

Section I

Judicial Principles on Violence
Against Women

Chapter 1

Introduction

1.1 The judiciary as an actor

The judiciary plays a central role in enhancing and protecting women's rights. To the extent that the courts are the final authority in criminal and civil matters that enter the justice system, one can state that the judiciary is the main institution on which women's rights ultimately depend. The judiciary plays a critical role in the development and enforcement of formal legal responses to discriminatory and criminal activities, including violence against women (VAW). Judicial officers have a unique role in addressing violence and in crafting effective remedies for the benefit of victims. They make decisions that affect the lives of the victims, perpetrators and in the case of domestic violence, children and other family members. In the courtroom, judicial officers are charged with the task of interpreting and enforcing existing laws. They may have the ability to establish courtroom policies and procedures to enhance the safety of victims and to hold perpetrators of violence accountable.

If the judiciary is to effectively carry out its role in enhancing justice for women, judicial officers must be alive to the reality that one of the consequences of a gendered society is that different rights and privileges, duties and obligations, as well as roles and status, are attributed to women on the one hand and men on the other by virtue of their sex, and that nevertheless this categorisation is but a social construct. It is critical that a judicial officer is conscious that only a very small proportion of the differences in roles assigned to men and women can be attributed to biological or physical differences based on sex. A judicial officer must be aware that gender roles shape women's access to rights and that this therefore is a justice and rights issue.

They must also be cognisant of the reality that cultural norms and values, including those which discriminate against women, are often exemplified in the written law. In such cases, a judicial officer must take advantage of a court's judicial review role to evaluate such laws within the perspective of (universally) accepted human rights norms and values, for it is now widely accepted that judicial review transforms processes of justice, including the role of judges as agents of social change. It also is important that judicial officers themselves do not import negative cultural norms into judicial processes and in adjudication. For judicial officers to meaningfully enhance

justice for women, they must be equipped with an understanding of the concept of gender.

An understanding of social construction of men and women enables a judicial officer to integrate gender perspectives into judicial processes so that before decisions are taken, an analysis is made of their effects on women and on men respectively. Understanding gender enables a judicial officer to adopt strategies that make women's (and men's) concerns and experiences an integral dimension of the adjudication process, so that men and women benefit equally – so that inequality is not perpetuated. Judicial awareness of the differential circumstances of women and men in society and the impact of seemingly neutral decisions on either gender is a must in the fight against VAW. The bench must therefore adopt a gender analysis of all questions before court, from criminal law to family law, to taxation etc.

In interpreting the law, the court has the role of defining the obligations of the state in relation to fundamental rights and freedoms, and to hold the state and all perpetrators of violence accountable for breach of these obligations. At the same time, the court must balance the rights of victims against those of perpetrators to ensure that women victims of violence access justice, in all spheres of life, on a basis of equality with everyone, including perpetrators of such violence, and that the victims of violence are not subjected to secondary victimisation in the process of navigating the judicial process. The law is a tool for social transformation and it also sets standards. The decisions that judicial officers make and the sentences that they impose against perpetrators of VAW should send a clear message to society that VAW is unacceptable and that both the state and the perpetrator will be held accountable. Ensuring that perpetrators of VAW are held accountable and are appropriately punished will restore public confidence in the judiciary. The judiciary may also be used as a platform from which the general public can be educated on the evils of VAW.

The mid-term review of the Commonwealth Plan of Action has identified 'Violence against Women' as one of the critical areas for action. Focusing on efforts to strengthen Jurisprudence of Equality on VAW, the Commonwealth Secretariat commissioned a review of case law on VAW in Commonwealth jurisdictions. The purpose of the review is to assess the outcomes of domestic violence cases filed in national courts within the Commonwealth, with a view to analysing the gendered pattern of the judgements and subsequent implementation measures. The review identified and examined how the various judiciaries around the Commonwealth have interpreted and applied – or failed to apply – national and/or international human rights laws, to address VAW. The review also identifies the various obstacles that prevent women victims of violence from accessing justice on a basis of equality of men and women.

1.2 Purpose of the bench book

Women and child victims of violence face a multitude of obstacles in their pursuit of justice. This bench book aims at addressing the challenges encountered by women victims of violence as they navigate through the justice system. These include the absence of legislation to criminalise the various manifestations of VAW, outright bias in the courtroom, patriarchal mind-sets and gender stereotypes that find their way into the courtroom, and failure by judicial officers to apply or interpret the law in a gender-sensitive manner. Such obstacles militate against women's access to justice on the basis of equality of men and women. The bench book also discusses structural impediments which inhibit access to justice, such as the geographical location of the courts and the financial and other related implications; the financial cost of accessing justice; intricate court procedures and insensitivity on the part of the judiciary due to limited knowledge of gender and women's rights law and standards; the fear of secondary victimisation by victims of violence; women victims' ignorance of the law and of their rights; and lack of support services to assist victims of violence to navigate the civil and criminal justice process, among other challenges. Furthermore, the bench book contains identified best practices and ground-breaking court decisions across the region which can be said to contribute towards the drive for social change. In line with the judicial practice of common law courts' discretionary utilisation of decisions from other jurisdictions under the doctrine of 'persuasive authority', the regional bench book offers what a bench book limited only to cases from within a particular jurisdiction could not have offered. This is because a 'persuasive' precedent may become binding through its adoption by a court of record in a particular jurisdiction. The bench book also points to jurisprudence being developed by international and regional tribunals. Additionally, annexes containing a paper on child, early and forced marriages (CEFM) and a list of reference materials provide judicial officers in East Africa with more literature on the subject.

The Commonwealth Judicial Bench Book is a resource that situates VAW in the four East African Commonwealth member countries (Kenya, Rwanda, Tanzania and Uganda); sets out the definition of VAW in international and regional human rights instruments and national legislation; highlights relevant international human rights standards, legal and policy instruments with respect to VAW, and provides statistics on occurrences and – where possible – costs of VAW. Lastly, the *Judicial Bench Book* discusses the obligation of the state to eliminate VAW through the exercise of due diligence to prevent and protect women from such violence, prosecute and punish perpetrators of such violence and provide an effective remedy for victims of such violence. The bench book discusses, through case law, measures to address VAW and the role of the judiciary in ensuring that the

state fulfils its obligations. Specifically, the *Judicial Bench Book* reviews the role of the judiciary in addressing VAW, identifies challenges and makes recommendations aimed at addressing the challenges which impact on the ability of the judiciary to tackle VAW.

By placing VAW within the sociocultural and legal context, it is hoped that the bench book will enhance the ability of judicial officers to handle cases of VAW, both within a human rights as well as a gender perspective. Some of the cases contained in the bench book offer examples of how particular courts have ably mainstreamed gender in judicial processes and/or applied internationally accepted human rights standards in the adjudication of matters before them. The book will thus act as a quick reference to judicial officers, in line with the foundations of the common law system – *stare decisis* and judicial precedent. On the other hand, some of the examples contained in the bench book showcase how a lack of appreciation of the lived realities of women victims of violence can lead to denial of justice. The critique of such cases offered in the book will hopefully expose the injustice arising from failure to interpret the law through a gender lens, offering lessons to judicial officers.