aimed at eliminating gender bias and the effects of stereotypes certainly offer a suitable way forward in that regard.
- ⟨ Introduce court support services, particularly for women complaining of domestic violence as a strategy to make the legal system more accessible and responsive to the needs of women who have experienced domestic violence.
- ⟨ Involve broader participation of certain groups in gender matters, for example, FIDA or other statutory bodies such as the Law Reform Commission in gender issues so as to give gender issues the significant attention they deserve.
- ⟨ Recognize the historical absence of women in the legal profession in general and in the judicial service in particular and the experience of women as aliens in the legal environment or arena in which the law has largely developed without the insights and perception which women within the profession can bring given the said historical factor.
- ⟨ In light of the above, evolve policies that ensure that women:-
  - Progress through the ranks of the judicial service in proportion to their numbers or seniority.
  - Are not over represented in the lower echelons while their representation in the upper echelons remain low.
  - Do not leave Judiciary in highly disproportionate numbers as compared to their male counterparts.
  - Eliminate traditional courtroom practices such as the physical setting of courthouses which its attendant disadvantages women in terms of projection of voices of higher pitch for one

to be audible which feat, most women find difficult to achieve without their fault and yet they still incur the wrath of the court, especially for those who are of a small stature who find it difficult to make their presence felt.

- Discourage courtroom theatrics which go down well with the presiding officers, but which are normally initiated and comfortably played mainly by male counsel but which their female counterparts find rather alienating and confusing.
- Adopt a policy of acceptance and support for women in the judicial system and the legal profession in general to enable the attainment of a more gender-balanced Judiciary. Such a policy may lead to more women gaining the level of experience and maturity required for judicial recruitment.
- Improve the legal environment for women to enable them overcome gender bias and discrimination in the Judiciary by appointing more female judicial officers.

### General Recommendations:

- I. There is need to develop a comprehensive educational format including the incorporation of gender fairness training into judicial education programmes and court personnel programmes; and encourage the incorporation of gender fairness training in all Continuous Legal Education (CLE) programmes.
- II. The education format should be monitored and updated on an annual basis to ensure that gender fairness training is being interwoven with other aspects of training for judges, lawyers, and court personnel.
- III. Also, have gender fairness issues included periodically in the discussions held at Bench and Bar Conferences.
- IV. Judges and other judicial staff should receive periodic training and education concerning the effects of gender bias on lawyers, court personnel, judicial officers, and consumers of justice as a whole, and devise methods for avoiding it. The training should heighten the awareness of judges to the possibility that gender is influencing their decision-making. If possible, this training should be provided in a form that involves judges as active participants and not merely as an audience.
- V. Encourage the inclusion of gender fairness issues for discussion at the annual meetings of Magistrates and Judges Associations and secure the commitment of members in promoting gender equity in the judicial system.

- VI. Develop and periodically review the Code of Judicial Conduct to determine if it adequately addresses a judge's responsibility and duty to perform their duties without bias or prejudice as well as their duty to not permit staff, court officials and others, subject to the judge's direction and control, to do so as well.
- VII. The Kenya Magistrates and Judges Association be encouraged to highlight gender issues in their 'Hakimu' magazine advising the members of their obligation not to discriminate based upon gender and notifying them of the legal consequences of doing so, such as law suits against them for discrimination or sexual harassment, among others.
- VIII. Court staff throughout the country should receive periodic training and education addressing gender fairness, promoting neutral hiring procedures, and equitably enforcing gender-neutral personnel policies. Gender-neutral management practices should be adopted in all courts and court related units. The training programs should be monitored to ensure equal access and participation by male and female employees.
- IX. It is important that court personnel are educated to treat all female judges, lawyers, litigants, witnesses and other court personnel in a professional manner and with equal deference and respect accorded their male counterparts and to avoid stereotyping based on gender.
- X. Encourage law schools to educate and sensitise their faculty and students about the subtle and overt manipulations of gender bias directed against attorneys, witnesses and litigants with an aim of curbing the practice in future.
- XI. Encourage law schools to intervene to correct inappropriate gender related conduct of law students, law professors and law school administration.
- XII. Encourage law schools to integrate instruction concerning inappropriate gender-related conduct and other gender fairness issues into clinical programs and classes on professional responsibility and trial advocacy.
- XIII. Encourage law schools to pursue a policy of providing students and graduates with equal opportunity to obtain employment without discrimination on the ground of sex.
- XIV. Periodically examine civil and criminal procedures and processes contained in the Kenyan laws for recommendations regarding possible amendments to eliminate subtle forms of gender discrimination.

## Part III: Select Excerpts of material relevant to Gender Mainstreaming in the Judiciary

### Appendix A

#### SUPREME COURT OF NEW MEXICO STATEMENT CONCERNING GENDER BIAS IN THE COURTROOM

In 1987 the State Bar of New Mexico established the Task force on Women and the Legal Profession and requested that the Task Force 'examine the needs of women lawyers, their acceptance by the Bench and Bar in general, their needs and the degree in which the State Bar has addressed those needs'. The Court has received and considered the final report of the Task Force. The Task Force has found that practices which reflect gender bias do occur in the courts and must be addressed by the presiding judge. The most common of these practices include:

- ⟨ Addressing women attorneys in an unprofessional manner, through the use of their first names or terms such as 'girls', 'sweetie', or 'honey'. This is unacceptable.
- ⟨ Comments on the physical attributes or clothing of women attorneys. This cannot be allowed to occur.
- ⟨ Gender-biased jokes or comments concerning women attorneys. This practice must be eliminated. Judges should be alert to these practices and take prompt action to remedy the situation.

In case of any gender-biased conduct, it is recommended that the counsel who feels aggrieved should ask for a conference with the judge, in chambers, to point out the alleged conduct. It is hoped that, in virtually all cases, the judge will recognize the problem and voluntarily discontinue such conduct on his or her part or direct discontinuance by others. In the event such conduct continues, the aggrieved attorney should not hesitate to make a record of the occurrence.

In addition to the above-cited situations, judges must be sensitive to the following areas of possible gender bias:

- ⟨ Fees awarded in fee –generating cases should be non-gender based. Women attorneys should be awarded fees the same as those awarded to male attorneys in similar cases.
- ⟨ Equal deference should be given to female expert witnesses.

Judges must inform judicial employees to refrain from gender-biased conduct and, in the event such conduct comes to the attention of the judge, she or he must promptly admonish against such conduct in future.

Judges must act as role models. In order to assure all citizens the same rights, judges must strive to accord the attorneys appearing before them the same respect and degree of credibility, regardless of the sex of the attorney. It is incumbent on all judges to treat the advocacy of all attorneys in a gender-neutral manner and to become sensitive to gender-biased behaviour. Sexual stereotyping has no place in the courtroom. Prejudice against women is no less serious than racial prejudice.

## Appendix B

### JUDICIAL BRANCH OF NEW MEXICO STATE GOVERNMENT

1. It should be the policy of the Judiciary that sexual harassment of employees in the workplace is unacceptable and will not be tolerated. There should be a law to provide that:-  
Harassment based on sex is a violation of individual right to privacy. Any unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature should constitute sexual harassment when;-
  - ⟨ Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
  - ⟨ Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
  - ⟨ Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
  
- I. Common sources of charges include offensive or abusive physical contact, joking, lewd language, suggesting sexual favors, displaying sexually suggestive objects, pictures, magazines, etc.
  
- II. All judicial officials, supervisors and employees of the judicial branch should be put under duty to avoid any behaviour or conduct toward any other employee which could be interpreted as sexual harassment.
  
- III. Any employee who feels that he or she has been the victim of sexual harassment should confront the individual doing the harassing and demand that the behaviour be stopped. If the harassment continues, the employee should notify his or her administrative authority that will immediately notify the Court Administrative Authorities of such behaviour.

Administrative authorities include the chief justice, the chief judge of the Court of Appeals, the various heads of the High Court Divisions, the chief law librarian of the High Court Law Library and other Court Libraries, the resident judge of the stations, a head of all subordinate court stations, the various chief magistrates of magistrate courts and the court administrator in those stations where a court administrator is authorized by the legislature, approved by the high court, designated by the presiding judge as the administrative authority. If the administrative authority is the individual harassing the employee, the employee should go directly to the Chief Justice.

- IV. The Chief Justice should promptly investigate the complaint and advise the person against whom the complaint is made that the behaviour complained of is inappropriate and will not be tolerated. If the reported harassment is substantiated, prompt, corrective action must be taken. Such action may include discipline up to and including termination of the offending employee or employees, depending on the nature of the violation.
- V. Employees who file sexual harassment complaints may not be retaliated against, and such retaliation in and of itself may be grounds for disciplinary action.

## Appendix C

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### PROPOSED ADOPTION OF RULE OF PROFESSIONAL CONDUCT 16-300, SUPREME COURT, NEW MEXICO

(The Court is considering adoption of the following proposed Rules of Professional Conduct).

Prohibition against individuals discrimination. In the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age, or sexual orientation against the judge, court personnel, parties, race, gender, religion, national origin, disability, age or sexual orientation is material to the issues in the proceeding.

For purposes of this rule, the terms 'judicial or quasi-judicial proceeding' shall refer to any and all courts, regardless of their jurisdiction or location, as well as any government agency, board, commission or department before whom the lawyer is engaged in the practice of law. The rule encompasses arbitration or mediation proceedings, whether or not court ordered.

For purposes of this rule, the term 'sexual orientation' shall mean heterosexuality.

For purposes of this rule, the term 'proceeding' shall mean any judicial or administrative process relating to the adjudication or resolution of legal disputes (including, but not limited to, discovery procedures, arbitration, and mediation), rule making, licensing, lobbying, the imposition or withholding of sanctions, or the granting or withholding of relief.

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## Appendix D

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### EXCERPTS FROM THE DRAFT CIDA POLICY ON GENDER EQUALITY, JUNE 1998.

#### 1. Introduction

CIDA has a long history of supporting gender equality and of updating its policy instruments at intervals to reflect its experience. Since the first guidelines on Women in Development (WID) were developed in 1976, we have worked consistently both within the Agency and with our partners, other donors and international institutions to advance the dialogue on equality and to ensure that our commitment to equality was reflected in all Agency policies, programmes and projects. As our experience has grown, our understanding of the processes that lead to gender equality has expanded and we have adjusted our approaches to reflect lessons learned. Over the years, our approach has evolved from understanding of the importance of women's participation in the development process to recognizing the need for gender equity and women's empowerment to emphasizing the centrality of gender equality and women's human rights.

CIDA's gender equality policy is a product of the many insights we have gained through experience and self-assessment, including the recent Performance Review carried out under the 1995 policy on Women in Development and Gender Equity. The present policy update also recognizes and incorporates advances made at international fora, most notably, the strategies and commitments to gender equality established in Beijing Platform For Action, the final document of the Fourth United Nations World Conference on Women held in Beijing in 1995. In addition, the policy reflects donor commitments to gender equality highlighted in *Shaping the 21<sup>st</sup> Century: The Contribution of Development Co-operation* and in the DAC Guidelines on Gender Equality and Women's Empowerment in Development Co-operation of the Organization for Economic Co-operation and Development (OECD).

#### 2. Goal

The goal of CIDA's Gender Equality Policy is to achieve gender equality whereby women and men are able to realize their full human rights, participate as decision-makers in shaping the sustainable development of their societies and benefit equally from the results.

**Setting the Stage for the Next Century: The Federal Plan for Gender Equality**, Status of Women Canada, August 1995. **Gender equality** means that women and men have equal conditions for realizing their full human rights and potential and to contribute to national, political, economic, social and cultural development and benefit equally from the results. Equality is essential for human development and peace.

Attaining gender equality demands a recognition that current social, economic, cultural and political systems are gendered; that women's unequal status is systematic; that this pattern is further affected by race, ethnicity and disability; and that it is necessary to incorporate women's specificity, priorities and values into all major social institutions.

### **Based on the OECD-DA Guidelines on Gender Equality and Women's Empowerment**

Gender equality does not mean involving equal numbers of women and men, nor does gender equality mean "that men and women become the same", but that their opportunities and life chances are equal. The emphasis on gender equality does not presume a particular model of women and men have equal opportunities to make choices about what gender equality means and work in partnership to achieve it. Because of current disparities, equal treatment of women and men is insufficient as a strategy for gender equality. Equal treatment in the context of inequalities can mean the perpetuation of disparities. Achieving gender equality will require changes in institutional practices and social relation through which disparities are reinforced and sustained. It also requires a strong voice for women in shaping their societies.

### **3. Principles**

CIDA's vision of gender equality is based on the following principles:

- a) **Gender equality is a crosscutting theme to be integrated into all policies, programmes and projects, as well as one of CIDA's six Programming Priorities.**
- b) **Achieving social justice, including gender equality, will require the recognition that every policy, programme and project affect women and men differently.**

Women and men have different perspectives, needs, interests, roles and resources – differences that are also affected by class, race and ethnicity. Policies, programmes and projects must account for the differences in experiences and situations between and among women and men.

- c) **Achieving gender equality will require specific measures designed to address systemic discrimination.**

Specific measures must often be taken to compensate for historical and social disadvantages that prevent women from otherwise operating on a level playing field with men. These measures are not designed to make women and men the same but to ensure that women and men have equal opportunities to make choices about their own lives. Addressing discrimination entails a transformation of the policies, laws, procedures, norms, beliefs and attitudes that maintain gender inequality.

**d) Gender equality can only be achieved through partnership between women and men.**

Gender inequality is an issue that concerns and must be addressed by both women and men. By enlarging choices for both women and men, all society benefits. Gender equality will involve changes in both women's and men's attitudes and behaviour regarding roles and responsibilities at home, in the workplace, in the community, and in national, donor and international institutions.

**e) Women's empowerment is central to achieving gender equality.**

Through empowerment, women gain control over their lives and a greater voice to challenge inequality in their home, workplace and community.

**f) Respecting women as agents of change in economic, social and political processes is essential to achieving gender equality.**

Women and men have the right to participate, articulate their needs and interests and take ownership of the decisions that affect their lives.

#### **4. Rationale for CIDA's Policy**

The advancement of women and the achievement of equality between women and men are matters of human rights and conditions for social justice and should not be seen in isolation as a women's issue. They are the only way to build a sustainable, just and developed society. Empowerment of women and gender equality are prerequisites for achieving political, social, economic, cultural, and environment security among all peoples.<sup>7</sup>

**(a) Canada's Commitments to Gender Equality and Women's Human Rights**

Canada is committed to achieving gender equality at home and throughout the world. For Canada, the rights of women and girls are inalienable, integral, and indivisible part of all human rights and fundamental freedoms. The Canadian Constitution, which includes the Charter of Rights and Freedoms, guarantees the right to equality in the law and equal benefit of the law without discrimination on a number of grounds including sex. Canada's Federal Plan for Gender Equality, approved by Cabinet in 1995, committed all federal departments to gender analysis and to the promotion of gender equality in all areas, including international co-operation.

Women's human rights are the rights to which women are entitled simply by being human. Regardless of their culture, religion, class or ethnicity, women all over the world are entitled to enjoy human rights. The primary international document stating women's human rights is the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

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<sup>7</sup> (Beijing Platform For Action, Fourth United National World Conference on Women, Beijing, 1995, Paragraph 41)

The Beijing Platform For Action represents the commitment in action of 189 nations to support women's empowerment, guarantee women's human rights and achieve gender equality. National governments committed themselves to promoting gender equality in the formulation of all government policies and programmes. They identified 12 common critical areas of concern for particular attention: poverty; education and training; health; violence against women; armed conflict; economy; power and decision-making; institutional mechanisms for gender equality; human rights; media; environment and the girl child.

**Ultimately, gender equality contributes to improving the well being of women, men, girls and boys in our partner countries, which is at the centre of our international co-operation mission.**

**(b) Human Rights, Democratization and Good Governance**

To increase respect for human rights, including children's rights, to promote democracy and better governance and to strengthen both civil society and the security of the individual.

The human rights of women and girls are an inalienable, integral, and indivisible part of all human rights and fundamental freedoms.

By both promoting and supporting processes towards the eradication of all forms of discrimination on the grounds of sex, CIDA can shape a new human rights practice that protects all human beings. Greater numbers of civil society organizations advocating for women's rights.

Increased capacity of government institutions to implement policies and programmes which support gender equality (eg police and judiciary sensitivity on domestic violence).

**(c) Gender, Gender Roles and the Gender Division of Labour**

Gender refers to the socially constructed roles and responsibilities of women and men. The concept of gender also includes the expectations held about the characteristics, aptitudes and likely behaviours of both women and men (femininity and masculinity). These roles and expectations are learned, changeable over time and variable within and between cultures. The focus on gender emerged to illustrate how women's subordination is socially constructed, and therefore able to change, as opposed to being biologically predetermined and therefore static.

The gender division of labour refers to the different work that women and men generally do for pay, within the community or inside the home. Factors such as education, technology, economic change and sudden crises like war and famine cause gender roles and the gender division of labour to change. By examining the gender division of labour it becomes evident how women and men's tasks are interdependent and that women, generally carry greater burden of unpaid work in the home and community.

## 7. Promoting gender equality in policy dialogue means:

- Developing and maintaining knowledge of the nature and scope of gender inequalities in the region, country, or sector, and strategies to overcome them;
- Addressing gender equality in all policy dialogue with governments institutions and civil society partners, especially through the use of the Beijing Platform For Action as a basis for discussion;
- Sharing with partners good practices, project and programme experiences and lessons in promoting gender equality;
- Using policy dialogue activities to identify constraints, opportunities and entry points for reducing gender inequality and promoting gender equality; and
- Encouraging participatory approaches by involving women's organizations and gender equality advocates in the policy dialogue process.

### e) Institutional strengthening and capacity building

Institutional strengthening and capacity building initiatives can promote gender equality by:

- Supporting partners to develop their capacity to undertake gender analysis at the policy, programme and institutional levels and to design and carry out programming that supports gender equality; and

## 8) Good practices to promote gender equality

Two decades of experience with CIDA have taught us several lessons that are relevant to supporting gender equality throughout CIDA programming initiatives. Gender equality is more apt to be achieved if the following conditions exist:

At the institutional and division levels:

- Senior management is committed to gender equality;
- There are sufficient resources and knowledgeable personnel and an enabling corporate environment to promote gender equality;
- There are accountability frameworks which ensure that the gender equality policy is implemented;
- Qualified gender equality specialists (especially locally-based ones are employed on a regular basis;
- Gender equality is treated as an objective in and of itself.

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