1 Introduction

Scope and Objectives of this Reference Manual

This Manual provides guidelines for mainstreaming gender into the legal and constitutional affairs of states. Its main objective is to assist governments in advancing gender equality in their countries. A multi-pronged approach, including a programme of law reform, is essential to gender mainstreaming and to transforming gender relations in the context of the particular society. Where government structures include a Ministry of Justice/Legal Affairs, it will play a pivotal role in legal reform. The Manual may also be of use to other stakeholders that are involved in determining and formulating legal policy, applying it and ensuring its enforcement. These include government departments, NGOs, women's groups, professional associations, the academic community and others committed to promoting gender equality.

The Manual seeks to promote the human rights of both women and men as partners in development, while considering that women's human rights have been neglected for a long time in human rights discourse. A rights-based approach to development rests on principles of good governance and the rule of law. The Manual provides an overview of the international legal requirements for the guarantee of women's human rights, which are an important basis for gender mainstreaming. It then considers constitutional reform and looks at substantive law reform in a number of areas: public life, nationality laws, labour laws, health and reproductive rights, violence against women and family law. Central to a gender mainstreaming policy must be laws that prohibit gender-based discrimination, that seek to establish true equality of opportunity between women and men and that promote equality of access to resources. The need for gender-sensitive government structures is emphasised, with the concomitant need for training.

There is an extensive list of recommendations, and tools are provided to enable an assessment of compliance with the provisions of the Convention on All Forms of Discrimination Against Women (CEDAW) and an evaluation of progress towards gender mainstreaming.

The Manual is part of the Gender Management System (GMS) Series, which consists of a number of publications presenting the concept and methodology of the GMS, with sector-specific guidelines for mainstreaming gender in key areas. The GMS is explored most fully in the *Gender Management System Handbook.*

A Gender Framework

What is Gender?

'Gender' refers to socially constructed roles of women and men ascribed to them on the basis of their sex, whereas the term 'sex' refers to biological and physical characteristics. Gender roles depend on a particular socio-economic, political and cultural context, and are affected by other factors, including age, race, class and ethnicity. Gender roles are learned and vary widely within and between cultures . . . [and] can change. Gender roles help to determine women's access to rights, resources and opportunities.'

Implementation of the outcome of the Fourth World Conference on Women, A/51/322, paras 7–14)

Included in the construct of gender are gender hierarchies: the unequal power relations (social, political, economic) between women and men; the stereotyping of women as inferior; the greater value that is put on men's roles and functions in society; and the sexual division of labour that locates women in less highly paid and socially under-valued work.

Why Focus on Gender?

'Gender' is a more useful defining category than a focus only on 'women' for a number of reasons, including:

+ Gender is not only about women; gender analysis is also applicable to men.
+ Gender is not an isolated issue but one that interacts with many others, including economic development, the environment, law-making, law enforcement and compliance with the law.
+ A focus on gender shifts the emphasis from special pleading for women to the identification of different needs in the community and the formulation of policies and strategies that address those needs. Policies can thus take account of difference without undermining the assumption of legal equality between women and men and the prohibition of discrimination on the basis of sex. It thus prioritises equality of opportunity and outcomes rather than formal equality.
+ Since gender is a social construct that is subject to change, assumptions about what it means can be examined and changed. There is nothing 'natural', 'pre-ordained' or 'permanent' about societal gender roles.

Using a gender perspective in the human rights context facilitates an understanding of how women's enjoyment of human rights is adversely influenced by the social construction of female and male roles, in which women are invariably relegated to a subordinate position.

As noted above, gender is only one social construct. Others include those relating to race, ethnicity, class, age, disability, marital status and sexuality. In assessing the impact of actual or proposed policies and law on individuals, attention must be given to the intersection of all such variables. The gendered impact of a particular policy may be obscured by other forms of disadvantage; similarly, a focus on gender must not obscure the relevance of other factors. (For a good example of considering race and gender, see the Committee on the Elimination of Racial Discrimination, General Recommendation 25 on the Gender Dimensions of Racial Discrimination, 2000.)

What is Gender Analysis?

Gender analysis begins with the identification of the social roles of men and women and the implications these have for status, opportunities and access to and control of resources. It thus involves the collection and use of sex-disaggregated data that reveal the roles and responsibilities of women and men. These data are fed into the policy process to enable assessments of how existing and proposed policies and programmes may affect women and men differently and unequally. Gender analysis also involves assessing how gender roles and gender-inequitable power relations may affect the achievement of a range of development goals, including the goal of gender equality and equity.

Gender analysis needs to be both quantitative and qualitative. The use of gender-sensitive indicators in such areas as demographics, patterns of human settlement, households and families, education, health, economic activity, access to land and credit, legal rights, gender-based violence and macroeconomics can provide useful quantitative data. This should be complemented by qualitative data, which trace historical, political, economic, social and cultural forces in order to clarify how and why gender differences came about, and thus provide indicators as to how they might be changed.

What is Gender Mainstreaming?

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.

Agreed conclusions of the UN Economic and Social Council 1997/2

At the same time, gender mainstreaming does not automatically remove the need for women-specific programmes or for projects targeting women. These will often remain necessary to redress particular instances of past discrimination or long-term, systemic discrimination. However, whenever separate programmes, projects or institutions are set up for women in the context of mainstreaming gender, it is vital to ensure that they are accompanied by concrete measures for integration and co-ordination. Women-specific programmes and gender mainstreaming are two strategies directed towards the same goal – gender equality – and may operate simultaneously or separately.

Gender mainstreaming involves a number of activities:
+ forging and strengthening the political will to achieve gender equality and equity at the local, national, regional and global levels;
+ incorporating a gender perspective into the planning processes of all ministries and departments of government, particularly those concerned with macroeconomic and development planning, personnel policies and management and legal and constitutional affairs, including the administration of justice;
+ integrating a gender perspective into all phases of sectoral planning cycles, including the analysis, development, appraisal, implementation, monitoring and evaluation of policies, programmes and projects;
+ developing systems for institutionalised collection and use of sex-disaggregated data in statistical analysis to reveal how policies affect women and men differently;
+ increasing the numbers of women in decision-making positions in government and the public and private sectors;

◆ providing tools and training in gender awareness, gender analysis and gender planning to decision-makers, senior managers and other key personnel to ensure that they understand the importance of and know how to integrate a gender perspective into their work;

◆ forging linkages between government, the private sector, civil society and other stakeholders to ensure a co-ordination of efforts and resources.

Because gender mainstreaming cuts across government sectors and other social partners, it requires strong leadership and co-ordination. The Commonwealth approach to providing the necessary leadership and co-ordination is through the Gender Management System (GMS), which is designed to facilitate gender mainstreaming (see Chapter 2).

Gender mainstreaming in legal and constitutional affairs requires a rights-based approach to social policy. Gender factors must be an integral part of all legislative programmes, judicial decision-making, administrative policy and decision-making. Since the forms and manifestations of inequality differ among states, the implementation of gender mainstreaming must be context-specific and take account of such variables as economic development, political and governmental institutions, local government structures, religion and the place of customary law. Issues that will facilitate or impede gender mainstreaming in the particular society must be identified and addressed.

This means that there is a need for an individualised and localised gender audit of law and legal institutions for each state and sub-state unit. Also, gender mainstreaming must bring about actual change, thus going beyond changes to the formal legal structures and law on the books. Legal, and consequently social, changes must be owned by the people and must be located in the context of their culture and religion. Strategies must therefore be worked out within those frameworks through co-ordination and consultation with women and men at the grassroots level.

It is also important to note that such advances as greater participation of women in decision-making and in activities of governmental departments, although an important step in mainstreaming and ensuring gender equity, are not of themselves sufficient to ensure the required cultural and behavioural changes necessary when asserting that gender matters. Care must be taken not to perpetuate the system through strategic window-dressing without addressing the related issues in political, social, cultural and economic affairs.

States can seek technical assistance in designing, implementing and evaluating programmes from UN agencies (including the Office of the High Commissioner for Human Rights, the UN Division for the Advancement of Women, UNIFEM and UNDP) and regional groups working on gender analysis, such as the Southern African Research and Documentation Centre (SARDC). Guidance is also available from the Gender and Youth Affairs Division of the Commonwealth Secretariat. Their manuals and training sessions can be used for assistance.

Why Mainstream Gender?

Despite major differences in levels of economic development, social structures and prevailing religious and secular ideologies, states have in common that inequality exists between women and men. This allows suggestions for gender mainstreaming to be made with respect to all states.

Gender mainstreaming has been promoted as an international strategy for the achievement of gender equality since the Third UN World Conference on Women

held in 1985 (Nairobi, Kenya) and was further urged at the Fourth UN World Conference on Women in 1995 (Beijing, China) and its follow-up process at the 23rd Special Session of the General Assembly (Beijing+5, June 2000).

The Beijing Platform for Action, 1995 in paragraph 217 refers to the 'gap between the existence of rights and their effective enjoyment'. Mainstreaming is a tool that can be used to redress this gap. Further, in paragraph 221 the PFA states that 'intensified efforts are needed to integrate the equal status and human rights of all women and girls into the mainstream of United Nations system-wide activities'. The obligation on UN institutions is extended to member states in paragraph 229,which stipulates that 'Governments should promote an active and visible policy of mainstreaming a gender perspective in all programmes and policies'.

The need to accelerate the process of mainstreaming a gender perspective was recognised in the Outcome Document adopted at the 23rd Special Session of the General Assembly: 'Women 2000: Gender equality, development and peace for the twenty-first century' in June 2000. Paragraph 80 of the *Further actions and initiatives to implement the Beijing Declaration and the Platform for Action* calls on governments to: '[d]evelop and use frameworks, guidelines and other practical tools and indicators to accelerate gender mainstreaming, including gender-based research, analytical tools and methodologies, training, case studies, statistics and information'.

In addition to the commitment to gender mainstreaming contained in these international statements of policy, there are other reasons for its adoption. Gender mainstreaming is essential for a properly functioning democracy. It puts people at the heart of policy-making; leads to better informed policy-making and therefore enhanced government; makes full use of all human resources and acknowledges the shared responsibilities of women and men in all spheres of social ordering; makes gender visible at all levels of society; and takes account of diversity between women and men and between women and women, men and men (Council of Europe, 1998).

In sum, arguments of efficiency, effectiveness, economics, equity and social justice all support the integration of gender issues into national legal policies and programmes.

Obstacles to Gender Mainstreaming

It is important to identify obstacles to gender mainstreaming so that they can be addressed. These may be found in existing laws, including legislation and customary laws, and in societal structures that have come to be seen as 'natural', 'the way things are done' and 'moral.' Other obstacles may be the attitude of key stakeholders; the representation of gender concerns as foreign, 'western' imports; and policies connected to macro-economics and globalisation, including structural adjustment programmes and privatisation of services previously viewed as public. Particular obstacles include the following:

Lack of constitutional guarantees

In many countries there are still no constitutional guarantees against discrimination on the basis of sex and some constitutions make the guarantees of non-discrimination subject to customary or traditional law. Judges may be unwilling to apply constitutional guarantees of sex equality. In addition, there may be a legally sanctioned hierarchy of rights: political rights are guaranteed by many constitutions but very few constitutions have similar guarantees in relation to social and economic rights. This privileging of the political over the economic may have a disproportionately negative impact on

women, who are largely responsible for managing the household economy and for the care of children, the aged and the disabled.

Reservations to treaties

States may have far-reaching reservations to international obligations, including to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). These include reservations that specify non-application of the Convention where it is contrary to constitutional provisions or professed religious requirements.

Discriminatory laws and legal practices

In Commonwealth countries where the legal system derives from the 'Westminster' model, international treaties are not self-executing and may not been incorporated into national law. Further, in many countries there is no anti-discrimination legislation that would give women legal redress against sex-based discrimination perpetrated by state or non-state actors. Women continue to face discrimination in employment practices and in access to educational facilities amongst other areas. Even when there are laws prohibiting discrimination, there may be no legal process or remedy or these may be inadequate to protect women against discrimination.

A multiplicity of laws

There may be several different legal systems and structures, including secular state (civil and criminal), personal, religious and customary laws. Even when the government is willing to legislate for gender equality, conflicts between legal hierarchies and an unwillingness to confront these differences for fear of social unrest or instability restrict claims for women's rights. Having different tribunals operating under these different laws leads to inconsistency and uncertainty.

Harsh criminal and civil law regimes

Perceived transgressions committed by women, such as sexual activity outside of marriage, may receive especially harsh sentences compared with men committing the same offence. Men who commit violent crimes may have recourse to defences such as family honour. Where judges are overwhelmingly male, there may be a lack of understanding of how such laws discriminate against women and they may be harshly applied.

An informal sub-legal culture

This is the exercise of quasi-legal power by bodies with no formal legal authority from the state, such as religious organisations and village communities or elders. Village councils (mostly male) in some countries, for example, impose harsh 'sentences' on women for violations of religious law or moral standards.

The interaction of multiple discriminations

Differentiation based on gender might be made invisible because another aspect of discrimination is highlighted. For example, there may be discrimination based on ethnicity, race, religion, disability, age or sexuality. Programmes that address one basis for discrimination might ignore the gendered aspects of the problem.

Indifference or lack of comprehension by key stakeholders

Stakeholders may fail to explain policies to those in the sector and therefore meet resistance in implementation. At times there is a gap between policy formulation and implementation due to a lack of effective communication between senior policy makers and lower staff cadres who are to put such policies into practice. Key stakeholders may not be committed to change or to effective legal reform. Economic development may be prioritised, but the linkage between gender equality and economic development may not be considered. Even where there is a formal acceptance on the part of the state that they should eliminate gender-based discrimination, such discrimination may continue to be reflected in policy formulation uninformed by gender impact analysis. It may be difficult to gain the political will to implement judicial rulings upholding sex equality. For example, the ruling in *Longwe v. Intercontinental Hotels* (practice of excluding unaccompanied women from the hotel violated her constitutional rights) was not implemented in Zambia, and the Longwe judgement was subsequently over-ruled in *Mwanza v. Holiday Inn*; the Nepalese government did not introduce new laws on inheritance after the case of *Dhungana v. Nepal* (laws that limit women's ability to inherit ancestral land found discriminatory); and the decision in *Md Ahmed Khan v. Shah* Bano Begum (Muslim man required to pay alimony on divorce in accordance with secular Criminal Code)was reversed by the Indian government.

Limited political participation by women

CEDAW calls on States Parties to eliminate discrimination against women in political life by ensuring their right to vote in all elections and participate in the formulation and implementation of government policy. However, women continue to be marginal participants in the formal and institutional political processes in most countries. Too often, the issue of representation of women as a social group is avoided by assuming a community of interests between men and women and taking women's consent as given. While it is true that not all women are committed to gender equality (and that some men are), the chances for success in mainstreaming appear to be enhanced when there are women in key positions for the planning, design and implementation of policy. About one third is regarded as sufficient 'critical mass' to influence decision-making.

The view that human rights are only applicable in the public sphere

At the international level, gains have been made in linking violations against women by non-state actors (in the private sphere) and systemic or societal gender discrimination. However, many states have not acted to protect women from, eliminate and punish 'private violations'. There is still a perception that human rights relate to the public sphere and that what takes place in the family is a private matter. Thus women's experiences of inequality, abuse and lack of personal autonomy in the private sphere are not redressed. There may be a lack of knowledge or reliable and objective data about gender inequalities.

Cultural acceptance of gender discrimination

This includes the perception that the subordinate position of women in society is 'natural' and that attempts to address it are socially disruptive and divisive. The growth of religious fundamentalism, which emphasises and at times distorts the role of culture, religion, community and the family, reinforces notions of women's roles in and outside the family that deny them access to the full realisation of their rights.

Lack of or limited access to education

Of the billion people world-wide who can neither read nor write, two-thirds are women. In some states, illiteracy rates are particularly high and girls' access to education even at the primary level is severely limited. Economic hardship, worsened through structural adjustment programmes, may mean the removal of girls from schooling. High levels of teenage pregnancy may lead to early drop-out, or expulsion, from school. Even where women have reached reasonable levels of primary and secondary education, there may be a lack of training available for women in technical and professional skills.

Legal illiteracy

Women may have little or no knowledge of their legal rights, and may also be unwilling or unable to seek legal redress even where remedies exist. A woman may be reluctant to report domestic violence, for example, if there is no protection from further instances. She may also fear the costs of legal assistance. Access to legal institutions and processes may be practically impossible in rural areas.

The sexual division of labour

Much of women's time is spent in household activities, such as collecting water and fuel, preparing food and caring for children and the elderly. The lack of recognition of women's unpaid labour leads to an undervaluing of the same tasks when performed in the paid workforce. Certain forms of paid work are seen as especially suitable for women, typically those involving caring, service, domestic-type tasks and passive labour. The double burden of unpaid domestic labour and paid labour is not recognised.

Early or customary marriages

Early marriage deprives girls of education and also limits their opportunities to develop skills that would give them social or economic independence. Early sexual activity and childbearing can cause severe health problems. Customary marriages may not be registered, leaving women unable to claim property rights, inheritance and/or economic support.

Lack of access to credit; prohibitions on land ownership

Gender-biased access to economic resources such as bank loans, mortgages or other types of credit may restrict women's ability to be financially independent. Women may also be prevented from owning or inheriting property by discriminatory property and inheritance laws and policies. These factors contribute to the feminisation of poverty.

Disparity between urban and rural women

Despite gains made by women in urban areas, rural women may lack opportunity in education and employment and lack access to health care and legal services. They may be especially vulnerable to local community elders.

Economic restructuring and structural adjustment programmes

The adverse impact of economic liberalisation and privatisation can fall disproportionately on women. Countries that have entered into structural adjustment

agreements may cut back social services and food subsidies, privatise social services and undertake monetary reform (which frees national income for servicing the foreign debt). The government may be given no choice by international financial institutions (IMF, World Bank) and there may be long-term benefits, but such programmes affect women much more than men. This is because women are disproportionately represented as carers and accordingly must make up the gap left by the lessening of public services and because there are greater numbers of women in poverty in the first place (see Beijing PFA para. 59 (a) and (f) for strategies for the IMF and World Bank in this regard). The Independent Expert on Human Rights and Extreme Poverty, who has analysed the effects of poverty on the human rights of women, has pointed out that taking all developing countries together, military expenditure equals the combined total spending on health and education.

Effects of armed conflict

Most recent and on-going conflicts are civil wars that make the entire country a war zone and cause a major increase in the number of civilian casualties. These wars are characterised by crimes and human rights abuses, such as sexual violence against women including rape and enslavement. The burden of caring for injured and traumatised people throughout the conflict also falls most heavily on women. Conflicts have created massive movements of peoples both within their own nations (making them internally displaced persons) and into neighbouring countries and further afield as refugees. The dislocation thus caused has left women increasingly susceptible to gender violence which they may experience prior to flight, during flight, in the country of asylum, and when they are being repatriated. The consequences for women of the social dislocation caused by armed conflict must also be taken into account in post-conflict reconstruction.

The media

The mainstream media may be unwilling to carry articles and programmes on matters of concern to women or may trivialise them. There may be an ideological tension between upholding a free press, allowing for the full expression of different views, and the necessity of combating gender stereotyping through the popular media.

Lack of resources

Resources may be lacking or there may be an unwillingness to commit resources to what is regarded as a low priority issue.

Inadequate research

Lack of research on, for example, the economic causes and situation of prostitution, voluntary migration of women workers and trafficking can inhibit appropriate legal responses.

Non-governmental organisations (NGOs)

There may be no legal framework for NGO activity, or restrictions on their activity, limiting their effective involvement in seeking change. Development NGOs may not include women's concerns on their agendas, leaving these to women's NGOs.

Trade Unions

Opposition to trade union activity and oppression of trade union activists might limit attempts to improve conditions for women workers. In any case, male-dominated Trade Unions may be more concerned in maintaining male privileges in the workplace than in enhancing the protection of women's rights.

Such obstacles are likely to exist to a greater or lesser extent in most states. Their identification is a first step in gender mainstreaming, and determination of which are most applicable in a particular context. Measures for their lessening or removal may be required at the political, legal, budgetary or social level, requiring co-operation of all stakeholders, including government, legal bodies, employers, media and public and private finance sectors. These issues are explored further below.