

# **Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia**



## **THE DEVELOPMENT OF THE BANGKOK GENERAL GUIDANCE FOR JUDGES IN APPLYING A GENDER PERSPECTIVE**

The *Bangkok General Guidance for Judges in Applying a Gender Perspective* was discussed and adopted by judges from the Philippines, Thailand, Timor Leste, and Indonesia, at a workshop in Bangkok, Thailand, from 24 to 25 June 2016. The International Commission of Jurists (ICJ) and UN Women hosted the workshop.

During the workshop, judges from the four Southeast Asian countries deliberated extensively how best to assist judges in employing a gender perspective in deciding cases before them. They attended several sessions over the course of the two-day workshop, participating in exercises focused on identifying and addressing gender stereotypes.

The idea to initiate the development of the *General Guidance* emerged from the ASEAN Regional Dialogue on Judging with a Gender Perspective, which was held in Jakarta, Indonesia, in 2015. There, the Supreme Court of the Philippines, represented by Justice Teresita de Castro, offered to take the lead on the development of the *General Guidance*.

The *General Guidance* will make judges aware of means to consider evidence without resorting to gender stereotypes and decide cases based on the principle of equality recognized under international human rights standards, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Recommendations for institutional policies that should be adopted by courts to help them become more gender sensitive and gender responsive are also set out in the *General Guidance*.

The *General Guidance* is especially significant as it reaffirms that customs and traditions should not be invoked to justify discrimination against women.

## **BANGKOK GENERAL GUIDANCE FOR JUDGES ON APPLYING A GENDER PERSPECTIVE IN SOUTHEAST ASIA**

**Bangkok, 25 June 2016**

### **PREAMBLE**

*Whereas* the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights;

*Whereas* the Declaration on the Elimination of Violence against Women recognizes that all women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms including: the right to equality, the right to equal protection under the law and the right to be free from all forms of discrimination;

*Whereas* the International Covenant on Civil and Political Rights (ICCPR) affirms that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law; and that the law must prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, including sex or gender;

*Whereas* the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) establishes that all States Parties must ensure the effective protection of women against any act of discrimination through competent national tribunals and other public institutions;

*Whereas* the empowerment of women contributes to the growth and development of a free and just society;

*Whereas* women throughout Southeast Asia still face multiple obstacles in achieving gender equality because of discrimination and stereotyping on the basis of their sex and gender, including within the justice systems of their countries;

*Whereas* every person is entitled to equal treatment before the law and equal access to justice;

*Whereas* the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region affirms that in the selection of judges there must be no discrimination on the basis of race, color, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status;

*Whereas* the Regional Judicial Dialogue on Judging with a Gender Perspective was convened in Jakarta, Indonesia from 5 to 6 October 2015 in an effort to strengthen judicial decision-making based on gender equality and freedom from discrimination;

*Whereas* the participants at the Judicial Dialogue identified the urgent need to develop a set of general principles on how to judge with a gender perspective in order to fight discrimination against women and to ensure equal access to justice for all women;

*Recalling* General Recommendation No. 33 of the CEDAW Committee recognizing the obligation of States to ensure that women have access to justice and to guarantee that women are free from discrimination within the legal system;

*Recalling* the words of the Special Rapporteur on the Independence of Judges and Lawyers that a gender-sensitive judicial system is a prerequisite for the full and non-discriminatory realization of human rights for all human beings and the achievement of gender equality on the ground;

*Recalling* the Southeast Asia Regional Judicial Colloquium on Gender Equality, Jurisprudence and the Role of the Judiciary in Promoting Women's Access to Justice held on 4 and 5 September 2013 at which the participating judges reaffirmed that culture, customary rules, religion and traditional practices should not be invoked as justification for violations of the rights and freedoms of women;

*Recognizing* that women are not only victims or clients of the justice system, but also key actors in the administration of justice, as judges, lawyers, law enforcers, prosecutors, mediators, correctional authorities, legal professionals, and other stakeholders;

Recognizing that the elimination of gender inequality and discrimination against women and empowering of women are critical steps in the eradication of violence against women;

We, the judges from Southeast Asia, participating at the 2016 Judicial Workshop on Judging with a Gender Perspective, held in Bangkok, Thailand, from 24 to 25 June 2016, adopt this General Guidance for Judges on Applying a Gender Perspective in Southeast Asia:

## **GENERAL CONSIDERATIONS**

1. The present Guidance aims to:
  - a) Provide assistance for judges in the understanding and application of gender equality and non-discrimination principles;
  - b) Assist justice sector professionals such as court officers, police officers, prosecutors, mediators, arbitrators, facilitators, lawyers, social workers, medical practitioners and civil society representatives in the identification of situations where same and/or differentiated treatment can lead to discrimination against women; and
  - c) Contribute to the implementation of a judicial system that guarantees the right of women to equal access to fair and gender-sensitive court proceedings, mediation processes, adjudication and enforcement of judgments.
2. This Guidance was elaborated taking into consideration, and in some instances directly tracking the language of international law and standards recognized in the CEDAW and other pertinent international instruments, recommendations issued by the Special Rapporteur on the independence of judges and lawyers and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) and comparative national law and standards, good practices, and experiences shared by the participants during the Workshop on Judging with a Gender Perspective held in Bangkok, Thailand on 24 and 25 June 2016.
3. This Guidance constitutes one of the many efforts of Southeast Asian justice sector stakeholders to eliminate the existing arbitrary and discriminatory treatment of women based on sex or gender that affects women in every aspect of their lives, especially when accessing the justice system.

4. This Guidance is directed to the members of the judiciary regardless of their level and area of expertise and to judicial training institutions. The applicability of the Guidance should not be limited to cases related to family law or criminal law, but should be applied in all areas of law.
5. Members of the judiciary play an essential role in combating gender-based discrimination. Through their decisions, judges can help modify practices or customs that reinforce gender stereotypes; establish interpretation criteria to prevent direct and indirect discrimination; determine procedures that demonstrate and maintain respect for the dignity and equality of women within the system of the administration of justice; establish rules for the application of laws to conform to the universal principles of equality and nondiscrimination against women; and influence lawmakers against enacting laws that violate the principles of equality and non-discrimination against women.

## BASIC CONCEPTS

6. For the purpose of this Guidance, the following terms are defined as follows:
  - (a) "Sex" refers to a person's physical, physiological and biological status, usually characterized as male, female or intersex, while the term "gender" refers to the social or cultural distinctions associated with a person's biological sex. This categorization shapes expectations, responsibilities and opportunities ascribed to women and may result in power hierarchies and discrimination.
  - (b) Formal or *de jure* equality requires that men and women must be treated the same and guaranteed equality of opportunity where they are equally situated. Equality of opportunity means that everyone should, at the outset, have the same opportunities so that they can realize their capabilities and participate in all areas of economic, social, political and cultural life as equals.
  - (c) Substantive or *de facto* equality consists of ensuring women "equality of results", which means that progress towards equality must bring about concrete outcomes or long-term changes in gender relations.
  - (d) Discrimination is a difference in treatment based on certain grounds such as race, color, language, religion, belief, caste, employment, political opinion, nationality, social origin, disability, age, location, region, indigenous and minority status, sex, gender, sexual orientation, gender identity, or other status, which has the effect of nullifying or impairing the enjoyment or exercise of rights.

Discrimination may be:

- i. Direct, when the act or law explicitly authorizes differentiated treatment which adversely affects the enjoyment of rights of one group in particular; or
- ii. Indirect, when the act or law seems to be neutral, but its consequences adversely affect the enjoyment of rights of one or more groups in particular.

A person or group of people may be discriminated against based on more than one ground. Discrimination is not usually an isolated occurrence; rather, intersectional forms of discrimination often occur in the context of discriminatory assumptions, norms and practices.

- (e) A distinction may be an objective and reasonable difference in treatment, which may serve a legitimate purpose, and does not adversely affect or restrict the enjoyment of rights.
  - (f) Stereotyping is taking a generalized view or preconception of qualities possessed by or the roles that should be performed by members of a particular group. Stereotyping ignores a particular person's circumstances, abilities, needs and demands.
  - (g) Gender stereotypes are a particular subset of generalizations regarding the characteristics of men and women. They can be descriptive, based on a view or perception of what men or women are like, or they can be prescriptive, based on an ideology of what they should be like. These gender stereotypes often provide the basis for related generalized assumptions as to how men or women should or will behave in a range of circumstances.
7. Equality, equal protection of the law, and non-discrimination are fundamental principles of domestic and international human rights law. These principles prohibit disadvantageous treatment based on the idea of the inferiority or superiority of either of the sexes or on rules rooted in gender stereotypes. Guarantees of equality must ensure formal and substantive equality.
8. Applying a gender perspective will assist judges to:
- a) Be conscious of the gender norms that shape expectations, responsibilities and opportunities as they pertain to women;
  - b) Identify the sources of differentiated treatment based on sex or gender with the law, legal systems and practices;
  - c) Determine whether differentiated treatment upholds equal protection and advances equality of opportunity and outcome or if it is discriminatory;
  - d) Identify and expose the consequences the categorization based on sex and/or gender creates, such as: violation of rights, unequal power relations and differences in rights and opportunities, among others; and
  - e) Identify the legal principles and procedures in domestic and international law, including restorative justice principles and procedures, that judges/mediators/arbitrators can apply in the conduct of court proceedings/mediations/arbitrations and in the evaluation of facts and evidence in adjudication/mediation/arbitration to ensure gender equality, equal protection and non-discrimination.

Judging with a gender perspective would allow equal opportunity, equal access and equal outcome in the dispensation of justice to those persons whose rights are at risk of not being recognized due to their sex or gender.

## GENERAL GUIDANCE FOR THE APPLICATION OF A GENDER PERSPECTIVE IN JUDICIAL DECISION-MAKING

9. Unequal gender relations and norms are socially constructed and must be changed through law, policy and practice.
10. Judges should carefully consider the facts of every case and the context surrounding the facts to determine if one of the persons involved is in an unequal power relationship or if one is adversely affected by unequal treatment, unequal legal protection or discrimination, because of sex or gender, including where sex or gender are one among multiple grounds of discrimination. Judges should be acutely conscious of any such inequalities while continuing to hear and determine the case.

Judges should be aware of intersecting forms of discrimination and exclusion based on race, color, language, religion, belief, caste, employment, political opinion, nationality, social origin, disability, age, location, region, indigenous and minority status, sex, gender, sexual orientation, gender identity, or other status. Cases involving intersecting forms of discrimination or exclusion should be carefully reviewed, especially for the purpose of establishing reparation measures.

11. When hearing and adjudicating cases, judges should be careful to avoid using gender stereotypes.

Some common stereotypes judges should take care to avoid are:

- Women are physically weak;
- Women cannot make decisions on their own;
- Men are the head of the household and must make all the decisions related to family;
- Women should be submissive and obedient;
- Good women are sexually chaste;
- Every woman wants to be a mother;
- Women should be the ones in charge of their children;
- Being alone at night or wearing certain clothes make women responsible for being attacked;
- Women are emotional and often overreact or dramatize hence it is necessary to corroborate their testimony;
- Testimonial evidence provided by women who are sexually active may be suspect when assessing "consent" in sexual offense cases; and
- Lack of evidence of physical harm in sexual offense cases means consent was given.

12. When determining which law to apply to a particular case, judges should:

- a) Evaluate if the law is based on a stereotype or a sexist view of a person;
- b) Evaluate the purported gender neutrality of the law and the consequences of its application, including whether the law may lead to indirect discrimination and discriminatory impacts;
- c) Consider whether there are reasonable constructions and interpretations of the law that better guarantee substantive equality, equal protection and non-discrimination and, where appropriate, apply such an interpretation;
- d) Consider the domestic application of international treaties to which their State is a party and adopt an interpretation that is consistent with the application of any such applicable treaties; and



- e) If their State is not a party to CEDAW or the ICCPR or is a party but has not adequately incorporated CEDAW or the ICCPR in domestic law, judges may resort to these and other applicable international law treaties to resolve ambiguities present in domestic law and fill gaps in domestic law. These standards may also serve as an interpretative guide and as a source of definitions that judges might not find in their domestic legal systems.

13. When deciding on the merits of a case or whether a case merits judicial review, judges should:

- a) Apply domestic law in accordance with international law and standards;
- b) Apply human rights principles of accountability, equality, universality, indivisibility, interdependence, interrelatedness, and inalienability;
- c) Identify any international standards that have been applied and explain their application;
- d) Identify and take into account the existence of any unequal power relation or structural discrimination, as well as any stereotype or gender bias detected in the facts or in the legal process;
- e) Give a reasoned explanation as to why they are applying a particular law to the case;
- f) Explain why applying a particular standard would cause illegitimate differentiated treatment;
- g) Incorporate meaningfully the gender analysis; and
- h) Take care to avoid re-victimization.

14. It should be recalled that under international law, any person who has suffered a human rights violation, including as a result of gender discrimination, has a right to an effective remedy and reparation for harm suffered. If reparation measures are necessary or appropriate, judges should apply measures that:

- a) Are consistent with the principles and standards of international human rights law;
- b) Are free from gender stereotypes;
- c) Effectively redress the disproportionate harm, based on sex or gender, caused to the victim;
- d) Take into consideration the situation and needs of the victims and enable their meaningful participation where possible;
- e) Adhere to the principles of restorative justice in criminal cases; and
- f) Contribute to efforts to address unequal power relations and structural discrimination.

Judges should, to every extent possible, use inclusive or gender-neutral and gender-sensitive language in court proceedings, decision-making, mediation and other court issuances.

15. Women who have suffered from domestic violence should have access to legal aid and be exempted from payment of docket and other legal fees.

16. Appropriate accommodations, including the provision of medical services and social welfare, should be made in the legal process for women in special situations, including adolescents, the elderly and women who are pregnant or lactating.

## **RECOMMENDATIONS FOR INSTITUTIONAL POLICIES IN THE JUDICIARY**

17. Developing a gender-sensitive and gender-responsive judicial system means not only including gender considerations in rules for adjudication of cases and mediation, but more generally in the administration of justice.
18. Gender equality should be a principle that guides judicial appointments. Women and men must be equally represented on the bench as they bring a diversity of perspectives, approaches and life experiences to adjudication, which influence the interpretation and application of laws. To that end, legislative, administrative and judicial authorities responsible for appointments and promotions, should move expeditiously and progressively to achieve gender parity.
19. Women judges should not be assigned only to cases involving family law or sexual violence, but to any other area that falls within their legal expertise. Women judges should be made eligible and considered for any level of the judiciary.
20. If necessary, temporary affirmative measures –like quotas which should be consistent with requirements of integrity and high competency -should be implemented in order to assure that women are adequately represented in the judiciary. Evaluation procedures for the appointment and promotion of judges should be merit-based and considered with a gender perspective to avoid rules and situations that might place women at a disadvantage in judicial appointments and promotions.
21. Evaluation panels for the appointment and promotion of judges should be composed of men and women. Gender stereotypes should never be a factor, express or implicit, in the evaluation of judges for appointment or promotion. One criterion for the evaluation of candidates should be demonstrated commitment to human rights and gender equality.
22. All judges and other justice sector personnel shall be entitled to the same remuneration for work of equal value.
23. Judges and, in general, all judicial staff should be adequately trained to apply a gender perspective in their daily work. Judicial training institutions should include courses on gender mainstreaming and women’s human rights.
24. It is advisable to establish a gender office, unit, or working group, in the judiciary in order to effectively promote the inclusion and institutionalization of a gender perspective in the administration of justice and monitor compliance thereto.
25. The commitment to gender sensitivity and gender equality of individual judges should be recognized and endorsed to encourage other judges to follow suit and to boost morale in general.
26. The judiciary should endeavor to actively engage with the other branches of government to ensure the implementation of the abovementioned general guidance.





















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