

# Judicial Resource Book on Violence Against Women for Asia

Combating Violence against Women and Girls  
for Cambodia, India, Pakistan and Thailand

*Niaz A Shah*



The Commonwealth

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Combating Violence against Women  
and Girls for Cambodia, India, Pakistan  
and Thailand

Niaz A Shah

Commonwealth Secretariat  
Marlborough House  
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London SW1Y 5HX  
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## Foreword

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Under the heading ‘Gender Equality’, Article XII of the Commonwealth Charter states:

*We recognise that gender equality and women’s empowerment are essential components of human development and basic human rights. The advancement of women’s rights and the education of girls are critical preconditions for effective and sustainable development.*

This Asia Judicial Resource Book responds to that commitment, and to the need expressed at the Commonwealth Judicial Forum held in Botswana in April 2013 for practical guidance on cases relating to Violence Against Women and Girls (VAWG). It was felt that digests of readily accessible reviews of Commonwealth case law and landmark judgments, considered within regional contexts, would be of value in strengthening the jurisprudence of equality.

This resource book aims both to deepen understanding of the varying forms of VAWG and to raise awareness of the important role that the judiciary can play in tackling them. It is designed to be used by judicial officers and other professionals as a practical contribution towards promoting justice and fairness in the judicial process for women who have been victims of violence.

Produced in partnership with the UN Women Regional Office for Asia-Pacific, this volume brings together information on key judgments of apex courts seeking to advance protections for women against violence, through application of constitutional guarantees and international human rights law. Judgments are analysed in the context of relevant legislative frameworks, and guidance offered on best practices on overcoming gender bias when dispensing justice.

Various manifestations of VAWG are considered, including child early and forced marriage, domestic violence, rape and sexual harassment, and studied in the national contexts of India, Pakistan, Thailand and Cambodia. Attention is also given to the obstacles survivors face within the legal system, and to ways of making justice more accessible.

In Asia, as in all regions of the Commonwealth, the judiciary can make a significant contribution towards strengthening and protecting the human rights of women and girls. This is of vital importance in advancing the values of our Commonwealth Charter, and in attaining the goals of the 2030

Agenda for Sustainable Development to which all our member countries are committed.

**The Rt Hon Patricia Scotland QC**  
Secretary-General of the Commonwealth

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## Table of Treaties

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- ASEAN Declaration on Elimination of Violence against Women 2013
- ASEAN Regional Plan of Action on Elimination of Violence against Women 2015
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984
- Convention on the Elimination of All Forms of Discrimination against Women 1979
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 1999
- Convention on the Rights of the Child 1989
- Declaration on the Elimination of Violence against Women 1993
- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic, Social and Cultural Rights 1966
- Universal Declaration of Human Rights 1948
- Vienna Convention on the Law of Treaties 1969
- Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (the SAARC Convention) 2002
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transitional Organized Crime 2000

## Table of Statutes

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### **Cambodia**

- Constitution of the Kingdom of Cambodia 2008
- Law on Marriage and Family Act 1989
- Labour Law of Cambodia 1997
- Civil Code of Cambodia 2003
- Law on the Prevention of Domestic Violence and the Protection of Victims Act 2005
- Criminal Code of Cambodia 2010

### **India**

- Commission of Sati (Prevention) Act 1987
- Dissolution of Muslim Marriages Act 1939
- Protection of Women from Domestic Violence Act 2005
- Hindu Marriage Act 1955
- Hindu Minority and Guardianship Act 1956
- Christian Marriage Act 1872
- Divorce Act 1869
- Indian Penal Code 1860
- Code of Criminal Procedure 1973
- Information Technology Act 2000
- Juvenile Justice (Care and Protection of Children) Act 2000
- Prohibition of Child Marriage Act 2006
- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013
- Criminal Law (Amendment) Act 2013
- Protection of Human Rights Act 1993

### **Pakistan**

- Child Marriage Restraint Act 1929
- Criminal Law (Second Amendment) Act 2011

- Dissolution of Muslim Marriages Act 1939
- Dowry and Bridal Gifts (Restriction) Act 1976
- Majority Act 1875
- Pakistan Penal Code 1860
- Prevention of Anti Women Practices Criminal Law (Third Amendment) Act 2011
- Protection against Harassment of Women at the Workplace Act 2010
- Protection of Women (Criminal Law Amendment) Act 2006
- Constitution of Pakistan 1973
- Code of Criminal Procedure 1898
- Juvenile Justice System Ordinance 2002
- Domestic Violence (Prevention and Protection) Act 2013 (Sindh)
- Domestic Violence (Prevention and Protection) Act 2014 (Baluchistan)
- Punjab Protection of Women against Violence Act 2015

**Thailand**

- Civil and Commercial Code B.E. 2468 (1925)
- The Criminal Code B.E. 2499 (1956) (as amended 2008)
- Labour Protection Act B.E. 2541 (1998)
- Domestic Violence Victim Protection Act B.E. 2550 (2007)
- Cabinet Resolution, Government of the Royal Kingdom of Thailand, 16 June 2015
- Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014)

## Table of Cases

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### **CEDAW Committee**

Communication No. 2/2003, A.T. v Hungary, views adopted on 26 January 2005

Communication No. 18/2008, Karen Tayag Vertido v Philippines, views adopted on 16 July 2010

Communication No. 34/2011, R.P.B. v Philippines, views adopted on 21 February 2014

Communication No. 5/2005, Sahide Goekce v Austria, views adopted on 6 August 2007

Communication No. 20/2008, V.K. v Bulgaria, views adopted on 25 July 2011

### **Judgments of National Courts**

#### **India**

Apparel Export Promotion Council v A. K. Chopra [1999] INSC 7 (20 January 1999)

Indra Sarma v V.K. Sarma [2013] INSC 1051 (26 November 2013)

Delhi Domestic Working Women's Forum v Union of India 1995 SCC (1) 14

Lata Singh v State of U.P. & Anr. [2006] INSC 383 (7 July 2006)

Vishaka v State of Rajasthan [1997] INSC 665 (13 August 1997)

Smt. Seema v Ashwani Kumar [2006] INSC 74 (14 February 2006)

Shalu Ojha v Prashant Ojha [2014] INSC 447 (18 September 2014)

Tekan Alias Tekram v State of M.P. (now Chhattisgarh) [2016] INSC 142 (11 February 2016)

#### **Pakistan**

Hafiz Abdul Waheed v Asma Jahangir (Saima Waheed Case), PLD 2004 SC 219

Issa Khan v Mst Ramza 1991 SCMR 2454

Zafar Iqbal v The State 2010 SCMR 401

Morrison Bhatti v The State 2008 MLD 866

Muhammad Ameer v The State PLD 2006 Supreme Court 283

Salman Akram Raja v The Government of Punjab through the Chief Secretary PLJ 2013 SC 107

Human Rights Case No.42389-P of 2013 (Action taken on news clipping from *Daily Dunya* dated 4.11.2013 regarding rape on a deaf and mute lady at Nankana Sahib)

Ms. Tahrim Tahir v Vice Chancellor of Quaid-e-Azam University Islamabad, 2013 MLD 225

Muhammad Sharif v The State P L D 1957 Supreme Court (Pak.) 201

## Abbreviations and Acronyms

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ADEVAW	ASEAN Declaration on Elimination of Violence against Women 2013
ADHOC	Cambodian Human Rights and Development Association
AIR	All India Reporter
ASEAN	Association of Southeast Asian Nations
CAMBOW	Cambodian Committee of Women
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women 1979
CHRI	Commonwealth Human Rights Initiative
CRC	Convention on the Rights of the Child 1989
DAW	Division for the Advancement of Women
DEVAW	Declaration on the Elimination of Violence against Women 1993
DHS	Demographic and Health Survey
GBV	Gender Based Violence
HRC	Human Rights Committee (UN)
HRCP	Human Rights Commission of Pakistan
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
IHRL	International Human Rights Law
ILO	International Labour Organization
JRB	Judicial Resource Book
LICADHO	Cambodian League for the Promotion and Defense of Human Rights
NCRB	National Crime Records Bureau
NHRC	National Human Rights Commission

OHCHR	Office of the High Commissioner for Human Rights
OP	Optional Protocol
PCr.LJ	Pakistan Criminal Law Journal
PDHS	Pakistan Demographic and Health Survey
PLD	All Pakistan Law Decisions
SAARC	South Asian Association for Regional Cooperation
SCC	Supreme Court Cases
VAW	Violence against Women
UPR	Universal Periodic Review
VAWG	Violence against Women and Girls
VCLT	Vienna Convention on the Law of Treaties 1969
WAR	War Against Rape
WHO	World Health Organization





# Chapter 1

## Introduction: Violence Against Women and Girls

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### Objectives

This chapter sets out the background, goal and rationale of this volume, and explains key terms and the mandate of the Commonwealth and UN Women. The aim is to familiarise readers with the aims and context of the project.

### 1.1 Background

Violence against Women and Girls (VAWG)<sup>1</sup> is ‘violence that is directed at a woman because she is a woman or affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty’.<sup>2</sup> As such it is a type, cause and consequence of discrimination. Five categories are usually distinguished within a definition of VAWG, although these are not exclusive: sexual violence; physical violence; emotional and psychological violence; harmful traditional practices; and socio-economic violence.<sup>3</sup> VAWG occurs in the home, in state institutions and in the community. It is indiscriminate in cutting across racial, ethnic, class, economic, religious and cultural divides.

VAWG is recognised as a ‘form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men’.<sup>4</sup> The rights that it violates include, but are not limited to, non-discrimination, equal protection before the law and equality before the law; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right to life; the right to health and the right to liberty and security of the person. As such, VAWG has numerous damaging consequences for the welfare of women and girls, impacting upon their physical, mental and sexual well-being.

VAWG manifests itself through all stages of the life cycle of women and girls.<sup>5</sup> Some types of violence cut across all stages of the life cycle, e.g. commercial sexual exploitation; economic abuse; sexual abuse; emotional and physical abuse; honour crimes; psychological abuse; rape; sexual harassment; sexual assault and denial of sexual and reproductive rights.

## 1.2 VAWG in target countries

The statistics in this Judicial Resource Book are based on reported incidents of violence against women. It is worth bearing in mind that violence against women is universally under-reported. Reporting rates are not necessarily a good proxy for prevalence rates. The magnitude of VAW might be much more serious than what is represented in this book and it would be beneficial for judges and other stakeholders to keep themselves up to date regarding the prevalence of VAWG.

### 1.2.1 Cambodia

Violence against women and girls is endemic in Cambodia, affecting all levels of society in all regions of the country.<sup>6</sup> Domestic violence continues to be the single most prevalent form of violence against women and girls in Cambodia.<sup>7</sup> In a 2016 WHO study, just over one in five women admitted to being physically and/or sexually abused by their intimate partner at least once in their lifetime;<sup>8</sup> and in a 2013 UN study, one in three men admitted to inflicting sexual or physical violence, or both, on a partner at least once in their lifetimes.<sup>9</sup>

Rape and sexual violence remain pervasive and continue to go unpunished. In a 2013 UN study on men and violence in Asia and the Pacific, just over one in five male respondents in Cambodia admitted to having committed rape at least once in their lifetime;<sup>10</sup> and of that 20 per cent, almost half had perpetrated rape more than once.<sup>11</sup> The motivations behind the decision to rape were cited as: 'sexual entitlement' (45%);<sup>12</sup> 'anger or punishment' (42%);<sup>13</sup> 'fun or boredom' (27%);<sup>14</sup> and 'drinking or intoxication' (14%).<sup>15</sup> Impunity for rape is widespread: 44.5 per cent of the male respondents who had admitted to perpetrating rape reported that they never faced any legal consequences (arrest or prosecution) for rape.<sup>16</sup>

Gender inequality and cultural attitudes play a significant role in enabling violence against women. A well-known saying in Khmer goes '[a] man is gold, a woman is cloth'.<sup>17</sup> In a 2016 WHO study, almost half of women interviewed believed that men were justified in physically abusing their wives.<sup>18</sup> Meanwhile, in a 2013 UN study, 96.2 per cent of men surveyed and 98.5 per cent of women surveyed believed that a woman should obey her husband.<sup>19</sup>

Early and forced marriage also remain a concern in Cambodia. Approximately 3 per cent of adolescent boys and 16 per cent of adolescent girls were married or living together in 2016.<sup>20</sup> Although the overall rate of early marriage has been generally decreasing since 2010,<sup>21</sup> arranged and early marriages still occur, particularly in rural areas, and once a couple is married there is great

pressure on them to stay married. Early marriages are particularly common amongst hill tribe communities.<sup>22</sup> It is also not unusual for rape to be settled through early forced marriage to avoid criminal charges.<sup>23</sup>

Sexual harassment is not readily reported or discussed, despite being a widespread issue. In the absence of a clear legal definition of sexual harassment<sup>24</sup> and any guidelines on the prevention of sexual harassment, general awareness on the issue of sexual harassment remains low, thus enabling it to go under-reported and under-investigated.<sup>25</sup>

### **1.2.2 India**

Multiple forms of violence against women are widespread across the country: domestic violence including 'dowry deaths'; child, early and forced marriage; female infanticide and foeticide; forced prostitution; sexual harassment in public places; and sexual assault and sexual abuse. Some traditional harmful practices that continue to occur include child, early and forced marriages, dowry-related practices, witch-hunting of women, and communal violence perpetrated against cultural, racial and religious minorities. In some states these issues are more serious than in others.

According to the National Crime Records Bureau of India, some 337,922 cases of crimes against women were reported in the country during 2014, an increase of 9.2 per cent from the previous year. These records indicate a steady increase during 2010–14 with 213,585 cases reported in 2010, 228,649 cases in 2011, 244,270 in 2012 and 309,546 in 2013. The crimes reported include rape; attempt to commit rape; kidnapping and abduction of women; dowry deaths; assault on women with intent to 'outrage her modesty'; 'insult to the modesty' of women; cruelty by a husband or his relatives; and trafficking.<sup>26</sup>

In 2014 there were 122,877 reported cases of cruelty by husband or his relatives; 82,235 cases of assault on women with intent to 'outrage modesty', 57,311 cases of kidnapping and abduction of women and 36,735 cases of rape.<sup>27</sup> An analysis of rape data published by NCRB indicates a nine per cent increase in crimes against women in 2014 compared to 2013, along with about 197 cases of custodial rape and 2,346 of gang rape cases recorded in 2014.<sup>28</sup>

### **1.2.3 Pakistan**

In Pakistan, violence against women in the form of domestic and sexual abuse, including child, early and forced marriages and dowry-related violence; acid attacks; and so-called 'honour killings' is pervasive. These crimes are grossly under-reported and seeking justice is difficult due to structural factors such as the lack of independence of women, a weak criminal justice system and a lack of societal support for women. In this

environment, progressive laws enacted to protect women against violence have been largely ineffective.<sup>29</sup>

According to the Human Rights Commission of Pakistan (HRCP), in 2013 media reports indicated that 56 women were murdered simply for giving birth to girls, 150 women were burned in acid attacks, gas leakage and stove burning, while 389 incidents of domestic violence were reported in the media with husbands being the most common perpetrators. In the same year, the police crime statistics from one province, Punjab, stated that 2,576 cases of rape of women were registered during the year.<sup>30</sup>

The HRCP has also reported a rise in ‘honour’ killings (murder of a woman who is perceived to have violated family ‘honour’ by having pre-marital or extra-marital sex, married of her own will or refused an arranged or forced marriage)<sup>31</sup> with 1,005 honour killings reported in 2014, including 82 minor girls, compared to the 869 cases in 2013.<sup>32</sup>

It is estimated that 21 per cent of girls in Pakistan are married before the age of 18.<sup>33</sup> Child marriages sometimes involve the transfer of money, settlement of debts<sup>34</sup> or exchange of daughters (Vani/Swara or Watta Satta).<sup>35</sup> Some of the settlements are sanctioned by a Jirga or Panchayat (council of elders from the community). Such practices also include giving women in marriage to the Holy Qur’an.<sup>36</sup>

#### **1.2.4 Thailand**

Violence against women and girls is pervasive in Thailand. Discriminatory gender stereotypes, cultural and strong patriarchal attitudes play a significant role in propagating violence against women, undermining women’s access to remedy and reparations for gender-based violence.<sup>37</sup> It is estimated that a woman is raped every 15 minutes in Thailand, resulting in approximately 30,000 incidents of rape each year.<sup>38</sup> Yet less than 4,000 cases are reported and only 2,400 cases are followed up with an arrest.<sup>39</sup>

Domestic violence continues to be a serious problem in Thailand.<sup>40</sup> In a recent UN study, 44 per cent of Thai women admitted to being a victim of physical violence or sexual violence or both by an intimate partner in their lifetime.<sup>41</sup> Another 22 per cent admitted to being subjected to physical violence or sexual violence or both within the last 12 months.<sup>42</sup> Previous studies have shown that as many as one in three households experienced some form of domestic violence over the course of the year.<sup>43</sup>

Prevailing cultural attitudes play a significant role in propagating domestic violence in Thailand. There is a well-known saying in Thai culture that a woman is the ‘hind legs of the elephant’ following the man’s front legs.<sup>44</sup> It is not uncommon for women and girls to believe they are partially to blame

for incidents of physical abuse, or to agree that in some circumstances a man is justified in abusing his intimate partner.<sup>45</sup> In a WHO study, 53.4 per cent of women who had previously experienced some form of intimate partner violence, believed that a man was justified in beating his wife under certain circumstances.<sup>46</sup>

Early and forced marriage is also a concern in Thailand. Thai law does not prohibit child or early marriage: the minimum age to marry is 17 years<sup>47</sup> but it is possible for adolescents as young as 13 years to be married with the permission of the Court.<sup>48</sup> Also, underage marriage is not a basis to annul a marriage under Thai law. According to UNICEF, approximately 16 per cent of adolescent girls in Thailand were living in a marriage or union in 2016.<sup>49</sup> Forced marriage is tacitly permitted under Thai law: section 277(5) of the Criminal Code allows a perpetrator (who is under 18 years of age) to avoid prosecution for statutory rape by marrying the victim (who must be above 13 years of age but below 15 years of age) where the Court grants approval.<sup>50</sup>

Sexual harassment occurs widely, however. With no specific legislation defining sexual harassment, and provisions under the Criminal Code<sup>51</sup> and Labour Protection Act<sup>52</sup> with minimal penalties, the issue remains under-reported and under-investigated. The criminal offence of public indecency was amended to increase punishment for sexual harassment in December 2014. The Cabinet of the Thai Government issued a resolution on 15 June 2015 to address sexual harassment and further developed a set of guidelines on how to prevent sexual harassment in the workplace.<sup>53</sup>

### 1.3 Terminology

To assist readers, a brief discussion on the commonly used key terms is reproduced below from the World Bank Group Guide on *Violence against Women and Girls*:

- The terms ‘**gender-based violence**’ (GBV) and ‘**violence against women**’ (VAW) are often used interchangeably, since most gender-based violence is perpetrated by men against women. GBV, however, includes violence against men, boys, and sexual minorities or those with gender-nonconforming identities. As such, violence against women (VAW) is one type of GBV.
- **Violence against women** (VAW) is any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life (UN General Assembly, 1993).

- **Gender-based violence (GBV)** is violence that is directed against a person on the basis of gender. It constitutes a breach of the fundamental right to life, liberty, security, dignity, equality between women and men, non-discrimination and physical and mental integrity (Council of Europe, 2012).
- **Intimate partner violence (IPV)** refers to behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse, and controlling behaviours (WHO, 2013).
- **Sexual violence/sexual assault** is any sexual act, attempt to obtain a sexual act, or other act directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. It includes rape, defined as the physically forced or otherwise coerced penetration of the vulva or anus with a penis, other body part, or object (WHO, 2012).
- **Sexual exploitation** means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially, or politically from the sexual exploitation of another (UN Secretary General, 2003).
- **Sexual harassment** is unwelcomed sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature (UN Secretary General, 2008).
- **Female genital mutilation/cutting** includes all procedures that involve partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons (WHO, 2013).
- **Child marriage** is a formal marriage or informal union before age 18.<sup>54</sup>

A Study of the Secretary-General of the United Nations on *Ending Violence Against Women, From Words to Action* has provided helpful definitions of the following terms:

- **Harmful traditional practices** female infanticide and prenatal sex selection, early marriage, dowry-related violence, female genital mutilation/cutting, crimes against women committed in the name of "honour", and maltreatment of widows, including inciting widows to commit suicide, are forms of violence against women that are considered harmful traditional practices, and may involve both family and community. While data has been gathered on some of these forms, this is not a comprehensive list of such

practices. Others (...) include the dedication of young girls to temples, restrictions on a second daughter's right to marry, dietary restrictions for pregnant women, forced feeding and nutritional taboos, marriage to a deceased husband's brother and witch hunts.<sup>55</sup>

- **A forced marriage** is one lacking the free and valid consent of at least one of the parties. In its most extreme form, forced marriage can involve threatening behaviour, abduction, imprisonment, physical violence, rape and, in some cases, murder.<sup>56</sup>
- **Dowry-related violence** is violence related to demands for dowry — which is the payment of cash or goods by the bride's family to the groom's family — which may lead to women being killed in dowry-related femicide.<sup>57</sup>

#### 1.4 Commonwealth and UN Women

Gender equality is one of the Commonwealth's core values. The Commonwealth Secretariat was given a strong mandate for action on VAWG by Commonwealth Heads of Government at their summit in Malta, November 2015: 'Heads agreed to continue efforts to eliminate all forms of gender-based violence, including in conflict and other emergency situations. Heads welcomed the continuing efforts by member states and Commonwealth bodies to prevent and eliminate child, early and forced marriage and female genital mutilation as barriers to development and the full realisation of girls' and women's human rights.' This mandate builds on previous iterations made by Heads of Government where the need to tackle VAWG was affirmed.

The Commonwealth **Plan of Action for Gender Equality 2005–15** (PoA) identified VAWG as one of the critical areas for action, and recognises that women and girls experience different forms of discrimination and that gender biases, inequalities and inequities intensify their disadvantages. To ensure gender justice, the PoA calls for gender-sensitive laws, customs, practices and mechanisms.

Eliminating discrimination against women and girls is a cornerstone of UN Women's mandate and one of the two aspirations underpinning the UN General Assembly's creation of UN Women – the United Nations Entity for Gender Equality and Empowerment of Women in July 2010.<sup>58</sup> Gender Equality was further entrenched as one of the core goals under the 2015 Sustainable Development Goals. Under Goal Five, Gender Equality is described as 'not only a fundamental human right, but a necessary foundation for a peaceful, prosperous and sustainable world'.<sup>59</sup> UN Women estimates that 35 per cent of women globally experience some form of



physical or sexual violence in their lifetime. Ending Violence against Women and Girls is a core component of UN Women's programmatic response to gender equality and one of the key targets under Goal 5. To realise its objective of ending violence against women and girls, UN Women employs a range of different responses and approaches, which include advocacy; supporting innovative approaches to end VAWG; improving knowledge and evidence on VAWG; expanding access to services for women and girls and improving prevention. The judiciary plays a critical role not only in promoting and advancing gender equality but also in prohibiting and preventing all forms of VAWG.

Jurisprudence of equality is the focus of the Commonwealth's collaboration with UN Women as spelled out in the **Memorandum of Understanding** adopted in 2015. In the context of this collaboration two judicial resource books are being produced for East Africa and Asia regions.

The Commonwealth Secretariat has also produced expert papers such as *Addressing Violence against Women in the Commonwealth within States' Obligations under International Law*.

## 1.5 Rationale and methodology

This resource book is the outcome of extensive research, numerous experts' meetings and workshops. The focus of these meetings was to identify laws, key judgments on VAWG and good practices from different jurisdictions, especially the four target countries. The effort was supported by leading independent experts on women's human rights.

The Commonwealth Secretariat and UN Women Asia-Pacific Regional Office convened an Asia regional consultation on strengthening the jurisprudence of equality to eliminate violence against women and girls from 25–27 November 2014 in Bangkok, Thailand. The consultations comprised presentations and discussions for the identification of key policies, advocacy strategies and concrete priority actions for strengthening the jurisprudence of equality on VAWG. One of the outcomes of the regional consultations was a recommendation for the development of a judicial resource book on the growing jurisprudence on violence against women and girls, which would assist the judiciary and other stakeholders in addressing violence against women in the region.

The *Judicial Resource Book on Violence Against Women for Asia* is a first in the region bringing together information on key judgments of apex courts seeking to advance protections for women against violence; through application of constitutional guarantees and international norms of equality;

in the context of the relevant legislative framework; and highlighting best practices in relation to addressing gender bias within the justice system.

In discussing VAWG, this *Judicial Resource Book* focuses on four forms of VAW: **rape, domestic violence, child and forced marriage and sexual harassment**. Forced marriage includes the forced marriage of widows. We have considered the incidence of such violence, and the law in four countries – two common law countries within South Asia (India and Pakistan) and two civil law countries in South-East Asia (Thailand and Cambodia). This geographical distribution enables consideration of the extent to which sub-regional intergovernmental bodies provide for common standards or processes to address VAW, within South Asia and South-East Asia respectively. While this discussion is necessarily schematic and broad, it makes it possible to identify the emergence of relevant domestic standards for legal protection of women and girls against violence, as well as jurisprudence highlighting the domestic application by national courts of international human rights standards. Case studies of landmark judgments by the highest courts of India and Pakistan invoking constitutional rights and human rights standards are referred to throughout the text. Given that Cambodia and Thailand are civil law jurisdictions, there is not much case law from those countries but it is hoped that the cross-fertilisation of case law between and among jurisdictions across the Asia-Pacific will help to further the evolution of jurisprudence to secure women's rights to legal protection against violence.

## 1.6 Goal and beneficiaries

This resource book aims to assist and enable judges and other stakeholders to contribute to the protection of women's human rights, especially victims of VAWG, by making informed and human rights compliant decisions. The ultimate goal is to contribute to better enjoyment of human rights of women and girls in the target countries.

The beneficiaries of this project are the women and girls of Cambodia, India, Pakistan and Thailand. Better enjoyment of human rights by women and girls contributes to a better, peaceful and a secure society.

## 1.7 Structure of the Judicial Resource Book

The book consists of eight chapters and two annexes, starting with this introductory chapter. The introduction briefly sets the scene by defining violence against women, sets out the goal of the book, the mandate of the Commonwealth and UN Women and the rationale and methodology used in producing this book. Key terms used in the book are also explained in the introduction.

Chapter 2 is a substantive chapter setting out the nature and various forms of VAWG and how international human rights law – both UN and regional – treats the issue of VAWG. It also briefly introduces readers to IHRL, especially highlighting the obligations of state organs for implementing and compliance with IHRL.

Chapter 3 focuses on the commitment of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) to combating VAWG. Decisions of the CEDAW Committee and concluding observations provide insights into the working of the committee and how it monitors compliance with and implements CEDAW. General recommendations by the CEDAW Committee also contribute to better understanding of substantive rights as well as States parties' obligations under CEDAW.

Chapter 4 deals with some of the challenges facing victims seeking to access the justice system and provides guidelines to the judiciary to improve victims' access to effective remedy and reparations for violence.

Chapter 5 addresses the topic of early, child and forced marriage. Chapter 6 addresses domestic violence, while Chapter 7 focuses on rape and sexual violence. Chapter 8 addresses sexual harassment.

For ease of reference, Annex 1 contains texts of the Convention on the Elimination of All Forms of Discrimination against Women 1979 and the Optional Protocol to CEDAW 1999.

Annex 2 contains a table of treaties ratified/acceded to by Cambodia, India, Pakistan and Thailand.

## Notes

- 1 The actual wording is about VAW but in this book 'VAW' and 'VAWG' are used interchangeably.
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## Chapter 2

# Violence Against Women and Girls as a Human Rights Issue

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### Objectives

This chapter introduces readers to international human rights law, violence against women as a human rights issue and obligations of States parties under human rights law. The aim is to enable judges and other stakeholders to rely on international human rights law when dealing with cases involving VAWG and to make human rights-compliant decisions.

This chapter consists of six sections. Section 2.1 briefly introduces international human rights law (IHRL). Section 2.2 identifies and delineates a clear definition of VAWG in human rights law. Section 2.3 establishes that VAWG is a human rights issue as it violates several human rights such as the right to human dignity, right to life and the right not to be tortured. Section 2.4 outlines States parties' obligations under IHRL and section 2.5 outlines human rights obligations of the target countries. Section 2.6 contains a brief conclusion.

### 2.1 International human rights law (IHRL)

International law or the law of nations is the binding body of rules and principles that govern the relationship between one state and another and the relationship between the state and other international organisations. International human rights law is a branch of international law.

Initially, international law was concerned solely with the relations between nation-states. Only states were the subjects and had rights under international law. Individuals were not deemed to have rights and, therefore, were objects of international law. Individuals were governed by national law.<sup>1</sup>

The status of the individual underwent changes after the development of IHRL. Now it is accepted that the fundamental rights of individuals are part of the subject matter of international law. Individuals may seek remedies, after exhausting domestic remedies, through international human rights bodies if their human rights are not respected by their own states. In most serious cases of human rights violations such as genocide, torture or persistent racial discrimination, international bodies such as the UN Security

Council or the International Criminal Court may take necessary action. Individuals are the direct subjects of international human rights law.

### **2.1.1 What are human rights?**

Human rights are legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.

Human rights are commonly understood as those rights to which a person is entitled merely for being human. Human rights may not be renounced or forfeited.<sup>2</sup>

Human rights are rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination.<sup>3</sup>

Human rights are inalienable. They cannot be restricted or abrogated except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.<sup>4</sup> But restrictions must be specified and proportionate.

Non-discrimination is a cross-cutting principle in international human rights law. The principle is contained in all core human rights treaties and is seen as a candidate for customary status. The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of various grounds including sex. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: 'All human beings are born free and equal in dignity and rights.'

Individuals are entitled to all human rights but correspondingly they must also respect the human rights of others.<sup>5</sup>

### **2.1.2 Sources of international law**

International law is primarily developed and endorsed by states with increasing support from civil society and international organisations on technical issues such as drafting. The sources of international law are listed in Article 38 of the Statute of the International Court of Justice 1945. The primary sources of international law are: international conventions, international custom reflecting practice accepted as law and the general principles of law recognised by the community of nations. The subsidiary sources of international law are judicial decisions and 'the teachings of the most highly qualified publicists'.



As international human rights law is a branch of international law, its primary and subsidiary sources are the same as international law. There are nine core international human rights instruments. Each of these instruments has established a committee of experts to monitor implementation of the treaty provisions by its States parties. Some of the treaties are supplemented by optional protocols dealing with specific concerns whereas the Optional Protocol to the Convention against Torture establishes a committee of experts. These treaties are:

- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic, Social and Cultural Rights 1966
- International Convention on the Elimination of All Forms of Racial Discrimination 1965
- Convention on the Elimination of All Forms of Discrimination against Women 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984
- Convention on the Rights of the Child 1989
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990
- International Convention on the Rights of Persons with Disabilities 2006
- International Convention for the Protection of All Persons from Enforced Disappearance 2006.

### **2.1.3 Implementation of IHRL**

International human rights law is implemented at two levels: national and international. National implementation is given primacy as the international forums are activated only after exhausting domestic remedies.

#### **International implementation**

Human rights treaty bodies are responsible for the monitoring and implementation of IHRL at international level. Treaty bodies are created in accordance with the provisions of the parent treaties that they monitor, e.g. the CEDAW Committee is responsible for the monitoring and implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women 1979. These committees are called treaty bodies. Currently, there are nine treaty bodies established under the core



human rights treaties. They consist of independent experts. Treaty bodies perform four main functions: concluding observations on reports of States parties, individual communication (i.e. complaint against a State party), inquiry and general comments/recommendations.

**Concluding observation:** States parties are required to submit periodic reports to the committees as to how the rights in a specific treaty are implemented. The relevant committee will examine a report from a State party and will issue its views on the report in the form of ‘concluding observations.’<sup>6</sup> It usually consists of areas where improvement have been made and areas of concern; that is, where improvement is needed. The committees always offer recommendations as to how to deal with identified areas of concern. The committees will be keen to see whether those recommendations are followed in the next periodic report.

**Individual communication:** Most committees have the competence to examine individual complaints with regard to alleged violations of human rights by a particular State party.<sup>7</sup> The committees consider these communications and adopt a view of whether there has been a violation of the particular Convention. The committee system has also introduced a follow-up procedure whereby the State party is given up to six months to remedy the situation and report back to the committee.

**Inquiry:** Some committees such as the Committee against Torture (CAT)<sup>8</sup> and the CEDAW Committee have the competence to conduct inquiries if there are allegations of ‘grave and systematic’ violations of human rights.<sup>9</sup>

**General comment/recommendation:** The committees also publish their interpretation of the content of human rights provisions known as general comments or recommendations.<sup>10</sup> They provide helpful insights and more information about various treaty provisions to help states and other stakeholders in understanding, and ideally complying with, human right standards.

#### **2.1.4 Universal Periodic Review**

The Universal Periodic Review (UPR) is a unique process which involves a periodic review of the human rights records of all 193 UN Member States. The UPR is a significant innovation of the Human Rights Council which is based on equal treatment for all countries. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The UPR also includes a sharing of best human rights practices around the globe. Currently, no other mechanism of this kind exists.<sup>11</sup>

### 2.1.5 National implementation

International human rights law has adopted a very flexible approach to the way IHRL is implemented at national level by States parties. States voluntarily ratify or accede to treaties and commit themselves to certain international obligations. Before ratification or accession, states are provided with an opportunity to enter reservations to certain provisions of a given treaty if they wish not to be bound by those provisions. This is why States parties which undertake international obligations without reservations are not allowed to invoke internal law for their failure to comply with human rights obligations. States are not allowed to enter reservations incompatible with the 'object and purpose' of a treaty.<sup>12</sup>

IHRL also does not specify any specific mode for incorporating IHRL into the domestic legal systems of States parties. It allows States parties the flexibility to choose a mode of implementation according to their constitutions. For instance, Article 2(2) of the International Covenant on Civil and Political Rights 1966 states:

*Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant [emphasis added].*

### 2.1.6 Domesticating IHRL

There is a great variety of domestic methods for implementing international human rights instruments. Scholars have classified these methods into adoption, incorporation, transformation, passive transformation, and reference. States may apply more than one of these methods. In very broad terms, two systems can be identified: **monism** and **dualism**. In some states, treaty provisions are automatically incorporated into domestic law once they have been ratified and published in the official gazette (i.e. treaties become 'self-executing'). France, Mexico and the Netherlands, for example, work this way. Other states, including the United Kingdom, other Commonwealth countries, and Scandinavian countries, require the express legislative enactment of treaty provisions before they become domestic law.<sup>13</sup> India and Pakistan are dualist states where domestication of CEDAW and other treaties requires an act of Parliament. Thailand has been broadly categorised as a monist state;<sup>14</sup> however, it functions largely as a dualist state in requiring domestic enabling legislation to transform international obligations into Thai law.<sup>15</sup> For example, Thailand acceded to the UN Convention against Torture<sup>16</sup> in 2007, but the state has yet to enact domestic legislation defining

and criminalising torture. As such, allegations of torture are currently not investigated or prosecuted as torture under Thai law.<sup>17</sup> Cambodia functions as a monist state directly incorporating international law under Article 31 of the Constitution of the Kingdom of Cambodia 2008:

*The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights.*

The Committee on Economic, Social and Cultural Rights (CESCR) has provided guidance on the issue as well:

*13. On the basis of available information, it is clear that State practice is mixed. The committee notes that some courts have applied the provisions of the Covenant either directly or as interpretive standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice, the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.*

*14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.*

*15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.<sup>18</sup>*

### **2.1.7 IHRL and the judiciary**

If international standards are incorporated into national legislation, it is easier for domestic courts and other actors of the justice system to apply them directly. When international human rights treaties have not been formally incorporated into domestic law, national courts can and should use

international human rights standards as guidance in interpreting national law, and thereby achieve human rights application of the domestic norms. In other words, national courts and other actors of the justice system may refer to international and regional human rights norms when interpreting and developing national law, and they may also use international human rights law as the minimum standard of protection that national law should attain.<sup>19</sup>

### 2.1.8 Terminology

The 1969 Vienna Convention on the Law of Treaties (VCLT) deals with various aspects of international law. Article 2 defines various terms:

*'Ratification', 'acceptance', 'approval', 'accession' mean in each case the international act so named whereby a state established its consent to be bound by a treaty.*

#### Reservation

Reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

#### Good faith

Once a state has ratified or acceded to a treaty without reservations, it is binding on the ratifying/acceding state. Article 26 of VCLT states that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Article 27 of VCLT states that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

#### Customary international law

Customary international is referred to as 'general practice accepted as law'. It consists of two elements: acts of states amounting to settled practice and a belief that the practice is obligatory because of the existence of a rule of law (known as *opinio juris*). Customary law is binding on all states except those consistently objecting to it.

#### *Jus cogens*

*Jus cogens* are a higher class of legal obligation on a State, known as a peremptory norm, in which no derogation is allowed by any State under any circumstance. Commonly recognised examples of *jus cogens* include the prohibition of slavery, genocide, the prohibition of torture, racial discrimination and the use of force by states (when not in self-defence or authorised by the UN Security Council).<sup>20</sup> Article 53 of the Vienna Convention on the Law of Treaties states:

*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*

## 2.2 Defining violence against women and girls

### 2.2.1 CEDAW

Violence against women and girls is not specifically defined by the CEDAW, a treaty specific to women's human rights. But the CEDAW Committee has defined the term 'discrimination' widely. The committee said:

*The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.<sup>21</sup>*

The committee clearly stated that gender-based violence constitutes discrimination within the meaning of Article 1 of CEDAW. The committee further stated that gender-based violence impairs and nullifies the enjoyment by women of human rights and fundamental freedoms under general international law and human rights law. These rights and freedoms include, among others:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health; and
- (h) The right to just and favourable conditions of work.<sup>22</sup>

The definition of discrimination under Article 1 is very wide, covering violence and discrimination both in public and private spheres perpetrated by state and non-state actors.

The Convention applies to violence perpetrated by public authorities. Such acts of violence may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention.

It is emphasised, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. Under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.<sup>23</sup>

### **2.2.2 Declaration on the Elimination of Violence against Women 1993**

Although not a binding document, Article 1 of the 1993 UN Declaration on the Elimination of Violence against Women (DEVAW) defines violence against women as:

*Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*

Article 2 of DEVAW provides a comprehensive definition of violence against women including physical and psychological harm taking place in public and private spheres. It states that violence against women shall be understood to encompass, but is not limited to:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; and*
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.*

The Beijing Declaration and Platform for Action (Beijing Declaration and PFA) was adopted by the Fourth World Conference on Women in 1995 is reflective of international consensus on and commitment to VAWG. The definition of VAW of the Beijing Declaration is a wide one including ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.’<sup>24</sup>

### **2.2.3 Regional Treaties**

There is as yet no regional instrument in the Asia Pacific on human rights or on VAW. Some sub-regional instruments, however, address specific forms of VAW.

#### **ASEAN**

Across South-East Asia, the 2013 Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in the ASEAN reaffirms the goals and commitments of ASEAN to eliminating VAW.<sup>25</sup> It acknowledges the commitments of individual ASEAN Member States to CEDAW and the Convention on the Rights of the Child 1989. In the Declaration, all ASEAN Member States, individually and collectively, expressed a common resolve to eliminate VAW and violence against children in the region through, among others, measures to strengthen and, where necessary, enact or amend national legislation for the elimination of VAW and children, and to enhance the protection, services, rehabilitation, education and training, recovery and reintegration of survivors/victims.<sup>26</sup>

#### **SAARC**

The South Asian Association for Regional Cooperation (SAARC) adopted in 2002 the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. This recognises the importance of establishing effective regional cooperation for preventing trafficking of women for prostitution and for investigation, detection, interdiction, prosecution and punishment of those responsible for such trafficking.<sup>27</sup> Article 1(5) defines ‘persons subjected to trafficking’ as ‘women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means.’

## **2.3 VAWG as a human rights issue**

Violence against women and girls breaches their right to human dignity, right to life and the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.



### 2.3.1 Human dignity

The 1948 Universal Declaration of Human Rights (UDHR) states that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’<sup>28</sup> Article 2 of UDHR states that ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ The 1966 International Covenant on Civil and Political Rights recognises that the rights set out in it ‘derive from the inherent dignity of the human person’<sup>29</sup> and that all rights set out in the ICCPR shall be enjoyed without discrimination.<sup>30</sup> Article 2 of UDHR prohibits discrimination on the basis of sex, among other grounds:

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

### 2.3.2 Right to life

Article 3 of UDHR states that ‘everyone has the right to life, liberty and security of person.’ Similarly, Article 6(1) of ICCPR states that ‘every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’

### 2.3.3 Prohibition of torture etc.

Human rights law prohibits torture in all circumstances. The principle of prohibition against torture has acquired the status of *jus cogens* (Latin: compelling law)<sup>31</sup> and is binding on all states.<sup>32</sup> Article 5 of UDHR states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Article 7 of ICCPR also states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Both UDHR and ICCPR have not defined torture but Article 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines it comprehensively:

*The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in*



*an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

This definition focuses on torture committed by state officials or those working under their authority but states have obligations under human rights law to prevent and prosecute the commission of torture by non-state actors.

## 2.4 Obligations under IHRL

States parties voluntarily ratify or accede to human rights treaties. They undertake obligations to implement those treaties they have ratified or acceded to in good faith. This undertaking includes measures necessary for the implementation of treaty provisions at the national level. States parties are required to honour and fulfil their obligations in three ways:

- **Respect:** States must refrain from interfering with the enjoyment of human rights.
- **Protect:** States must prevent private actors or third parties (including state organs) from violating human rights.
- **Fulfil:** States must take positive measures (e.g. legislation, policies, programmes etc.) to ensure the realisation of human rights.

Beyond the obligations to respect, protect and fulfil, States parties are also required to follow the principle of **due diligence**. Article 4(C) of DEVAW stipulates that states parties must ‘exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons’. The principle has been affirmed by the CEDAW Committee<sup>33</sup> in its decisions on individual complaints and is reflected in treaty law as well.<sup>34</sup>

Although all the treaties discussed below do not expressly address VAWG, they set out robust prohibitions on discrimination on the basis of sex. States’ obligations to eliminate violence against women are enshrined in international and regional treaties and customary international law. In addition, and in many cases pursuant to this international framework, States across the Asia Pacific region have adopted national legislative and policy frameworks which recognise violence against women as a form of discrimination and a human rights violation that is pervasive, systemic and rooted in power imbalances between women and men. In many countries, international human rights norms on the elimination of violence against women have been incorporated into domestic law through interpretations by judicial bodies. Despite the existence of such laws, normative obligations are far from being fully implemented. To underpin their efforts to prevent

violence against women and provide protection to survivors and victims, many states in the region have adopted national action plans to establish the institutional mechanisms, resourcing and monitoring necessary to effectively address this systematic and pervasive issue.<sup>35</sup>

#### **2.4.1 The Charter of the United Nations 1945**

The Charter of the United Nations 1945 introduced the principle of equality as an international human rights standard. Its preamble ‘reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.’<sup>36</sup> It enumerates among the purposes and principles of the UN, the promotion of and respect for human rights and for fundamental freedoms for all ‘without distinction as to race, sex, language or religion.’<sup>37</sup>

Important human rights provisions are contained in Articles 55 and 56 of the Charter. Article 55(c) of the Charter states that ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex and language or religion.’

Article 56 of the Charter states that: ‘All members pledge themselves to take joint and separate action in co-operation with the organizations for the achievements of the purposes set forth in Article 55.’

These provisions constitute the foundation of modern human rights law and impose obligations on Member States to promote human rights and to co-operate with the UN, among other bodies, with a view to defining and codifying those rights.

#### **2.4.2 International Covenant on Civil and Political Rights 1966 (ICCPR)**

Article 2(1) of the International Covenant on Civil and Political Rights 1966 requires States parties to undertake ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

The Human Rights Committee of the ICCPR has emphasised states’ obligations to prevent children from ‘being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution.’<sup>38</sup>

Article 23(3) of ICCPR provides that ‘no marriage shall be entered into without the free and full consent of the intending spouses’. Article 23(4) of the ICCPR sets out that States must ‘take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and

at its dissolution.’ States parties are also required ‘to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.’<sup>39</sup>

The Human Rights Committee outlines States parties’ positive obligations to protect individuals from interference of their rights by non-state actors. It states that:

*The positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.*<sup>40</sup>

The HRC also notes that there may be circumstances where a failure ‘to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by non-State actors’ will constitute a violation of the ICCPR.<sup>41</sup>

### **2.4.3 International Covenant on Economic, Social and Cultural Rights 1966**

The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) requires all States parties to ensure that the rights contained in the Covenant are applied without discrimination on the basis of sex, among other grounds.<sup>42</sup> Article 3 requires that States parties must ‘ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth’ in the Covenant. Article 7 requires State parties to ensure ‘safe and healthy working conditions’ for all. It implies that States parties are required to provide a working environment free from all forms of violence, harassment and sexual harassment.

The Optional Protocol to the ICESCR (OP-ICESCR) 2008 refers to the UN Charter and UDHR reiterating the principles of equality and non-discrimination stating that everyone is entitled to all the rights and freedoms set forth therein ‘without distinction of any kind, such as race, colour, sex’ etc.<sup>43</sup>

The Committee on Economic, Social and Cultural Rights has adopted a number of General Comments addressing State parties’ obligations to combat discrimination. For example, while commenting on Article 2(1) of the ICESCR, the committee stated that States parties are required to take ‘all appropriate means, including particularly the adoption of legislative measures’ for fulfilling their obligations. The committee pointed it out that in many instances ‘legislation is highly desirable and in some cases may even be indispensable.’<sup>44</sup>

While commenting on Articles 2(2) and 3 of the ICESCR the committee underlined the equal rights of men and women to the enjoyment of all economic, social and cultural rights, and that ‘the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality.’<sup>45</sup> General Comment No. 16 also reiterates the principle of equality and provides that the rights set forth in the Covenant are to be enjoyed by men and women ‘on a basis of equality’<sup>46</sup> and ‘the principle of non-discrimination is the corollary of the principle of equality.’<sup>47</sup>

#### **2.4.4 Convention on the Rights of the Child 1989**

Article 19 of the Convention on the Rights of the Child (CRC) requires State parties to ‘take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.’ It further states that these protective measures should include programmes for prevention, protection, and support for child victims.

The First Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OP1-CRC) requires State parties to ensure that children under the age of 18 are not recruited compulsorily in the armed forces.<sup>48</sup>

The Second Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OP2-CRC) requires State parties to prohibit the sale of children for child prostitution and child pornography.<sup>49</sup>

#### **2.4.5 Regional instruments**

In addition to international human rights law, regional human rights treaties also define violence against women and girls and impose obligations on States parties to combat VAWG.

##### **ASEAN**

In the ASEAN Declaration on Elimination of Violence against Women (ADEVAW) 2013 the ASEAN Member States (which include Cambodia and Thailand), individually and/or collectively, expressed a common resolve to eliminate violence against women and children in the region. They referred to measures to strengthen and, where necessary, enact or amend national laws for the elimination of violence against women and children, and to enhance the protection, services, rehabilitation, education and training, recovery and reintegration of survivors/victims.<sup>50</sup>

## SAARC

In South Asia, the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002 (the SAARC Convention) requires State parties to take appropriate measures to include provisions in their domestic jurisdiction to punish trafficking of women and children for the purpose of prostitution.<sup>51</sup>

## 2.5 Obligations of target countries

Annex 2 provides a table showing treaties ratified and/or acceded to by Cambodia, India, Pakistan and Thailand. These four countries are parties to CEDAW and CRC and are thus required to fulfil their obligations in combating violence against women in their jurisdictions. In addition to UN treaties, the target countries are bound by their commitments under regional treaties under the auspices of ASEAN and SAARC.

### 2.5.1 State organs and their responsibility

The Human Rights Committee states that:

*The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'<sup>52</sup>*

The International Law Commission states that 'the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'.<sup>53</sup> It goes on to say that 'an organ includes any person or entity which has that status in accordance with the internal law of the State'.<sup>54</sup>

The Report of the UN Special Rapporteur on ‘Violence against women, its causes and consequences’<sup>55</sup> has summarised States’ obligations as follows:

*As a general rule, State responsibility is based on acts or omissions committed either by State actors or by actors whose actions are attributable to the State. A longstanding exception to this rule is that a State may incur responsibility where there is a failure to exercise due diligence to prevent or respond to certain acts or omissions of non-State actors. The due diligence standard serves as a tool for rights holders to hold States accountable, by providing an assessment framework for ascertaining what constitutes effective fulfilment of a State’s obligations, and for analyzing its actions or omissions. For due diligence to be satisfied, the formal framework established by the State must also be effective in practice.*

## 2.6 Conclusion

Violence against women and girls violates their basic human rights such as the right to dignity, the right to life, and the right to be free of torture (both physical and psychological) and contravenes the basic principle of non-discrimination. States parties are required to comply with their human rights obligations to prevent VAWG and prosecute perpetrators of violence against women. They are also required to provide effective remedies to victims in the form of damages. The human rights obligations of States parties are the responsibility of all state organs: legislature, executive, judiciary and others.

## Notes

- 1 UNHCR, *Human Rights and Refugee Protection: self-study module 5* (Vol. 1, 2005), page 8.
- 2 OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), page 10.
- 3 OHCHR, ‘What are human rights?’ (2016), <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> accessed 31 October 2016.
- 4 Ibid.
- 5 Ibid.
- 6 See Article 21 of CEDAW.
- 7 See Article 1 of OP 1 of the International Covenant on Civil and Political Rights 1966.
- 8 See Article 20 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.
- 9 See Article 8 of OP to CEDAW.
- 10 For instance, see Article 40(4) of the ICCPR.
- 11 UN High Commissioner for Human Rights, ‘Basic facts about the UPR’ (Geneva, 2 February 2017) <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> accessed 2 February 2017.
- 12 See Article 19 (c) of VCLT.
- 13 UNHCR, *Human Rights and Refugee Protection: self-study module 5* (Vol. 1, 2005), page 46.
- 14 Sompong Sucharitkul, ‘National Treaty Law and Practice: Thailand’, in Duncan B. Hollis et al (eds), *National Treaty Law and Practice* (Martinus Nijhoff, Leiden, Boston 2005), page 706.

- 15 Ibid, pages 701–703; Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014), s 23; David Sloss, 'Domestic Application of Treaties', in Santa Clara Law Digital Commons (2011), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs> accessed 25 November 2016.
- 16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. Thailand acceded on 2 October 2007.
- 17 State Report, Thailand UPR, 2016, para 132.
- 18 General Comment No. 9, 1998.
- 19 UNHCR, *Human Rights and Refugee Protection: self-study module 5* (Vol. 1, 2005), page 47.
- 20 Ibid, page 13.
- 21 CEDAW Committee, General Recommendation No. 19, 1992, section 6.
- 22 Ibid, section 7.
- 23 Ibid, section 8–9.
- 24 Beijing Declaration and Platform of Action 1995, para 113.
- 25 Declaration on the Elimination of Violence against Women and Elimination of Violence against Children 2013, see recital 3.
- 26 Ibid, Article 1.
- 27 Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, preamble, recital 6.
- 28 Universal Declaration of Human Rights 1948, preamble, recital 1.
- 29 International Covenant on Civil and Political Rights 1966, preamble, recital 2.
- 30 See Article 26.
- 31 See the Supreme Court of Pakistan decision *Pakistan Muslim League v Federation of Pakistan* PLD 2007 SC 642 where it held that UDHR has acquired customary status and its provisions are binding on Pakistani courts. See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, [99]. It is a paragraph.
- 32 UNHCR, *Human Rights and Refugee Protection: self-study module 5* (Vol. 1, 2005), page 13.
- 33 See CEDAW General Recommendation No. 19, 1992, section 9.
- 34 Christine Chinkin, 'Addressing violence against women in the commonwealth within states' obligations under international law'. *Commonwealth Law Bulletin*, Vol. 40, Issue 3, 2014: Special Issue on the Commonwealth Law Ministers Meeting 2014, pages 471–501.
- 35 Action Aid, *Violence against Women and Girls: International Human Rights Standard* (UK 2011), <https://static1.squarespace.com/static/536c4ee8e4b0b60bc6ca7c74/t/5437eb32e4b02e62e3f6e557/1412950834953/International+Human+Rights+Standards.pdf> accessed 20 November 2015.
- 36 Charter of the United Nations 1945, preamble, recital 3.
- 37 Ibid, Article 1(3).
- 38 Human Rights Committee, General Comment No. 17, 2013, para 3.
- 39 ICCPR, Article 23.
- 40 General Comment No. 31, 2004, para 8.
- 41 Ibid.
- 42 ICESCR, Article 2(2).
- 43 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, see preamble recital 2.
- 44 Committee on Economic, Social and Cultural Rights, General Comment No. 16, 2005, para 3.
- 45 Ibid, para 3.
- 46 Ibid, para 6.
- 47 Ibid, para 10.
- 48 The First Optional Protocol to the CRC on the Involvement of Children in Armed Conflict 2000, Article 3.
- 49 The Second Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000, Article 3.

- 50 ASEAN Declaration on Elimination of Violence against Women 2013, Article 1.
- 51 South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, Article 3(2).
- 52 Human Rights Committee, General Comment No. 31, 2004, para 4.
- 53 Article 4 of the International Law Commission draft articles on Responsibility of States for Internationally Wrongful Acts 2001.
- 54 Ibid.
- 55 Rashida Manjoo, 'Report of the Special Rapporteur on violence against women, its causes and consequences' A/HRC/23/49, 14 May 2013.



## Chapter 3

# Combating Violence Against Women and Girls: the Commitment of the CEDAW Committee

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### Objectives

This chapter aims to introduce readers to the work of the CEDAW Committee and its commitment to ending violence against women. Its work also demonstrates how States parties may be held accountable (including the judiciary as a state organ) at international level by the CEDAW Committee. CEDAW also provides extremely useful recommendations to States parties.

CEDAW has been described as a ‘Bill of Rights for Women’ and as such it occupies a special position in respect of combating violence against women and girls. This chapter provides an overview of the CEDAW Committee’s commitment to assist States parties in fulfilling their obligations, as well as holding them accountable where they fail in fulfilling their obligations. The committee assists States parties through concluding observations on reports submitted to it and by adopting general recommendations on key themes and issues such as violence against women. The committee holds States parties accountable through individual communications (individual complaints against states) and holding inquiries into alleged grave and systematic violations of rights under CEDAW.

The four targeted countries – Cambodia, India, Pakistan and Thailand – are parties to CEDAW and are required to submit periodic reports to the CEDAW Committee. In line with their obligations under Article 18 of CEDAW, Cambodia, India, Pakistan and Thailand have submitted reports to the committee. Concluding observations of the committee on these countries provides a very helpful overview of the current state of play in respect of violence against women and women’s human rights in general. These observations are reproduced in section 3.2.

This chapter consists of four main sections. Section 3.1 focuses on general recommendations whereas section 3.2 focuses on concluding observations by the CEDAW Committee on States parties’ reports. Section 3.3 deals with

individual communication and section 3.4 focuses on the inquiry procedure under CEDAW-OP. This is followed by a short conclusion section.

### **3.1 General recommendations**

The committee has adopted several general recommendations to CEDAW on issues such as women and HIV/AIDS, violence against women, disabled women, and reservations. General Recommendation No. 19 1992 specifically deals with violence against women, clarifying issues such as the definition of VAW and the obligations of States parties. It spells out the contents of various rights and lists recommendations on actions that States parties may take to fulfil their obligations.

#### **3.1.1 General Recommendation No. 19**

The committee's comments on the definition of VAW are cited in Chapter 2 but its comment on specific articles of CEDAW, in General Recommendation No. 19, are reproduced below:

##### **Articles 2 and 3**

10. Articles 2 and 3 establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations under articles 5-16.

##### **Articles 2(f), 5 and 10(c)**

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.
12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.

**Article 6**

13. States parties are required by article 6 to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women.
14. Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.
15. Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.
16. Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.

**Article 11**

17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.
18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

**Article 12**

19. States parties are required by article 12 to take measures to ensure equal access to health care. Violence against women puts their health and lives at risk.

20. In some States there are traditional practices perpetuated by culture and tradition that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation.

#### Article 14

21. Rural women are at risk of gender-based violence because of traditional attitudes regarding the subordinate role of women that persist in many rural communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns.

#### Article 16 (and article 5)

22. Compulsory sterilization or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.
23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.<sup>1</sup>

In light of the above comments, the committee at paragraph 24 recommended the following:

- (a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;
- (b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention;

- (c) States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence;
- (d) Effective measures should be taken to ensure that the media respect and promote respect for women;
- (e) States parties in their reports should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that result. They should report on the measures that they have undertaken to overcome violence and the effect of those measures;
- (f) Effective measures should be taken to overcome these attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices that hinder women's equality (recommendation No. 3, 1987);
- (g) Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation;
- (h) States parties in their reports should describe the extent of all these problems and the measures, including penal provisions, preventive and rehabilitation measures that have been taken to protect women engaged in prostitution or subject to trafficking and other forms of sexual exploitation. The effectiveness of these measures should also be described;
- (i) Effective complaints procedures and remedies, including compensation, should be provided;
- (j) States parties should include in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace;
- (k) States parties should establish or support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling;
- (l) States parties should take measures to overcome such practices and should take account of the committee's recommendation on female circumcision (recommendation No. 14) in reporting on health issues;
- (m) States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control;
- (n) States parties in their reports should state the extent of these problems and should indicate the measures that have been taken and their effect;

- (o) States parties should ensure that services for victims of violence are accessible to rural women and that where necessary special services are provided to isolated communities;
- (p) Measures to protect them from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers;
- (q) States parties should report on the risks to rural women, the extent and nature of violence and abuse to which they are subject, their need for and access to support and other services and the effectiveness of measures to overcome violence;
- (r) Measures that are necessary to overcome family violence should include:
  - i. Criminal penalties where necessary and civil remedies in cases of domestic violence;
  - ii. Legislation to remove the defence of honour in regard to the assault or murder of a female family member;
  - iii. Services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes;
  - iv. Rehabilitation programmes for perpetrators of domestic violence;
  - v. Support services for families where incest or sexual abuse has occurred;
- (s) States parties should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken;
- (t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:
  - i. Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;
  - ii. Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
  - iii. Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence;

- (u) States parties should report on all forms of gender-based violence, and such reports should include all available data on the incidence of each form of violence and on the effects of such violence on the women who are victims;
- (v) The reports of States parties should include information on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures.<sup>2</sup>

The committee elaborated States parties' obligations to ensure equality in marriage and family relations. It expressly stated that women must have equal rights with men in respect of the right to freely choose a spouse and enter into marriage only with their free and full consent, which is particularly relevant for addressing forced marriage.<sup>3</sup> It requires States to give equal rights to women 'to enter into and conclude contracts and to administer property',<sup>4</sup> to 'grant women equal rights with men to acquire, change or retain their nationality' and 'to pass nationality onto the children'.<sup>5</sup>

### **3.1.2 States parties' obligations under Article 2 and General Recommendation No. 28**

Article 2 of CEDAW lists obligations of States parties:

- States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
  - (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
  - (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
  - (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
  - (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

In General Recommendation No. 28, the CEDAW Committee commented on **obligations of States parties** as follows:

15. The first obligation of States parties referred to in the chapeau of article 2 is the obligation to “condemn discrimination against women in all its forms”. States parties have an immediate and continuous obligation to condemn discrimination. They are obliged to proclaim their total opposition to all forms of discrimination against women to all levels and branches of Government, to their population and to the international community, and their determination to bring about the elimination of discrimination against women. The term “discrimination in all its forms” clearly obligates the State party to be vigilant in condemning all forms of discrimination, including forms that are not explicitly mentioned in the Convention or that may be emerging.
16. States parties are under an obligation to respect, protect and fulfil the right to non-discrimination of women and to ensure the development and advancement of women in order to improve their position and implement their right of de jure and de facto or substantive equality with men. States parties shall ensure that there is neither direct, nor indirect discrimination against women. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral as it relates to men and women, but has a discriminatory effect in practice on women, because pre-existing inequalities are not addressed by the apparently neutral measure. Moreover, indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men.
17. States parties also have an obligation to ensure that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises or private individuals, in the public and private spheres. This protection shall be provided by competent tribunals and other public institutions and enforced by



sanctions and remedies, where appropriate. States parties should ensure that all government bodies and organs are fully aware of the principles of equality and non-discrimination on the basis of sex and gender and that adequate training and awareness programmes are set up and carried out in this respect.

[...].

20. The obligation to fulfil encompasses the obligation of States parties to facilitate access to and to provide for the full realization of women's rights. Human rights of women shall be fulfilled by the promotion of de facto or substantive equality through all appropriate means, including through concrete and effective policies and programmes aimed at improving the position of women and achieving de facto or substantive equality, including where appropriate, the adoption of temporary special measures in accordance with article 4 (1) and General Recommendation No. 25.
21. States parties in particular are obliged to promote the equal rights of girls since girls are within the larger community of women and are more vulnerable to discrimination in such areas as access to basic education, trafficking, maltreatment, exploitation and violence. All these situations of discrimination are aggravated when the victims are adolescents. Therefore, States shall pay attention to the specific needs of (adolescent) girls by providing education on sexual and reproductive health and by carrying out programmes that are aimed at the prevention of HIV/AIDS, sexual exploitation and teenage pregnancy.  
[...].
23. States parties also agree to "pursue by all appropriate means" a policy of eliminating discrimination against women. This obligation of means or conduct gives a State party a great deal of flexibility for devising a policy that will be appropriate for its particular legal, political, economic, administrative and institutional framework and that can respond to the particular obstacles and resistance to the elimination of discrimination against women existing in that State party.
24. The main element of the introductory phrase of article 2 is the obligation of States parties to pursue a policy of eliminating discrimination against women. This requirement is an essential and critical component of a State party's general legal obligation to implement the Convention. This means that the State party must immediately assess the de jure and de facto situation of women and take concrete steps to formulate and implement a policy that is

targeted as clearly as possible towards the goal of fully eliminating all forms of discrimination against women and achieving women's substantive equality with men.<sup>6</sup>

The CEDAW Committee has further elaborated specific obligations under Article 2 in the following way:

30. Article 2 expresses the obligation of States parties to implement the Convention in a general way. Its substantive requirements provide the framework for the implementation of the specific obligations identified in paragraphs 2 (a)-(f) and all other substantive articles of the Convention.
31. Paragraph 2 (a), 2 (f) and 2 (g) establish the obligation of States parties to provide legal protection and to abolish or amend discriminatory laws and regulations as part of the policy of eliminating discrimination against women. States parties must ensure that, through constitutional amendments or by other appropriate legislative means, the principle of equality between women and men and of non-discrimination is enshrined in domestic law with an overriding and enforceable status. They must also enact legislation that prohibits discrimination in all fields of women's lives under the Convention and throughout their lifespan. States parties have an obligation to take steps to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Certain groups of women, including women deprived of their liberty, refugees, asylum-seeking and migrant women, stateless women, lesbian women, disabled women, women victims of trafficking, widows and elderly women, are particularly vulnerable to discrimination through civil and penal laws, regulations and customary law and practices. By ratifying the Convention or acceding to it, States parties undertake to incorporate the Convention in their domestic legal systems or to give it otherwise appropriate legal effect within their domestic legal orders in order to secure the enforceability of its provisions at the national level. The question of direct applicability of the provisions of the Convention at the national level is a question of constitutional law and depends on the status of treaties within the domestic legal order. The committee takes the view, however, that the rights to non-discrimination and equality in all fields of women's lives throughout their lifespan, as enshrined in the Convention, may receive enhanced protection in those States where the Convention is automatically or through specific incorporation part of the domestic legal order. The committee

urges those States parties in which the Convention does not form part of the domestic legal order to consider incorporation of the Convention to render it part of domestic law, for example through a General Law on Equality, in order to facilitate the full realization of Convention rights as required by article 2.

32. Paragraph 2 (b) contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparations to women whose rights under the Convention have been violated. Without reparations the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.
33. According to paragraph 2 (c), States parties must ensure that courts are bound to apply the principle of equality as embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of States parties under the Convention. However, where it is not possible to do so, courts should draw any inconsistency between national law, including national religious and customary laws, and the State party's obligations under the Convention to the attention of the appropriate authorities since domestic laws may never be used as justifications for failures by States parties to carry out their international obligations.
34. States parties must ensure that women can invoke the principle of equality in support of complaints of acts of discrimination contrary to the Convention, committed by public officials or by private actors. States parties must further ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, to be determined in a fair hearing by a competent and independent court or tribunal where appropriate. Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, to bring the perpetrator(s) to trial and to impose appropriate penal

sanctions. States parties should financially support independent women's legal resource associations and centres in their work to educate women about their rights to equality and to assist them in pursuing remedies for discrimination.

35. Paragraph 2 (d) establishes an obligation of States parties to abstain from engaging in any act or practice of direct or indirect discrimination against women. States parties must ensure that State institutions, agents, laws and policies, do not directly or explicitly discriminate against women. They must also ensure that any laws, policies or actions that have the effect or result of generating discrimination are abolished.
36. Paragraph 2 (e) establishes an obligation of States parties to eliminate discrimination by any public or private actor. The types of measures that might be considered appropriate in this respect are not limited to constitutional or legislative measures. States parties should also adopt measures that ensure the practical realization of the elimination of discrimination against women and women's equality with men. This includes measures that: ensure that women are able to make complaints about violations of their rights under the Convention and to have access to effective remedies; enable women to be actively involved in the formulation and implementation of measures; ensure governmental accountability domestically; promote education and support for the goals of the Convention throughout the education system and in the community; encourage the work of human rights and women's non-governmental organizations, establish the necessary national human rights institutions or other machineries; and provide adequate administrative and financial support to ensure that the measures adopted make a real difference in women's lives in practice. The obligations of States parties requiring them to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination and to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, also extend to acts of national corporations operating extraterritorially.<sup>7</sup>

On **reservation** to Article 2, the committee has said:

41. The committee considers article 2 to be the very essence of the obligations of States parties under the Convention. The committee therefore considers reservations to article 2 or to subparagraphs

of article 2 to be, in principle, incompatible with the object and purpose of the Convention and thus impermissible in accordance with article 28, paragraph 2. States parties that have entered reservations to article 2 or to subparagraphs of article 2 should explain the practical effect of those reservations on the implementation of the Convention and should indicate the steps taken to keep the reservations under review, with the goal of withdrawing them as soon as possible.<sup>8</sup>

## 3.2 Concluding observations

As the four target countries are required to submit periodic reports, the CEDAW has the opportunity to look at all reports and make comprehensive concluding observations. So far, with the exception of Cambodia, this is the only mechanism the committee can rely on to assess compliance of the target countries with CEDAW's obligations.

### 3.2.1 Cambodia

Cambodia submitted its third and fourth periodic reports to the committee, which considered them on 28 October 2013. The CEDAW Committee appreciated some of the positive steps taken by Cambodia, e.g. introduction of laws on suppression of trafficking, domestic violence, etc., but expressed its concerns in respect of violence against women:

20. The committee acknowledges the steps taken by the State party to develop a second national action plan for the prevention of violence against women, which builds on the lessons learned from the first such plan, which covers the period 2009–2012. The committee regrets, however, the limited progress made in the prevention and elimination of violence against women during the reporting period. The committee remains concerned that the lack of public trust in the justice system and the negative attitudes of judicial officers and law enforcement personnel towards women victims of violence continue to impede the effective prosecution of cases. The committee, while noting the explanations provided by the State party regarding its practice of disposing of cases of violence against women through mediation, is concerned that this may discourage women from taking legal action against perpetrators, even when such action is warranted. The committee is also concerned at the lack of data on the number of protection orders issued during the reporting period and on shelters available for women who are victims of violence.

21. [...] the committee urges the State party:
  - (a) To intensify efforts to train judicial and law enforcement officers on the strict application of the Law on the Prevention of Domestic Violence and Protection of Victims to ensure that cases of violence against women, including domestic and sexual violence, are effectively prosecuted and not systematically diverted to mediation;
  - (b) To encourage women to lodge formal complaints about domestic and sexual violence, by destigmatizing victims and raising awareness about the criminal nature of such acts;
  - (c) To continue public awareness-raising campaigns on all forms of violence against women, in particular in rural areas;
  - (d) To provide information in the next periodic report on the number of protection orders issued during the reporting period and the number of shelters available for women victims of violence.
22. The committee notes the State party's efforts to introduce measures for all forensic examinations of rape victims to be exempt from charges. It remains concerned, however, at continued reports of corruption in the administration of justice and the high cost of medical certificates for rape and sexual assault, which continue to impede women's access to justice and prosecutions of sexual violence against women.
23. The committee recommends that the State party step up efforts aimed at raising awareness among medical practitioners regarding how to handle cases of violence against women. It should also raise awareness of the Government's policy whereby all forensic examinations of victims of rape and sexual assault are exempt from charges.<sup>9</sup>

### 3.2.2 India

India submitted its fourth and fifth periodic reports to the committee, which considered them on 2 July 2014. The committee appreciated certain steps taken by India, e.g. introduction of women-specific laws, but expressed concerns in respect of the following areas:

#### Violence against women

10. The committee notes the State party's efforts to enact a legal framework to prevent and respond to violence against women, including women from the marginalized castes and communities, such as Dalit and Adivasi women, and the establishment in 2013

of the Justice Verma Committee on Amendments to Criminal Law to review existing normative gaps. The committee is concerned, however, about the:

- (a) Stark increase in violent crimes against women, especially rape and abduction, and the high number of cases of rape reported by the National Crime Records Bureau in 2012, indicating an increase by 902.1 per cent since 1971, and continuing impunity for such acts;
  - (b) Retention in the Penal Code of an exemption from punishment when a rape is committed by the victim's husband if the wife is above 15 years of age;
  - (c) Escalation of caste-based violence, including rape, against women and girls and the downplaying by key State officials of the grave criminal nature of sexual violence against women and girls;
  - (d) Poor implementation of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act and the impunity of perpetrators of serious crimes against women;
  - (e) High number of dowry-related deaths since 2008;
  - (f) Persistence of so-called "honour crimes" perpetrated by family members against women and girls;
  - (g) Declining girl child sex ratio from 962 per 1,000 in 1981 to 914 per 1,000 in 2011;
  - (h) Criminalization of same-sex relationships, as referred to in the ruling of the Supreme Court (*Suresh Kumar Koushal and another v NAZ Foundation*, 2013);
  - (i) Increasing number of acid attacks against women since 2002, the underreporting of such crimes notwithstanding.
11. The committee urges the State party:
- (a) To implement the recommendations of the Justice Verma Committee regarding violence against women;
  - (b) To promptly enact the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill and to ensure that it provides for a comprehensive system of reparations for victims and for gender-sensitive, victim-centred procedural and evidentiary rules;
  - (c) To amend the Criminal Law (Amendment) Act, ensuring that marital rape is defined as a criminal offence, as requested by the committee in its previous concluding observations

(CEDAW/C/IND/CO/3, para. 23), expanding the scope of protection of the law to cover all prohibited grounds of discrimination and defining gang rape as constituting an aggravating factor meriting a more severe punishment;

- (d) To enact specific legislation to introduce heavier sentences for perpetrators of acid attacks, to regulate the sale and distribution of acid substances and to conduct large-scale campaigns to raise public awareness of the criminal nature of such attacks;
- (e) To strengthen the efficiency of the police, to ensure that police officers fulfil their duty to protect women and girls against violence and are held accountable, to adopt standard procedures for the police in each state on gender-sensitive investigations and treatment of victims and of witnesses and to ensure that first information reports are duly filed;
- (f) To establish, without delay, one-stop crisis centres providing women and girls who are victims of violence and rape with free and immediate access to medical attention, psychological counselling, legal aid, shelters and other support services;
- (g) To provide systematic training on women's rights to all law enforcement personnel, medical staff and judicial officials;
- (h) To put in place an effective system to monitor and evaluate the implementation, effectiveness and impact of legislation to combat sexual violence;
- (i) To make efforts to eliminate any criminalization of same-sex relations by studying the possibility, as accepted by the State party during its universal periodic review (see A/HRC/21/10/Add.1), and to take note of the ruling of the Supreme Court (Suresh Kumar Koushal and another v NAZ Foundation, 2013) in this regard;
- (j) To take urgent measures to adopt a national plan of action for improving the girl child sex ratio;
- (k) To allocate sufficient resources for the immediate enforcement of legislation on violence against women and for the establishment of special courts, complaints procedures and support services envisaged under that legislation in a time-bound manner.

#### Violence against women in border areas and conflict zones

12. The committee is deeply concerned about the reported high level of violence, including rape and other forms of sexual



violence, enforced disappearance, killings and acts of torture and ill-treatment, against women in conflict-affected regions (Kashmir, the north-east, Chhattisgarh, Odisha and Andhra Pradesh). It is particularly concerned about the:

- (a) Provisions of the Armed Forces (Special Powers) Act requiring prior authorization by the Government to prosecute a member of the security forces and the reportedly high risk of reprisals against women who complain about the conduct of the security forces;
  - (b) Significant number of displaced women and girls, in particular in the north-east, including as a result of sporadic communal violence, their precarious living conditions and exposure to serious human rights violations and the lack of gender-sensitive interventions at all stages of the displacement cycle;
  - (c) Continued marginalization and poverty of the women and girls who survived the Gujarat riots and are living in the relief colonies and their precarious living conditions with limited access to education, health care, employment and security and poor infrastructure in terms of sanitation, water, transportation and housing;
  - (d) Lack of centres providing medical, psychological, legal and socioeconomic support to women and girls who are victims of sexual violence in conflict-affected areas;
  - (e) Limited regulation of the arms trade and the proliferation of small arms and light weapons and their impact on the security of women;
  - (f) Restrictions imposed on women human rights defenders, in particular those operating in conflict areas, including restrictions on international funding and the surveillance under which they are placed;
  - (g) Absence of women in peace negotiations in the north-eastern states.
13. The committee calls upon the State party:
- (a) To, in accordance with the recommendations of the Justice Verma Committee, promptly review the continued application of the Armed Forces (Special Powers) Act and related legal protocols and to enforce special powers protocols in conflict areas and assess the appropriateness of their application in those areas;

- (b) To amend and/or repeal the Armed Forces (Special Powers) Act so that sexual violence against women perpetrated by members of the armed forces or uniformed personnel is brought under the purview of ordinary criminal law and, pending such amendment or repeal, to remove the requirement for government permission to prosecute members of the armed forces or uniformed personnel accused of crimes of violence against women or other abuses of the human rights of women and to grant permission to enable prosecution in all pending cases;
- (c) To amend section 19 of the Protection of Human Rights Act and confer powers to the National Human Rights Commission to investigate cases against armed forces personnel, in particular cases of violence against women;
- (d) To ensure that the security sector is subject to effective oversight and that accountability mechanisms, with adequate sanctions, are in place, to provide systematic training on women's rights to the military and other armed forces involved in security operations and to adopt and enforce a code of conduct for members of the armed forces to effectively guarantee respect for women's rights;
- (e) To ensure the full and effective implementation of the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, as soon as it has been enacted;
- (f) To adopt an integrated policy to enhance the living conditions of women and girls who survived the Gujarat riots, including by adopting appropriate economic recovery measures, allocating below-poverty-line cards and providing other benefits under government schemes, and to step up witness protection and security measures, especially for women and girls living in relief colonies;
- (g) To ensure that women in the north-eastern states participate in peace negotiations and in the prevention, management and resolution of conflicts in line with Security Council resolution 1325 (2000) and the committee's general recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations;
- (h) To remove restrictions on the work of human rights defenders, such as restrictions on their funding and by not placing them under surveillance.

### 3.2.3 Pakistan

Pakistan submitted its fourth periodic report to the committee, which considered it on 12 February 2013. The committee appreciated positive steps taken, e.g. enactment and revision of laws aiming at the elimination of discrimination against women. The committee also recognised the difficulties faced by Pakistan, especially violence and terrorism. The committee, however, expressed concerns at certain areas:

#### Stereotypes, harmful practices and violence against women

21. The committee is concerned about the persistence of patriarchal attitudes and deep-rooted stereotypes concerning women's roles and responsibilities that discriminate against women and perpetuate their subordination within the family and society, all of which have recently been exacerbated by the influence of non-State actors in the State party. It expresses serious concern about the persistence, among others, of child and forced marriages, "karo-kari", stove burning and acid throwing, marriage to the Koran, polygamy and honour killing. It is concerned that despite the provisions in the Criminal Law (Amendment) Act of 2004 that criminalize offenses in the name of so-called honour, the Qisas and Diyat ordinances continue to be applied in these cases, resulting in perpetrators being given legal concessions and/or being pardoned and not being prosecuted and punished. The committee expresses its concern at the high prevalence of domestic violence and marital rape and at the absence of clear legislation criminalizing such acts. It is also concerned about the paucity of information about the implementation of the standard operating procedures on the treatment of women victims of violence and at the scarce number of shelters for victims. It is further concerned at the inconsistencies in the collection of data on violence against women and about reports on the wide circulation of small arms and its impact on women's security.

The committee also called upon Pakistan:

- (a) To ensure the proper implementation of the Prevention of Anti-Women Practices Act of 2011 and other relevant legislation [...];
- (b) [...];
- (c) To strengthen support services for victims of violence, such as counselling and rehabilitation services, both medical and psychological; increase the number of shelters to ensure the

implementation of the standard operating procedures for the treatment of victims in all provinces;

- (d) To adopt a comprehensive strategy to eliminate all harmful practices and stereotypes, in conformity with article 2, and specifically 2 (f), and article 5 (a) of the Convention, which includes awareness-raising efforts targeting the general public and the media, religious and community leaders, in collaboration with civil society and women's organizations;
- (e) To ensure a robust and effective regulation of the arms trade as well as appropriate control over the circulation of existing and often illicit arms, in order to enhance the security of women and girls; [and]
- (f) To take appropriate measures to ensure the collection of disaggregated data on all forms of violence against women, including domestic violence, by the Gender Crime Cell.

### 3.2.4 Thailand

Thailand submitted its combined sixth and seventh periodic report to the committee on 27 May 2015 but so far no concluding observations have been adopted. The combined report, however, presents helpful developments in terms of laws and national policies. The 2006 concluding observations provide an overview of the issues facing women and girls in Thailand. The committee expressed concerns regarding violence against women:

- 23. The committee continues to be concerned about the prevalence of violence against women and girls. While welcoming the “draft Act on the Prevention and Resolution of Domestic Violence”, the committee is concerned about the inadequacy of the punishment for perpetrators set out therein. The committee also notes with concern that the “draft Act” focuses on reconciliation and family unity to the detriment of the right of women to live free from violence. The committee is furthermore concerned that the definition of rape in section 276 of the Penal Code is limited to sexual intercourse between a man and a woman who is not his wife, thus allowing a husband to rape his wife with impunity.
- 24. The committee urges the State party to accord priority attention to the adoption of comprehensive measures to address violence against women and girls in accordance with its general recommendation No. 19 on violence against women and the United Nations Declaration on Violence against Women. The committee encourages the State party to proceed expeditiously

with the completion and enactment of the “draft Act on the Prevention and Resolution of Domestic Violence” and to ensure that women and girls who are victims of violence have access to immediate means of redress and protection and that perpetrators are effectively prosecuted and punished. The committee also calls upon the State party to amend the definition of rape in the Penal Code by deleting the exemption for marital rape so as to make it a criminal offence. The committee recommends gender-sensitivity training for law enforcement personnel, the judiciary, health service providers and teachers to ensure that they are sensitized to all forms of violence against women and can respond adequately to it. The committee also calls on the State party to take measures towards modifying those social, cultural and traditional attitudes that are permissive of violence against women.<sup>10</sup>

Some of the concerns raised in the 2006 concluding observations seem to be addressed as is reflected in Thailand’s May 2015 report to the CEDAW Committee:

*The Parliament passed anti-discrimination and gender equality-related legislation, such as Domestic Violence Victims Protection Act B.E. 2550 (2007), the revision of Penal Code criminalizing marital rape, legal amendments concerning the right to choose one’s title and family name, among others.*<sup>11</sup>

### Violence against women

On violence against women the 2015 report states:

32. The Constitution provides for rights and protection against violence in Articles 4, 40 (6), 52 and 81. Specifically, Article 81 (2) and (5) stipulates that in pursuing directive principles of State policies in terms of legislation and administration of justice for the protection of rights and liberties of persons, the State shall provide support to the operation of private organizations in the private sector providing legal aids to the public, in particular to those affected by domestic violence. (Annex A).
33. The Protection of Victims of Domestic Violence Act B.E. 2550 (2007), aims to provide protection for persons from all forms of domestic violence on the basis of human rights and strengthening family institution. The Act emphasizes rehabilitation of victims and offenders, opting for behavioural change instead of punitive approach, to prevent repeating offences and to maintain relationships within families. The Act also provides for temporary measures to protect victims and requires the involvement of

government multidisciplinary team, the public and the media in enforcing the law and providing protection for victims at every stage of legal proceedings from filing a complaint to conducting court proceedings, mediation and victim-sensitive media reporting.

34. The Act requires any person who witnesses an act of domestic violence to notify the authority. This helps create awareness that domestic violence is a social problem and everyone has to be concerned. Procedures for rehabilitation by multidisciplinary team are set under the Act. Victims are also provided psychological care and protection against repeated act of violence. In addition, the Act provides for the application of temporary protection orders to protect victims living in violent situations during investigation or court proceedings.

[...].

38. Changing traditional attitudes and norms is a long-term challenge which requires consistent efforts. Thailand has given importance to campaign to end violence against children and women to send out the message that “violence against women and girls is not a private issue, but a public one”. Annual activities are organized in November, designated as a campaign month to end violence against children and women. In addition, the government also announced 2010 as the “End of Violence against Children, Women and Domestic Violence Year”.

### 3.3 Individual communication

The 2000 Optional Protocol to CEDAW ‘recognises the competence of the committee ... to receive and consider communications’<sup>12</sup> ‘by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party’.<sup>13</sup> This means that those who feel aggrieved may invoke the jurisdiction of the CEDAW Committee to consider a complaint against their own country. A complaint to the CEDAW Committee will be admissible only when the admissibility criteria are complied with. Article 4 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women states:

1. The committee shall not consider a communication unless it has ascertained that all available domestic remedies have been

exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

2. The committee shall declare a communication inadmissible where:
  - (a) The same matter has already been examined by the committee or has been or is being examined under another procedure of international investigation or settlement;
  - (b) It is incompatible with the provisions of the Convention;
  - (c) It is manifestly ill-founded or not sufficiently substantiated;
  - (d) It is an abuse of the right to submit a communication;
  - (e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

### **3.3.1 CEDAW and the target countries**

Cambodia acceded to the Optional Protocol (OP) in 2010 and individuals may take cases against it to the CEDAW Committee. So far there is no case decided by or pending against Cambodia before the committee.

India has acceded to CEDAW and has signed the OP but has not acceded to it so far. Hence, this mechanism is not available to Indians until India accedes to the OP. India is encouraged to accede to the OP.

Pakistan has acceded to CEDAW and has neither signed nor acceded to the Optional Protocol. This mechanism is therefore not available to Pakistanis until Pakistan accedes to the OP. Pakistan is encouraged to accede to the OP.

Thailand has signed and acceded to the Optional Protocol in 2000. The people of Thailand may invoke this mechanism against Thailand. So far there is no case decided by or pending against Thailand before the committee.

The committee has received and considered a number of communications by individuals or on their behalf against various States parties. There are no complaints against Cambodia or Thailand and, obviously, against India or Pakistan as they have not acceded to the Optional Protocol yet, but a number of cases are discussed below as they provide helpful insights into the working of and interpretation by the committee of various women's rights contained in CEDAW.

### 3.3.2 Selected cases

#### Karen Tayag Vertido v Philippines 2010

##### Key points:

- Rape and gender stereotypes
- Gender-based myths and misperceptions, e.g. ‘ideal rape victim’

The author of the communication, dated 29 November 2007, is Karen Tayag Vertido, a Filipino national who claims to be a victim of discrimination against women within the meaning of article 1 of the Convention in relation to general recommendation No. 19 of the Committee on the Elimination of Discrimination against Women. She also claims that her rights under articles 2 (c), (d), (f) and 5 (a) of CEDAW were violated by the State party.

She was raped on 29 March 1996. The matter was reported to the police within 48 hours. The case was initially dismissed for lack of probable cause by a panel of public prosecutors, which conducted a preliminary investigation. The author filed an appeal regarding the dismissal of her complaint with the Secretary of the Department of Justice, which reversed the dismissal and, on 24 October 1996, ordered that the accused be charged with rape. The alleged rapist, J. B. C., subsequently filed a motion for reconsideration, which was denied by the Secretary of Justice. The information was filed in court on 7 November 1996 and the Court issued an arrest warrant for J. B. C. that same day. He was arrested more than 80 days later, after the chief of the Philippine National Police issued an order on national television directing the police to make the arrest within 72 hours. On 26 April 2005 the Regional Court of Davao City acquitted J. B. C.<sup>14</sup>

#### Case 3.1 Karen Tayag Vertido v Philippines

Karen Vertido complained to the CEDAW Committee claiming that:

- 3.1 [...] by acquitting the perpetrator, the State party violated her right to non-discrimination and failed in its legal obligation to respect, protect, promote and fulfil that right. She further claims that the State party failed in its obligation to ensure that women are protected against discrimination by public authorities, including the judiciary. She submits that this shows the State party's failure to comply with its obligation to address **gender-based stereotypes** that affect women, in particular those working in the legal system and in legal institutions. She further submits that the acquittal is also evidence of the failure of the State party to exercise **due diligence** in punishing acts of violence against women, in particular, rape.

The committee's discussion on merits of the complaint is very insightful:

- 8.5 [...]. With regard to the alleged gender-based myth and stereotypes spread throughout the judgement and classified by the author (see paras. 3.5.1–3.5.8 above), the committee, after

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a careful examination of the main points that determined the judgement, notes the following issues. First of all, the judgement refers to principles such as that physical resistance is not an element to establish a case of rape, that people react differently under emotional stress, that the failure of the victim to try to escape does not negate the existence of the rape as well as to the fact that "in any case, the law does not impose upon a rape victim the burden of proving resistance". The decision shows, however, that the judge did not apply these principles in evaluating the author's credibility against expectations about how the author should have reacted before, during and after the rape owing to the circumstances and her character and personality. The judgement reveals that the judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The committee notes that the Court did not apply the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behaviour from the author, who was perceived by the court as being not "a timid woman who could easily be cowed". It is clear from the judgement that the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response [...].

Although there exists a legal precedent established by the Supreme Court of the Philippines that it is not necessary to establish that the accused had overcome the victim's physical resistance in order to prove lack of consent, the committee finds that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. In this regard, the committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.

- 8.6 Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgement, such as the weight given to the fact that the author and the accused knew each other, constitute a further example of "gender-based myths and misconceptions".
- 8.7 With regard to the definition of rape, the committee notes that the lack of consent is not an essential element of the definition of rape in the Philippines Revised Penal Code.<sup>15</sup> It recalls its general recommendation No. 19 of 29 January 1992 on violence against women, where it made clear, in paragraph 24 (b), that "States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity". Through its consideration of States parties' reports, the committee has clarified time and again that rape constitutes a violation of women's right to personal security and bodily integrity, and that its essential element was lack of consent.
- 8.8 The committee finally would like to recognize that the author of the communication has suffered moral and social damage and prejudices, in particular by the excessive duration of the trial proceedings and by the revictimization through the stereotypes and gender-based myths relied upon in the judgement. The author has also suffered pecuniary damages due to the loss of her job.
- 8.9 [...] the committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (c) and (f), and article 5 (a) read in conjunction with article 1 of the Convention and general recommendation No. 19 of the committee.<sup>16</sup>

## R. B. P. v Philippines 2014

### Key points:

- Rape myths
- Sex and gender discrimination
- Free interpretation and fair trial
- States parties' obligations for judicial decisions

The author of this communication is R. P. B., a Filipina national born in 1989. She claims to be the victim of a violation by the State party of article 1 and article 2 (c), (d) and (f) of CEDAW. She is deaf and mute (impaired speech). She was raped by her 19-year-old neighbour when she was a minor. The accused had known about the complainant's physical state at the time of the commission of the crime. The Regional Trial Court acquitted the accused in 2011 according to stereotypical notions about the conduct of a rape victim, regardless of her special circumstances being a deaf-mute minor.<sup>17</sup>

The Court doubted the credibility of the testimony and found that she failed to prove that the sexual intercourse was not consensual. The author, after exhausting domestic remedies, complained to the committee claiming that:

The State party has failed to protect her from gender-based discrimination, in particular by not providing her with accessibility, on an equal basis with other victims, to the court, as a woman who is also deaf and mute. The author's specific allegations on this account relate in particular to the use by the trial court of gender-based myths and stereotypes about rape and rape victims, which led to the acquittal of the alleged perpetrator; the court's failure to consider her vulnerability as a deaf girl and to provide reasonable accommodation on this basis, such as sign language interpreting; and the court's failure to conduct the proceedings without undue delay.<sup>18</sup>

### Case 3.2 R. B. P. v Philippines

The CEDAW Committee concluded that the State party failed to fulfil its obligations and violated the rights of the author under Article 2(c), (d) and (f) in relation to Article 1 of the Convention and General Recommendations Nos. 18 and 19. The reasoning of the committee is illuminating:

- 8.3 With regard to the author's claim in relation to article 2 (c) of the Convention, the committee recalls that the right to effective protection, which also includes the right to an effective remedy, is inherent in the Convention.<sup>19</sup> It falls within the ambit of article 2 (c), whereby States parties are required "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination", in conjunction with paragraph 24 (b) and (i) of general recommendation No. 19, whereby States parties should "ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and

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respect their integrity and dignity” and provide “effective complaints procedures and remedies, including compensation” to overcome all forms of gender-based violence. The committee also recalls that, for a remedy to be effective, adjudication of a case involving rape and sexual offences claims should be dealt with in a fair, impartial, timely and expeditious manner.<sup>20</sup> It further recalls its general recommendation No. 18, where it observed that “disabled women are considered as a vulnerable group”, “who suffer from a double discrimination linked to their special living conditions”. In this context, the committee emphasizes that it is crucial to ensure that women with disabilities enjoy effective protection against **sex and gender-based discrimination** by States parties and have access to effective remedies.

- 8.4 Having regard to the above, the committee notes the undisputed fact that the author’s case, in which only the author, her mother and the accused were heard in court, remained at the trial court level from 2006 to 2011. It also notes that the State party has not refuted the author’s contention that the lack of adequate planning by the trial court, in addition to its lengthy correspondence with the Philippine Deaf Resource Centre providing interpretation to her, contributed significantly to the undue delay in the proceedings.
- 8.5 The committee observes that the **free assistance of an interpreter** in cases where the parties concerned, such as the accused or the witnesses, cannot understand or speak the language used in court, **is a fundamental fair trial guarantee** enshrined in human rights treaties<sup>21</sup> and further developed in the jurisprudence of treaty bodies.<sup>22</sup> It notes that, in the present case, the author, a young deaf woman, understood only written English and was unable to hear, whereas the proceedings, including the court hearings, were conducted both in spoken and written Filipino and English.
- 8.6 The committee further notes the author’s claim that sign language interpreting was not provided to her in the course of the investigation and in some of the court hearings, including during the pronouncement of the acquittal of the accused [...].
- 8.7 [...] The committee considers that, in the circumstances of the present case, the provision of sign language interpretation was essential to ensure the author’s full and equal participation in the proceedings, in compliance with the principle of equality of arms and hence to guarantee her the enjoyment of the effective protection against discrimination within the meaning of article 2 (c) and (d) of the Convention, read in conjunction with the committee’s general recommendation No. 19.<sup>23</sup>
- 8.8 With regard to the author’s claim under article 2 (f) of the Convention, the committee recalls that the Convention places obligations on all State authorities and that **States parties are responsible for judicial decisions that violate the provisions of the Convention**. It notes that, under this provision of the Convention, the State party is to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. In this regard, the committee stresses that stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim.<sup>24</sup> In the particular case, the compliance of the State party’s obligation to banish gender stereotypes on the grounds of article 2 (f) needs to be assessed in the light of the level of gender, age and disability sensitivity applied in the judicial handling of the author’s case.
- 8.9 The committee notes that, under the doctrine of stare decisis, the court referred to guiding principles derived from judicial precedents in applying the provisions of rape in the Revised Penal Code of 1930 and in deciding cases of rape with similar patterns. At the outset of the

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judgement, the committee notes a reference in the judgement to three general guiding principles used in reviewing rape cases. With regard to the alleged gender-based myths and stereotypes spread throughout the judgement,<sup>25</sup> the committee, after a careful examination of the main points that determined the judgement, notes that, first, the trial court expected a certain type of behaviour from the author that an ordinary Filipina female rape victim had to demonstrate in the circumstances, i.e. to "summon every ounce of her strength and courage to thwart any attempt to besmirch her honour and blemish her purity". Second, the court assessed the author's behaviour against this standard and found that her "demeanour was inconsistent with that of an ordinary Filipina" and the "reasonable standard of human conduct" because she had not sought to escape or resist the offender, in particular by making noise or using force. The court stated that "her failure to even attempt to escape [...] or at least to shout for help despite opportunities to do so casts doubt on her credibility and renders her claim of lack of voluntariness and consent difficult to believe". The committee finds that those findings in themselves reveal the existence of strong gender stereotyping resulting in sex and gender-based discrimination and disregard for the individual circumstances of the case, such as the author's disability and age.

- 8.10 The committee further notes that the gender stereotypes and misconceptions employed by the trial court included, in particular, lack of resistance and consent on behalf of the rape victim and the use of force and intimidation by the perpetrator. It recalls its jurisprudence that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. It reiterates that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.<sup>26</sup> It also reiterates that lack of consent is an essential element of the crime of rape, which constitutes a violation of women's right to personal security, autonomy and bodily integrity.<sup>27</sup> In this regard, the committee notes that, notwithstanding the specific recommendation to the State party to integrate the element of "lack of consent" into the definition of rape in the Revised Penal Code of 1930,<sup>28</sup> the State party has not reviewed its legislation.
- 8.11 The committee further recognizes that the author has suffered material and moral damage and prejudice, in particular by the excessive duration of the trial proceedings, by the court's failure to provide her with the free assistance of sign language interpreters and by the use of the stereotypes and gender-based myths and disregard for her specific situation as a mute and deaf girl in the judgement.
9. [...] the committee is of the view that **the State party has failed to fulfil its obligations** and has thereby violated the rights of the author under article 2 (c), (d) and (f), read in conjunction with article 1 of the Convention and general recommendations Nos. 18 and 19 of the committee.

Regarding the author, the committee recommended that the State party:

- (i) Provide reparation, including monetary compensation, commensurate with the gravity of the violations of the rights of the author;
- (ii) Provide free-of-charge psychological counselling and therapy for the author and her affected family members; [and]
- (iii) Provide barrier-free education with interpreting.

### A.T. v Hungary 2005

#### Key points:

- Domestic violence

The author of this communication, Ms A. T., is a Hungarian national born on 10 October 1968. The author states that for four years she has been subjected to regular severe **domestic violence** and serious threats by her common law husband, L. F. Her husband moved out of the jointly owned house and returned when the court allowed him back in. Eventually, he moved out with another partner.<sup>29</sup>

The author alleges that she is a victim of violations by Hungary of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women for its failure to provide effective protection from her former common law husband. She claims that the State party passively neglected its “positive” obligations under the Convention and supported the continuation of a situation of domestic violence against her.<sup>30</sup>

#### Case 3.3 A.T. v Hungary

The CEDAW Committee received and heard representations from both parties and reached the following decision on merits:

- 9.2 The committee recalls its general recommendation No. 19 on violence against women, which states that “... [T]he definition of discrimination includes gender-based violence” and that “[G]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence”. Furthermore, the general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that “... discrimination under the Convention is not restricted to action by or on behalf of Governments ...” and “[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”. Against this backdrop, the immediate issue facing the committee is whether the author of the communication is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.
- 9.3 With regard to article 2 (a), (b), and (e), the committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party’s efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The committee further notes the State party’s general assessment that domestic violence cases as such do not

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enjoy high priority in court proceedings. The committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "... [T]he committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

- 9.4 The committee addressed articles 5 and 16 together in its general recommendation No. 19 in dealing with family violence. In its general recommendation No. 21, the committee stressed that "the provisions of general recommendation 19 ... concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men". It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time, it was concerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family ...". In respect of the case now before the committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the committee recognized vis-à-vis the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.
- 9.5 The committee also notes that the lack of effective legal and other measures prevented the State party from dealing in a satisfactory manner with the committee's request for interim measures.
- 9.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (a), (b) and (e) and article 5 (a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women.<sup>31</sup>

The CEDAW committee recommended that the State party:

- (a) Take immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family; [and]
- (b) Ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights.

### Sahide Goekce v Austria 2007

#### Key points:

- Domestic violence

Brief facts as presented by the authors to the CEDAW Committee are Mrs Goekce (deceased) is a victim of violence at the hands of her husband. The first violent attack against Şahide Goekce by her husband ... took place on 2 December 1999 ... when [he] choked Şahide Goekce and threatened to kill her. Şahide Goekce spent the night with a friend of hers and reported the incident to the police. The next violent attack happened on 21 and 22 August 2000. When the police arrived at the Goekce's apartment, Mustafa Goekce was grabbing Şahide Goekce by her hair and was pressing her face to the floor. The police issued three restraining orders against Mr Goekce. On 23 October 2002, the Vienna District Court of Hernals issued an interim injunction for a period of three months against Mustafa Goekce. The authors indicate that the police knew from other sources that Mustafa Goekce was dangerous and owned a handgun. The police did not check whether Mustafa Goekce had a handgun even though a weapons prohibition was in effect against him. On 5 December 2002, the Vienna Public Prosecutor stopped the prosecution of Mustafa Goekce for causing bodily harm and making a criminal, dangerous threat on grounds that there was insufficient reason to prosecute him. On 7 December 2002, Mustafa Goekce shot Şahide Goekce with a handgun in their apartment in front of their two daughters. The police report reads that no officer went to the apartment to settle the dispute between Mustafa Goekce and Şahide Goekce prior to the shooting. Two-and-a-half hours after the commission of the crime, Mustafa Goekce surrendered to the police. He is reportedly currently serving sentence of life imprisonment in an institution for mentally disturbed offenders.<sup>32</sup>

#### Case 3.4 Sahide Goekce v Austria

The CEDAW Committee received representations and heard both parties and reached the following conclusions on merits:

- 12.1.1 As to the alleged violation of the State party's obligation to eliminate violence against women in all its forms in relation to Şahide Goekce in articles 2 (a) and (c) through (f), and article 3 of the Convention, the committee recalls its general recommendation 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "...discrimination under the Convention is not restricted to action by or on behalf of Governments..." and that "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

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- 12.1.2 The committee notes that the State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators. However, in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations.
- 12.1.3 In the instant case, the committee notes that during the three-year period starting with the violent episode that was reported to the police on 3 December 1999 and ending with the shooting of Şahide Goekce on 7 December 2002, the frequency of calls to the police about disturbances and disputes and/or battering increased; the police issued prohibition to return orders on three separate occasions and twice requested the Public Prosecutor to order that Mustafa Goekce be detained; and a three-month interim injunction was in effect at the time of her death that prohibited Mustafa Goekce from returning to the family apartment and its immediate environs and from contacting Şahide Goekce or the children. The committee notes that Mustafa Goekce shot Şahide Goekce dead with a handgun that he had purchased three weeks earlier, despite a valid weapons prohibition against him as well as the uncontested contention by the authors that the police had received information about the weapon from the brother of Mustafa Goekce. In addition, the committee notes the unchallenged fact that Şahide Goekce called the emergency call service a few hours before she was killed, yet no patrol car was sent to the scene of the crime.
- 12.1.4 The committee considers that given this combination of factors, the police knew or should have known that Şahide Goekce was in serious danger; they should have treated the last call from her as an emergency, in particular because Mustafa Goekce had shown that he had the potential to be a very dangerous and violent criminal. The committee considers that in light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police are accountable for failing to exercise due diligence to protect Şahide Goekce.
- 12.1.5 Although, the State party rightly maintains that, it is necessary in each case to determine whether detention would amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator of domestic violence, such as the right to freedom of movement and to a fair trial, the committee is of the view, as expressed in its views on another communication on domestic violence, that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity.<sup>33</sup> In the present case, the committee considers that the behaviour (threats, intimidation and battering) of Mustafa Goekce crossed a high threshold of violence of which the Public Prosecutor was aware and as such the Public Prosecutor should not have denied the requests of the police to arrest Mustafa Goekce and detain him in connection with the incidents of August 2000 and October 2002.
- 12.1.6 While noting that Mustafa Goekce was prosecuted to the full extent of the law for killing Şahide Goekce, the committee still concludes that the State party violated its obligations under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the committee and the corresponding rights of the deceased Şahide Goekce to life and physical and mental integrity.
- 12.2 The committee notes that the authors also made claims that articles 1 and 5 of the Convention were violated by the State party. The committee has stated in its general

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recommendation 19 that the definition of discrimination in article 1 of the Convention includes gender-based violence. It has also recognized that there are linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence. At the same time, the committee is of the view that the submissions of the authors of the communication and the State party do not warrant further findings.

- 12.3 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the committee on the Elimination of Discrimination against Women is of the view that the facts before it reveal a violation of the rights of the deceased Şahide Goekce to life and physical and mental integrity under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the committee.<sup>34</sup>

### V. K. v Bulgaria 2011

#### Key points:

- Domestic violence

The author of this communication is V. K., a Bulgarian citizen. The author claims that for years she has been a victim of domestic violence perpetrated by her husband. At first, she was subjected to psychological, emotional and economic abuse and also, in 2006 and 2007, to physical violence. On 12 April and 22 May 2007, the author filed an application with the Warsaw District Court, asking for protective measures as well as for an order for financial maintenance from her husband to ensure that basic family needs would be met. On 27 September 2007, the Plovdiv District Court issued an order for immediate protection based on article 18 of the Law on Protection against Domestic Violence. With immediate effect, the Court ordered the author's husband to restrain himself from exercising domestic violence against the author and from approaching the dwelling of the author and her children, as well as places of social contact and recreation, until the end of the proceedings. The Court also decided that the children's temporary residence would be with the author.<sup>35</sup>

By its decision of 18 December 2007, the Plovdiv District Court rejected the author's application for a permanent protection order under article 5, paragraph 1, and items 1, 3 and 4, of the Law on Protection against Domestic Violence. It applied article 10, paragraph 1, of the Law, which provides that a request for a protection order must be submitted within one month of the date on which the act of domestic violence occurred, and found that no domestic violence had been perpetrated against the author by her husband on 21 September 2007, nor at any other time during the relevant one-month period prior to her application for a protection order (27 August to 27 September 2007). It also found no immediate danger to the life and health of the author and her children. The author appealed to regional court and the appeal was also rejected.<sup>36</sup>

### Case 3.5 V. K. v Bulgaria

The author complained to committee with a long list of grounds but the gist of all grounds is contained in paragraph 3.6:

- 3.6 For the author, the following omissions by the State party further reflect her lack of protection from domestic violence: (a) the failure to criminalize domestic violence, including the failure to detain perpetrators of domestic violence and criminalize non-compliance with protection orders; (b) the lack of effective implementation of the Law on Protection against Domestic Violence and the lack of clarity in the Law as to the burden of proof in domestic violence proceedings; (c) the lack of coordination among law enforcement organs and the judiciary; (d) the lack of funding for shelters and crisis centers; (e) the lack of prevention and protection programmes for victims, as well as of resocialization programmes for perpetrators; (f) the failure to train law enforcement officials and judges on domestic violence; and (g) the failure to collect statistical data on domestic violence.

Given the gravity of the situation, the committee asked the State party for interim measures:

- 5.1 In favour of the author and her children as may be required to avoid irreparable damage to them while their communication is under consideration by the committee. The committee also requested the State party to ensure the protection and physical integrity of the author and her children at all times, including when the author's husband exercises his visitation rights at the author's residence. It further invited the State party to provide information on the measures taken to give effect to the committee's request by 13 April 2009 at the latest.<sup>37</sup>

The CEDAW Committee received representations from and heard both parties and reached the following conclusions on merits:

- 9.2 The committee considers that at the heart of the present communication lies the author's allegation that the State party has failed to provide her with effective protection against domestic violence, in violation of article 2 (c) and (e)-(g), read in conjunction with article 1, and articles 5 (a) and 16 of the Convention.

[...].

- 9.9 The committee concludes that the Plovdiv District Court, when deciding on a permanent protection order under article 5, paragraph 1, items 1, 3 and 4, of the Law on Protection against Domestic Violence on 18 December 2007, as well as the Plovdiv Regional Court in its appeal decision of 7 April 2008, applied an overly restrictive definition of domestic violence that was not warranted by the Law and was inconsistent with the obligations of the State party under article 2 (c) and (d) of the Convention, which forms part of the legal order of, and is directly applicable in, the State party. Both courts focused exclusively on the issue of direct and immediate threat to the life or health of the author and on her physical integrity, while neglecting her emotional and psychological suffering. Moreover, both courts unnecessarily deprived themselves of an opportunity to take cognizance of the past history of domestic violence described by the author by interpreting the purely procedural requirement in article 10 of the Law on Protection against Domestic Violence, i.e., that a request for a protection order must be submitted within one month of the date on which the act of domestic violence has occurred, to preclude consideration of past incidents having occurred prior to the relevant one-month period. The courts also applied a very high standard of proof by requiring that the act of domestic violence must be proved beyond reasonable doubt, thereby placing the burden of proof entirely on

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the author, and concluded that no specific act of domestic violence had been made out on the basis of the collected evidence. The committee observes that such a standard of proof is excessively high and not in line with the Convention, nor with current anti-discrimination standards which ease the burden of proof of the victim in civil proceedings relating to domestic violence complaints.

[...].

- 9.12 The committee considers that the interpretation of the Plovdiv District and Regional Courts that the rationale behind the one-month period within which a victim needs to apply for a protection order (article 10, paragraph 1, of the Law on Protection against Domestic Violence) is to provide for urgent court interventions rather than to police the cohabitation of partners, lacks gender sensitivity in that it reflects the preconceived notion that domestic violence is to a large extent a private matter falling within the private sphere, which, in principle, should not be subject to State control. Similarly, as stated above, the exclusive focus of the Plovdiv courts on physical violence and on an immediate threat to the life or health of the victim reflects a stereotyped and overly narrow concept of what constitutes domestic violence. Such stereotyped interpretation of domestic violence is, for example, reflected in the reasoning of the Plovdiv Regional Court that "Striking at someone, you can exercise violence, but only after breaking certain limits of abuse, and, as is the case, the statement of V.K. does not make it clear how exactly she was struck at, namely on the procedure date, neither how her inviolability was affected." Traditional stereotypes of women's roles in marriage can also be found in the divorce judgement dated 8 May 2009 of the Plovdiv District Court which refers to the author's use of "insolent language" with regard to her husband and orders her to assume her maiden name upon dissolution of the marriage. The committee concludes that the refusal of the Plovdiv courts to issue a permanent protection order against the author's husband was based on stereotyped, preconceived and thus discriminatory notions of what constitutes domestic violence.
- 9.13 The committee also considers that the unavailability of shelters claimed by the author and not contested by the State party, where she and her children could have stayed following their return to Bulgaria in September 2007, constitutes a violation of the State party's obligation under article 2 (c) and (e) of the Convention to provide for the immediate protection of women from violence, including domestic violence. In this regard, the committee recalls its general recommendation No. 19 (1992) on violence against women.
- 9.14 Lastly, the committee would like to recognize that the author of the communication has suffered moral and pecuniary damage and prejudice. Even assuming that she was not directly subjected to physical domestic violence following the final rejection, with costs, of her application for a permanent protection order on 7 April 2008, she nevertheless suffered from considerable fear and anguish after the end of the court proceedings relating to the protection order, when she and her children were left without State protection, as well as from revictimization through the gender-based stereotypes relied upon in the court decisions.
- 9.15 [...] The committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the author's rights under article 2 (c), (d), (e) and (f), in conjunction with article 1, and article 5 (a), in conjunction with article 16, paragraph 1, of the Convention, as well as general recommendation No. 19 of the committee.
- 9.16 Regarding the author, the committee recommended to 'provide adequate financial compensation to the author commensurate with the gravity of the violations of her rights'.

### 3.4 Inquiry

Article 8 of the First Optional Protocol provides for an inquiry procedure that allows the committee to initiate an investigation where it has received reliable information of grave or systematic violations by a State party. India, Pakistan and Thailand have not acceded to the Optional Protocol yet but Cambodia has acceded to it and the CEDAW Committee is competent to conduct an inquiry in Cambodia should the need arise. The CEDAW Committee has conducted several confidential inquiries in other countries so far. The recent inquiry in the Philippines is discussed as an example.

#### 3.4.1 Philippines Inquiry April 2015

On 2 June 2008, the committee received a joint submission from three non-governmental organisations<sup>38</sup> asking it to conduct an inquiry under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women into alleged systematic and grave violations of rights guaranteed under the Convention resulting from the implementation of Executive Order No. 003, issued by the former Mayor of Manila on 29 February 2000, which governed the provision of sexual and reproductive health rights, services and commodities in Manila.<sup>39</sup>

According to the information received by the non-governmental organisations, while the executive order did not expressly prohibit the use of modern contraceptives, its continued implementation in practice severely limited women's access to sexual and reproductive health services and effectively resulted in a ban on modern contraceptives in Manila. The non-governmental organisations further submitted that the executive order continued to be implemented under the subsequent mayor, Alfredo Lim, elected in 2007, who had issued a new executive order (No. 030), which allegedly had imposed a funding ban on modern contraception.<sup>40</sup>

The committee made the following legal findings against the State party:

21. Under international law of State responsibility, all acts of State organs are attributable to the State.<sup>41</sup> Furthermore, the accountability of States parties for the implementation of their obligations under the Convention is engaged through the acts or omissions of all branches of government (see general recommendation No. 28, para. 39). The committee therefore recalls that the actions of a mayor, his or her office and all other municipal officers, in their official capacity, are attributable to the State party, given that they are State organs and that the State party is responsible for ensuring compliance with the standards of the Convention by all its organs, including local governments, to which powers have been devolved.

22. The committee therefore observes that the acts and omissions of the executive power of the local government of Manila, namely the issuance and implementation of Executive Orders Nos. 003 and 030 and associated policies, are attributable to the State party [...].<sup>42</sup>
26. The committee finds that the State party has failed to address the effects of the implementation of Executive Orders Nos. 003 and 030 and that, between 2004 and 2010, at times either supported or condoned the policies of the City of Manila. In those circumstances, the committee finds that the State party bears responsibility for the violations set out below.

The committee also found violation of most Articles of CEDAW but its findings on the grave and systematic nature of the violation of women's rights are given below:

46. [...] the committee finds that the State party has failed to fulfil its obligations under the Convention and is thereby responsible for the following violations, which it considers to be both grave and systematic:
  - (a) The violations of the rights under article 12, read alone;
  - (b) The violations of the rights under article 12, read in conjunction with articles 2 (c), (d) and (f), 5 and 10 (h); [and]
  - (c) The violations of the rights under article 16 (1) (e), read alone.
47. The committee's determination regarding the gravity of the violations takes into account, notably, the scale, prevalence, nature and impact of the violations found. The number of persons affected by the policies set out in the executive orders is significantly high, given that thousands of women of childbearing age continue to have inadequate access to sexual and reproductive health services in Manila, bearing in mind that teenage girls begin having children at a young age. The implementation of Executive Orders Nos. 003 and 030 has led to higher rates of unwanted pregnancies and unsafe abortions, increased maternal morbidity and mortality and increased exposure to sexually transmitted diseases and HIV. The committee also takes note of the potentially life-threatening consequences of resorting to unsafe abortion as a method of contraception and recalls that there is a direct link between high maternal mortality rates resulting from unsafe abortion and lack of access to modern methods of contraception. In addition, the committee stresses that each of the violations established reaches the required threshold of gravity given the significant consequences, as detailed in the findings, for women's health,

personal development and economic security, in particular for economically disadvantaged women. The denial of access to affordable sexual and reproductive health services, including the full range of methods of contraception, had severe consequences for the lives and health of many women and also affected their enjoyment of several rights set forth in the Convention in areas such as employment and education. By limiting women's rights to freely choose the number and spacing of their children, women and girls were effectively undermined in gaining access to and pursuing the same education and employment opportunities as enjoyed by men and thereby driven further into or maintained in poverty.

48. The committee considers that the systematic denial of equal rights for women can take place either deliberately, namely with the State party's intent of committing those acts, or as a result of discriminatory laws or policies, with or without such purpose. The systematic nature of violations can also be assessed in the light of the presence of a significant and persistent pattern of acts that do not result from a random occurrence. The committee holds the view that the systematic character of each of the violations found is evident from the prevalent pattern of violations that occurred as a result of policies disproportionately affecting women and discriminating against them. The committee takes note that, while the lack of access to contraception is generally problematic throughout the State party, the situation in Manila is particularly egregious as a result of an official and deliberate policy that places a certain ideology above the well-being of women and that was designed and implemented by the local government to deny access to the full range of modern contraceptive methods, information and services. The committee believes that the violations are not isolated cases, given that the continued implementation of Executive Order No. 003 over a decade resulted in the health system's incapacity to deliver sexual and reproductive health services other than so-called "natural family planning" and caused women to continuously face significant barriers to gaining access to affordable sexual and reproductive health services, commodities and information. The above factual findings demonstrate that the State party condoned a situation that lasted for more than 12 years, during the successive terms of two different mayors.

The committee made a number of recommendations in respect of sexual and reproductive health rights and services for women.

### 3.5 Conclusion

CEDAW is rightly considered as a Bill of Rights for women. The primary focus of CEDAW is at national implementation. This is why for any complaint to be admissible, the applicant must have exhausted domestic remedies first. National implementation is monitored by the CEDAW Committee through periodic reports submitted by states after every four-year period. Through its Concluding Observations, the committee assists States parties by appreciating the positive steps that they have taken in implementing CEDAW at national level and by making helpful recommendations where implementation is lacking or needs strengthening. This is the only mechanism for monitoring and for holding states accountable in the case of those States parties that have not acceded to the First Optional Protocol. In this chapter we have discussed concluding observations on the target states reflecting work of the committee through this mechanism. For those states that have acceded to the Optional Protocol, individuals within those states may take their complaints to the CEDAW Committee after exhausting domestic remedies. The facts in each individual communication are specific but the committee tends to give recommendations to states which, as we have seen above, have wide-ranging implications for all women. Only Cambodia has acceded to the Optional Protocol but India, Pakistan and Thailand are encouraged to accede to the Optional Protocol. The CEDAW Committee also performs a crucial function by conducting inquiries where grave and systematic violations of women's rights are reported. The recommendations are country-specific but have wide-ranging implications for all women. The Philippines Inquiry provides an example as to how states may be held accountable through this mechanism. The CEDAW Committee assists States parties by formulating general recommendations. These usually explain various aspects of states' obligations or contents of a particular right. The CEDAW Committee displays its commitment to women's human rights at two levels: it assists States parties with national implementation, and holds them accountable at international level.

### Notes

- 1 CEDAW Committee, General Recommendation No. 19, 1992.
- 2 Ibid.
- 3 CEDAW Committee, General Recommendation No. 21, 1994, section 16.
- 4 Ibid, section 25.
- 5 See Article 9 of CEDAW.
- 6 CEDAW Committee, General Recommendation No. 28, 2010.
- 7 Ibid.
- 8 Ibid.
- 9 Concluding observations of the CEDAW Committee (CEDAW/C/KHM/Q/4-5).
- 10 Concluding observations of the CEDAW Committee, 2006 (CEDAW/C/THA/Q/4-5).



- 11 Sixth and seventh periodic reports of Thailand, 27 May 2015, CEDAW/C/THA/6-7.
- 12 See Article 1 OP CEDAW.
- 13 Ibid, Article 2.
- 14 See Communication No. 18/2008, *Karen Tayag Vertido v Philippines*, view adopted on 16 July 2008, paras 2.1–3.17.
- 15 Article 266-A of the Revised Penal Code of the Philippines. ‘Rape: When and How Committed’.
- Rape is committed:
1. By a man who shall have carnal knowledge of a woman under any of the following circumstances:
    - (a) Through force, threat, or intimidation;
    - (b) When the offended party is deprived of reason or otherwise unconscious;
    - (c) By means of fraudulent machination or grave abuse of authority; and
    - (d) When the offended party is under 12 years of age or is demented, even though none of the circumstances mentioned above be present.
  2. By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person’s mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.’
- 16 See Communication No. 18/2008, *Karen Tayag Vertido v Philippines*, view adopted on 16 July 2008.
- 17 Communication No. 34/2011, *R. P. B. v the Philippines*, views adopted on 21 February 2014, paras 1 and 2.1.
- 18 Ibid para 8.2.
- 19 *Vertido v Philippines*, para 8.4. NB: footnotes number 19 to 28 are as they appear in the decisions of the committee.
- 20 Ibid, para 8.3.
- 21 See, for example, article 14, paragraph 3 (f), of the International Covenant on Civil and Political Rights (ratified by the Philippines in 1986); article 40, paragraph 2 (vi), of the Convention on the Rights of the Child (ratified by the Philippines in 1990); and article 18, paragraph 3 (f), of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ratified by the Philippines in 1995). Article 21 (b) of the Convention on the Rights of Persons with Disabilities, ratified by the Philippines in 2008, requires that the States parties accept and facilitate ‘the use of sign languages [...] by persons with disabilities in official interactions’.
- 22 For example, the jurisprudence of the Human Rights Committee shows that there is no right under article 14, paragraph 3 (f), of the International Covenant on Civil and Political Rights to have court proceedings conducted in the language of one’s choice (see, for example, communications Nos. 221/1987 and 323/1988, *Yves Cadoret and Hervé Le Bihan v France*, views adopted on 11 April 1991, para. 5.7; and communication No. 327/1988, *Hervé Barzig v France*, views adopted on 11 April 1991, para. 5.6). Only if the accused or the witnesses have difficulties in understanding, or in expressing themselves in the court language, is it obligatory that the services of an interpreter be made available (see, for example, communication No. 327/1988, para. 5.5). Article 14, paragraph 3 (f), provides for the right to an interpreter during the court hearing only (see, for example, communications Nos. 273/1988, *B. d. B. et al. v The Netherlands*, decision of 30 March 1989; 221/1987, *Yves Cadoret v France*, decision of 11 April 1991; and 323/1988, *Hervé Le Bihan v France*, decision of 9 November 1989). However, the Committee found that a confession that took place in the sole presence of the two investigating officers, one of whom typed the statement and the other provided interpretation into the author’s language, deprived the latter of a fair trial under article 14, paragraph 1, of the International Covenant on Civil and Political Rights (see, for example, communication No. 1033/2001, *Nallaratnam Singarasa v Sri Lanka*, views adopted on 21 July 2004 para. 7.2).
- 23 See para. 8.3 above.
- 24 *Vertido v the Philippines*, para. 8.4.



- 25 See paras. 3.3–3.6 above.
- 26 See *Vertido v the Philippines*, para 8.5.
- 27 *Ibid*, para 8.7.
- 28 *Ibid*, para 8.9 (a.i). Article 266-A of the Revised Penal Code of the Philippines, as amended by Republic Act No. 8353 of 1997, reads ‘Rape: When and How Committed. Rape is committed:
1. By a man who shall have carnal knowledge of a woman under any of the following circumstances:
    - (a) Through force, threat, or intimidation;
    - (b) When the offended party is deprived of reason or otherwise unconscious;
    - (c) By means of fraudulent machination or grave abuse of authority; and
    - (d) When the offended party is under 12 years of age or is demented, even though none of the circumstances mentioned above be present.
  2. By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person’s mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.’
- 29 Communication No. 2/2003, *A. T. v Hungary*, views adopted on 26 January 2005, para 2.1–2.7.
- 30 *Ibid*, para 3.1–3.3.
- 31 *Ibid*.
- 32 Communication No. 05/2005, *Sahide Goekce v Austria*, views adopted on 6 August 2007.
- 33 See *A.T. v Hungary*, para 9.
- 34 Communication No. 05/2005, *Sahide Goekce v Austria*, views adopted on 6 August 2007.
- 35 Communication No. 20/2008, *V. K. v Bulgaria*, views adopted on 25 July 2011.
- 36 *Ibid*.
- 37 *Ibid*.
- 38 The Philippines-based Task Force CEDAW Inquiry, the Centre for Reproductive Rights and International Women’s Rights Action Network Asia-Pacific.
- 39 CEDAW Committee Inquiry in Philippines, CEDAW/C/OP.8/PHL/1, para 1.
- 40 *Ibid*, para 3.
- 41 Paragraph 4 of general comment No. 31 of the Human Rights Committee states that ‘all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party’. The International Law Commission, in article 4 of its articles on responsibility of States for internationally wrongful acts, states that ‘the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State’. It goes on to say that ‘an organ includes any person or entity which has that status in accordance with the internal law of the State’. In its commentary, the Commission has clarified that mayors have been held to be State organs because they are carrying out public functions or exercising public power.
- 42 Section 2 of the Local Government Code states that ‘the State shall provide for a more responsive and accountable local government structure instituted through a system of decentralization whereby local government units shall be given more powers, authority, responsibilities, and resources’.

## Chapter 4

# Access to Justice for Victims of Violence

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### Objectives

This chapter provides an overview of the obstacles that victims and survivors of violence face in accessing the justice system in Asia. The aim is to highlight the common hurdles and provide some guidelines which may assist judges and other stakeholders to detect and address those hurdles and provide victims and survivors of violence with effective access to the justice system.

The right of access to justice for women is essential to the realisation of all the rights protected under the CEDAW. Unhindered access to justice for women is a critical pathway for the achievement of gender equality. Respect and protection of human rights can be guaranteed only if effective domestic remedies are available.<sup>1</sup>

The right of equal access to justice has been recognised by several international treaties as being a basic human right.<sup>2</sup> It requires states parties to treat women and men equally in all matters relating to the law, including civil, contractual and property matters, at all stages of proceedings before courts and tribunals. Access to justice demands identifying and redressing obstacles that prevent women from reporting violence committed against them, and from receiving protection and redress. It also includes criminalisation of relevant behaviours, enforcement of existing laws, securing prosecutions and avoiding secondary victimisation and ensuring adequate reparations for survivors and victims.<sup>3</sup>

In ensuring access to justice, multiple steps and stakeholders are involved: from the initial reporting to the police to the involvement of health and social services, civil society organisations, access to legal aid, investigations and prosecutions, and the eventual judicial decision which needs to be duly enforced.

### 4.1 Barriers to women's access to justice

Persisting inequalities between women and men, gender bias and stereotypes result in unequal access of women and men to justice. Women face the following common obstacles to accessing justice:

- gender bias and stereotyping amongst institutional service providers, law enforcement agencies and courts
- Lack of decision-making power
- Pressures to fulfil gendered expectations
- Lack of knowledge and awareness about their rights in relation to access to justice
- Lack of faith in the justice system
- Stigmatisation by lawyers and police officers
- Coercion and bribery
- Difficulty of giving evidence
- Social stigma
- Secondary victimisation by the criminal justice system
- Lack of resources.<sup>4</sup>

The CEDAW Committee has identified a number of obstacles and restrictions that impede women from realising their right of access to justice on a basis of equality. They include a lack of effective jurisdictional protection offered by the States parties in relation to all dimensions of access to justice. These obstacles occur in a structural context of discrimination and inequality, due to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women.<sup>5</sup>

The committee has further observed that the centralisation of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to access them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to quality, gender-competent legal advice, including legal aid, as well as the deficiencies often noted in the quality of justice systems (gender-insensitive judgments/decisions due to the lack of training, delays and excessive length of proceedings, corruption, etc.) all prevent women from accessing justice.<sup>6</sup>

Belonging to a particularly vulnerable group of women can result in an increased restriction of access to certain rights. Women living in rural areas, elderly women, women with disabilities, lesbian/bisexual/transgender women, trafficked women, migrants (including refugees, asylum seekers and undocumented women), and women from certain ethnic or religious groups may be disadvantaged. This may be due to specific disadvantages at

the socioeconomic level, but can also be the result of a lack of awareness of their specific needs among justice or law enforcement officials. Women from these groups are also often victims of stereotyping, which can result in bias and insensitivity on the part of the justice system.<sup>7</sup> Women belonging to such groups often do not report violations of their rights to the authorities for fear that they will be humiliated, stigmatised, arrested, deported, tortured or have other forms of violence inflicted upon them, including by law enforcement officials.<sup>8</sup>

## 4.2 Bias in the courtroom

Gender bias is well entrenched in the legal systems of the target countries, as is evidenced by the discussion on case law in subsequent chapters. Gender bias is more prevalent in the informal justice system and customary law. Very often victims of violence turn to the informal system for dispute resolution and assistance especially in rural areas, and they rarely access the formal justice system. Stereotyping and gender bias in the judicial system impede women's access to justice in all areas of law, and may particularly impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalise those who do not conform to these stereotypes.<sup>9</sup>

The impact of judicial stereotyping is wide-ranging. It might:

- Distort judges' perceptions of what occurred in a particular situation of violence or the issues to be determined at trial
- Affect judges' vision of who is a victim of gender-based violence
- Influence judges' perceptions of the culpability of persons accused of gender-based violence
- Influence judges' views about the credibility of witnesses
- Lead judges to permit irrelevant or highly prejudicial evidence to be admitted to court and/or affect the weight judges attach to certain evidence
- Influence the directions that judges give to juries
- Cause judges to misinterpret or misapply laws
- Shape the ultimate legal result.<sup>10</sup>

Gender stereotypes and discriminatory attitudes play a significant role in denying victims' access to justice. For instance, the Thailand Supreme

Court in Case 4465/2530 ruled that a previous relationship between the complainant and the accused precluded an allegation of 'date rape'. In the Supreme Court Case 536/252, the Court refused to return a verdict of statutory rape on the basis that the 11-year-old victim did not cry out for help. In another Supreme Court case 2957/2544, the Court convicted the accused only because the Bench believed that the victim, who was a virgin, could not have fabricated the details of the rape incident.<sup>11</sup>

Some recurrent gender stereotypes include:

- A 'genuine' victim of gender-based violence will report the violence at the first available opportunity
- Women make false allegations of violence to avenge themselves or extort money
- Most gender-based violence is committed by strangers
- A genuine victim will resist rape and show signs of struggle or sustain physical injuries
- Violence is only a problem if it happens to 'good' or 'innocent' women and girls
- A woman or girl's manner of dress or behaviour, for example walking alone at night, may imply consent to sexual assault
- Sexual violence is not perpetrated by family members
- Sexual violence only occurs at certain levels of society, and only affects the poor
- Rape or sexual assault perpetrated by husbands/intimate partners is not a crime.<sup>12</sup>

These broad and unsubstantiated views, while having no objective basis, too often inform the practice of courts.<sup>13</sup>

The CEDAW Committee has identified specific examples of how gender stereotyping has impacted on and prevented justice outcomes. For instance, the accused in a rape trial was acquitted<sup>14</sup> by a court in the Philippines relying on gender-based myths and stereotypes about rape victims and challenged the credibility of the victim on the grounds that 'an accusation of rape can be made with facility' and that the victim had ample opportunities to escape her attacker.<sup>15</sup> It is essential to ensure that any person when deciding a case sets aside their own biases and prejudice when considering evidence and arguments.<sup>16</sup>

The CEDAW Committee has observed that judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce

and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence reports,<sup>17</sup> investigations and trials, especially in cases of gender-based violence, with stereotypes, undermining the claims of the victim/survivor and simultaneously supporting the defences advanced by the alleged perpetrator. Stereotyping, therefore, permeates both the investigation and trial phases and finally shapes the judgment.<sup>18</sup>

Institutionalised secondary victimisation is also apparent within the criminal justice system. The whole process of the criminal justice system from the investigation to trial and eventually the ultimate sentence or acquittal may cause secondary victimisation.<sup>19</sup>

The CEDAW Committee has recommended to State parties to:

- Take measures, including awareness-raising and capacity-building for all actors of justice systems and for law students to eliminate gender stereotyping and incorporate a gender perspective in all aspects of the justice system;
- Include other professionals, in particular health professionals and social workers, who can play an important role in cases of violence against women and in family matters, in these awareness-raising and capacity-building programmes;
- Ensure that capacity-building programmes address in particular the inflexible standards often developed by judges and prosecutors on what they consider as appropriate behaviour for women; and
- Raise awareness on the negative impact of stereotyping and gender bias and encourage advocacy related to stereotyping and gender bias in justice systems, especially in gender-based violence cases.<sup>20</sup>

### 4.3 Guidelines for judges

Increasingly, legal systems across the world recognise that judges need to understand and respond to the special requirements of particular sections of the community, including women, to ensure effective and impartial access to, and the delivery of, justice.

As mentioned above, judges may have their own personal biases and preconceptions about many issues. However, when involved in the process of judging, whether in a civil or criminal case, it is essential to ensure that each judge is fully aware of her/his own biases and prejudices, and that these are set aside when considering evidence and arguments. This involves avoiding generalisations or making assumptions about any person based on the community they belong to or the general background from which they come, and instead treating them as individuals.<sup>21</sup>

The list of potential biases is not exhaustive, but these are some common examples applicable to cases of VAW. To do justice, courts need to avoid relying on myths, and instead rely on evidence, taking pains to establish the facts of each case. Every woman or girl who is a complainant should be treated as an individual, avoiding a common assumption that all women are the same or that all women are likely to act in the same way. Judges should not be swayed or influenced by a victim's physical appearance, including her clothing, etc., when assessing the victim's credibility.<sup>22</sup>

Doing justice also requires an understanding that litigants do not have one set of life experiences, beliefs or values. As a consequence, different people will experience their presence and participation in court proceedings differently, with some having to overcome greater obstacles to seek justice.<sup>23</sup>

Judges may adapt the nature of the proceedings to take account of each person's situation, to enable them to give their evidence, and receive a fair hearing, by taking all or any of the following steps:

- Speak more slowly or in simpler language, or through an interpreter, depending on whether the person being spoken to is a child, very elderly or hard of hearing, or speech impaired, or is a litigant in person, and not familiar with the court process;
- Use the correct form of oath or affirmation depending on the individual's belief or faith;
- Take evidence on commission from a person who cannot attend court due to extreme ill-health or a severe physical disability;
- Use appropriate and respectful language to avoid causing offence to any person;
- Provide breaks or opportunities to drink water to the elderly, children or people with disabilities, or pregnant or nursing/breastfeeding women, who may find the proceedings particularly exhausting;
- Clear the courtroom in sensitive matters, or where children are involved;
- Avoid false assumptions, e.g. that a woman sex worker does not want custody of her children;
- Treat every woman as an individual, and avoid generalising that all women are the same or that all women are likely to act in the same way; and
- Intervene if lawyers, during cross-examination, appear to be stereotyping, unfairly alluding to the women's gender, or asking intrusive or humiliating questions.<sup>24</sup>

Judges have to recognise specific difficulties and concerns faced by women, identify their implications in a court setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties. These points may also be considered and avoided:

- Do not judge an individual woman by how society thinks women ought to behave, or by the way a man would have behaved in that situation;
- Do not use language which may cause offence to or humiliate individuals and/or is inappropriate for their actual roles;
- do not assume or imply that a woman is of a lesser status than a man; and
- Do not refer to a woman's physical appearance, including her clothing, etc.<sup>25</sup>

Some additional issues that judges may take into account depending on the nature of offence are set out below.

#### **4.3.1 Rape**

Judges may consider the following issues in rape cases:

- Give the victim immediate protection if necessary;
- Ensure confidentiality of rape victims or other complainants;
- Hold the trial proceedings in camera, and make the trial process as comfortable for the victim as possible through the powers available to the court; and
- Take into consideration that lack of consent does not necessarily mean physical evidence of force or resistance.<sup>26</sup>

On the other hand, judges may consider avoiding the following:

- Do not endorse or state in court the following unfounded assumptions myths about rape and/or sexual assault:
  - A genuine victim will report the rape at once
  - False allegations of rape are common
  - Most rapes are committed by strangers
  - Rape victims should put up a fight and show signs of struggle
  - Women can provoke or ask to be raped or assaulted; and
- do not allow the defence in cross-examination to unduly refer to the above assumptions.<sup>27</sup>



### 4.3.2 Forced, child and early marriages

Judges may consider the following issues in cases of forced and child marriages:

- Give due consideration to the wishes and choice of the woman or girl, including in cases where her parents are alleging rape/abduction/ kidnapping and she claims to have married of her own free will; and
- Ensure that the woman/girl in question is able to communicate her wishes to the court securely and safely (in the judges' chambers or after clearing the courtroom, or during an in-camera hearing).<sup>28</sup>

Judges should avoid directing that any adult woman be placed in safe custody without determining whether she has consented to this.

### 4.3.3 Domestic violence

In dealing with cases relating to domestic violence, judges may adopt the following positive measures:

- Direct interim relief for maintenance, residence and shelter and child custody where appropriate;
- Child custody is a sensitive issue and in making custody decision, the best interests of the child should be a primary consideration;
- In considering prayers for bail by the accused for breach of protection orders, or otherwise, ensure that the woman/girl victim's safety is not prejudiced;
- Note that the threats of violence against women by husbands or ex-husbands often tend to be ongoing and continual;
- Bear in mind the impact of domestic violence on any woman/girl, and that it may make her/him lose their self-confidence, appear nervous or frightened; and
- Consider the difficulty for women/girls in giving evidence in court about domestic violence, and take appropriate measures, e.g. making sure they are comfortable in the courtroom as far as possible, using alternative methods (trial in camera) of taking evidence if appropriate, controlling the quality of cross-examination to be less hostile or biased.

Judges may avoid the following:

- Do not endorse or state the following unfounded assumptions myths about domestic violence:

- A woman can easily leave a violent man if she wants to
- A woman provokes her husband/partner to rage and violence
- When a woman says ‘no’, she means ‘yes’
- Women are sexually assaulted only by strangers
- Women ask to be assaulted or raped; and
- do not allow the defense in cross-examination to unduly refer to the above assumptions.<sup>29</sup>

#### 4.3.4 Sexual harassment

Judges may wish to consider the following in sexual harassment cases:

- Consider how to ensure that the identity of the complainant is kept confidential by passing appropriate orders;
- Consider allowing hearings in camera in certain circumstances, and where an application is made by the complainant; and
- Restrain defence lawyers if they seek to base their cross-examination or questions on myths or baseless assumptions, e.g. about women’s clothing or actions ‘inviting’ harassment or stalking.

Judges may seek to avoid the following:

- Do not repeat or take into account unfounded assumptions or myths about women and girls ‘asking to be harassed or stalked by their clothing, actions.’<sup>30</sup>

## Notes

- 1 UN Women, ‘UN Women welcomes CEDAW General Recommendation on women’s access to justice’ (2015), <http://www.unwomen.org/en/news/stories/2015/8/cedaw-general-recommendation> accessed 15 January 2016.
- 2 See Articles 6–11 UDHR, Articles 14–16 ICCPR, Article 15 of CEDAW.
- 3 Christine Chinkin, ‘Addressing violence against women in the commonwealth within states’ obligations under international law’. *Commonwealth Law Bulletin*, Vol. 40, Issue 3, 2014: Special Issue on the Commonwealth Law Ministers Meeting 2014, pages 471–501.
- 4 E. Skinnider et al, ‘A Discussion Paper on The Trial of Rape – Understanding the criminal justice system response to sexual violence in India, Thailand and Viet Nam’ (UN Women, UNDP, UNDOC and Unite, 2015).
- 5 See CEDAW Committee, General Recommendation 33, 13 July 2015, para 3.
- 6 Ibid, para 13.
- 7 Council of Europe, ‘*Gender Equality Strategy 2014–2017 Guaranteeing Equal Access of Women to Justice*’ (2016), [http://www.coe.int/t/dghl/standardsetting/equality/03themes/access\\_to\\_justice/Factsheet%20A2J%20Jan%202015%20English.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/Factsheet%20A2J%20Jan%202015%20English.pdf) (accessed 2 January 2016).
- 8 See CEDAW Committee, General Recommendation 33, 13 July 2015, para 10.

- 9 Ibid, para 27.
- 10 Council of Europe, '*Eliminating judicial stereotyping*' (2014), [http://www.coe.int/t/dghl/standardsetting/equality/03themes/access\\_to\\_justice/judicial\\_stereotyping2014.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/judicial_stereotyping2014.pdf) accessed 2 January 2016.
- 11 UN Women, '*Women's Access to Justice*' (2013), <http://asiapacific.unwomen.org/~media/field%20office%20eseasia/docs/publications/2014/7/sea%20judicial%20colloquium%20final%20pdf.ashx> accessed 3 January 2016.
- 12 E. Skinnider et al, 'A Discussion Paper on The Trial of Rape – Understanding the criminal justice system response to sexual violence in India, Thailand and Viet Nam' (UN Women, UNDP, UNDOC and Unite, 2015).
- 13 S. Hossain, '*CEDAW Bench Book*' (Ministry of Law, Justice and Parliamentary Affairs, (Legislative and Parliamentary Affairs Division, Bangladesh and UN Women, Bangladesh, 2013).
- 14 S. Priya, '*Study Related to Discrimination against Women in Law and in Practice in Political and Public Life, Including during Times of Political Transitions: In Asia Pacific*', (OHCHR, Working Group, 2012), [www.ohchr.org/Documents/Issues/Women/WG/PublicPoliticalLife/AsiaPacific\\_1.docx](http://www.ohchr.org/Documents/Issues/Women/WG/PublicPoliticalLife/AsiaPacific_1.docx) accessed 10 October 2015.
- 15 Women and Justice Database '*16 Cases on Gender-Based Violence – Day 6*' (2013), <http://womenandjustice.tumblr.com/post/68627761819/16-cases-on-gender-based-violence-day-6> accessed 14 December 2015.
- 16 S. Hossain, '*CEDAW Bench Book*', Ministry of Law, Justice and Parliamentary Affairs, Legislative and Parliamentary Affairs Division, Bangladesh and UN Women, Bangladesh, 2013.
- 17 *Isatou Jallow v Bulgaria*, views adopted on 23 July 2012, para 8.6. See also Case of *González et al. ('Cotton Field') v Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), paras 400-401 (Inter-American Court of Human Rights).
- 18 CEDAW Committee, General Recommendation No. 33, para 27.
- 19 Ibid, para 48.
- 20 Ibid, para 29.
- 21 S. Hossain, '*CEDAW Bench Book*', Ministry of Law, Justice and Parliamentary Affairs, Legislative and Parliamentary Affairs Division, Bangladesh and UN Women, Bangladesh, 2013.
- 22 Ibid.
- 23 Ibid.
- 24 Ibid.
- 25 Ibid.
- 26 Ibid.
- 27 Ibid.
- 28 Ibid.
- 29 Ibid.
- 30 Ibid.

## Chapter 5

# Child, Early and Forced Marriage

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### Objectives

The objectives of this chapter are to provide an overview of the issues of child, early and forced marriage in the target countries, i.e. the symptoms, causes and legal and other responses by state organs to address these issues. The aim is to enable and sensitise judges and other stakeholders to make informed and human rights compliant decisions when they are dealing with cases of child, early and forced marriages.

This chapter consists of four sections. Section 5.1 focuses on the issues of child and forced marriages in Cambodia, i.e. its symptoms, causes and legal and other responses by state organs to address these issues. Section 5.2 focuses on the issues of child and forced marriages in India, i.e. its symptoms, causes and legal and other responses by state organs to address these issues. Section 5.3 focuses on the issues of child and forced marriages in Pakistan, i.e. its symptoms, causes and legal and other responses by state organs to address these issues. Section 5.4 focuses on the issues of child and forced marriages in Thailand, i.e. its symptoms, causes and legal and other responses by state organs to address these issues.

## 5.1 Cambodia

### 5.1.1 Child and early marriage

Adolescents account for approximately 20 per cent of the total population in Cambodia, which roughly translates to 3,064,000 children.<sup>1</sup> Of those 3 million, 3 per cent of adolescent boys and 16 per cent of adolescent girls were married or living together in 2016.<sup>2</sup> In a recent survey of women aged 20 to 24 years, 2 per cent admitted to being married before 15 years while 19 per cent stated that they were married by 18 years of age.<sup>3</sup> Although the overall rate of early and child marriage has been decreasing since 2010,<sup>4</sup> early and child marriages continue to be common in certain communities in Cambodia.<sup>5</sup>

Child and early marriage: law

**Constitution of Cambodia 2008:** Cambodia has incorporated its international obligations in its Constitution under article 31 which ‘recognizes and respects

human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's rights and children's rights.<sup>6</sup>

Article 31(2) of the Constitution guarantees that all 'citizens shall be equal before the law, enjoying the same rights and freedoms and obligations regardless of race, colour, sex, language, religious belief, political tendency, national origin, social status, wealth or other status.'<sup>7</sup> Article 45 states that '[m]arriage shall be conducted according to law, based on the principle of mutual consent between one husband and one wife'.<sup>8</sup>

**Civil Code 2003:** Article 948 of the Civil Code of Cambodia sets out a minimum age and legal framework on marriage: 'Neither men nor women may marry until they have reached the age of 18. [H]owever, if one of the parties has attained the age of majority and the other party is a minor of at least 16 years of age, the parties may marry with the consent of the parental power holders or guardian of the minor'.<sup>9</sup>

Article 953 explains the process for obtaining consent in an early marriage. Under article 953(1) '[i]f one of the parties wishing to marry is a minor, the consent of parental power holders or guardians must be obtained'.<sup>10</sup> However, under article 953(2) '[i]f one of the parental power holders does not consent, the consent of the other parental power holder shall be sufficient'.<sup>11</sup> Under article 953(3) '[i]f the parental power holders or guardian unreasonably refuses consent, the minor wishing to marry may apply to the court for adjudication in place of consent'.<sup>12</sup> In other words, child marriage between two children under 18 years of age is not permitted; however, an adolescent of at least 16 years may marry an adult with the consent of a parent, guardian or the court.

Articles 958 to 964 set out a process of annulment. Article 960 speaks specifically to the issue of early or child marriage, '[e]ither party to a marriage, their parents or a public prosecutor may apply to the court for annulment of a marriage effected in contravention of Articles 948 (Marriageable age)'.<sup>13</sup> Article 961 provides a prescription period for the right of annulment, '[n]o application may be made to annul a marriage effected in contravention of Article 948 (Marriageable age) once the under-age party attains the marriageable age'.<sup>14</sup> The bride and groom are, however, entitled to a three-month grace period upon reaching marriageable age to apply to the court for the annulment.<sup>15</sup>

**International obligations:** as a State party to CEDAW<sup>16</sup> Cambodia is obligated to 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations'.<sup>17</sup> Under article 16(2) Cambodia must take specific measures to ensure that the 'betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum

age for marriage'.<sup>18</sup> The CEDAW Committee and the UN Committee on the Rights of the Child issued a joint general recommendation in which child marriage was defined as 'any marriage where at least one of the parties is under 18 years of age'.<sup>19</sup> They further noted that 'child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent'.<sup>20</sup> While there is a some allowance to permit adolescents under 18 years to exercise their evolving capacity to enter into early marriage, it is only 'allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law'.<sup>21</sup>

Cambodian laws on child and early marriage comply with Cambodia's obligations under international law in setting the minimum age of marriage at 18 years. There are, however, some discrepancies and exceptions, which if interpreted too broadly could enable some forms of child marriage, and thus contravene Cambodia's obligations under international law.

The Civil Code of Cambodia complies with the joint recommendations of the Committee on the Rights of the Child and the Committee on CEDAW which call for '[a] minimum legal age of marriage for girls and boys ... at 18 years'.<sup>22</sup>

However, the Civil Code of Cambodia 2007 provides for exceptions, which enable marriages of adolescents below the age of 18 years. Under the Civil Code, adolescents may engage in child marriage, provided they receive approval from one of three sources: (a) both parents; (b) if not both parents, at least one parent; (c) if parental consent is not possible, then the child couple may apply to the court. Allowing exceptions for early marriage in cases of unintended pregnancy raise concerns of forced marriage, especially where the pregnancy is the result of rape or sexual violence. Relying on parents' consent for such exceptional marriage also goes against the Committee on CEDAW and the Committee on the Rights of the Child, which clearly stipulate that marriages involving children under 18 years should only be 'allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law'.<sup>23</sup> On this basis, the exceptions for early marriage under the Civil Code of Cambodia could, if interpreted too broadly, tacitly enable early and child marriage, contravening Cambodia's obligations under international law.

#### Child and early marriage: Recommendations

The following guidelines are offered which may be helpful in bringing Cambodia into compliance with its obligations under international law:

- Interpret and apply the laws to prohibit any marriage between adolescents under 18 years of age, even with the consent of parents.

- Take measures to ensure a marriage is voluntary with both parties consenting to the union.
- Prohibit and rescind informal settlement agreements involving allegations of sexual abuse or rape which include the forced marriage of the perpetrator with the victim.

### 5.1.2 Forced marriage

It is not uncommon in some Asian countries such as Cambodia for forced marriages to occur as part of informal settlements in rape cases.<sup>24</sup> The act of forcing a victim to marry their perpetrator is seen as ‘rid[ding] history of the error.’<sup>25</sup> In most rape settlements involving forced marriage, the victim must also agree to withdraw any petition/criminal case against the accused. According to a Cambodian human rights lawyer, a rape settlement involving forced marriage is viewed as ‘restoring’ the social status of the victim.<sup>26</sup> Given the stigma attached to children born outside of marriage, forced marriages also occur when a woman becomes pregnant following pre-marital relations, or becomes pregnant as a result of rape and is forced to marry the father of the unborn child.<sup>27</sup>

A local human rights organisation, LICADHO, has monitored 282 rape cases since 2012 to analyse how rape allegations are handled within the justice system. Of those 282 cases, two cases involved forced marriage in an informal rape settlement.

In one case, a 12-year-old girl was raped three times by a 20-year-old man. The victim’s family initially reported the case to the Commune Police. The police then arranged for a negotiation with the alleged perpetrator’s family, in which the victim’s family agreed that the victim would marry the alleged perpetrator when she reached 16 years of age. In exchange, the police complaint was withdrawn. It is suspected that the police received some form of payment for negotiating the settlement.<sup>28</sup> The vast majority of rape cases involving settlements of forced marriage are not reported.

#### Forced marriage: law

All forms of forced marriage are prohibited by law. However, forced marriage after rape is not explicitly prohibited under the law. And although a process of annulment is available for any forced marriage, most victims of forced marriage have neither the opportunity nor the social status within their community to speak out against it.

Article 31 of the 2008 constitution has incorporated Cambodia’s international obligations. Article 31(2) of the Constitution further states that all ‘citizens shall be equal before the law, enjoying the same rights and freedoms and obligations regardless of race, colour, sex, language, religious belief, political

tendency, national origin, social status, wealth or other status.<sup>29</sup> Article 45 states that '[m]arriage shall be conducted according to law, based on the principle of mutual consent between one husband and one wife'.<sup>30</sup>

**Civil Code 2003:** Articles 958, 960 and 963 expressly set out conditions by which a marriage may be annulled.<sup>31</sup> Under article 958(a), '[a] marriage shall be treated as void only in the following cases: (a) [w]here there is no intention to marry common to the parties on account of mistake as to the identity of the other party, coercion or other cause'.<sup>32</sup> Article 963(1) states, '[a] person who has been induced by fraud or duress to effect a marriage may apply to the court for annulment of such marriage'.<sup>33</sup> Article 963(2) sets out a prescription period: '[t]he right of annulment described in paragraph (1) shall be extinguished if 3 months have elapsed since the party discovered the fraud or became free of duress, or if the party has ratified the marriage'.<sup>34</sup>

**International obligations:** As a State party to CEDAW, Cambodia is obligated to 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations'.<sup>35</sup> Under article 16(1) (b) Cambodia must take specific measures to ensure that women and girls have the 'same right freely to choose a spouse and to enter into marriage only with their free and full consent'.<sup>36</sup>

As noted in Chapter 3, the CEDAW Committee has expressly stated that women must have equal rights with men in respect of their right to freely choose a spouse and enter into marriage only with their free and full consent.<sup>37</sup> The committee made further observations that '[a] woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being'.<sup>38</sup> In respect of early and child marriage, the CEDAW Committee and the CRC Committee have noted that 'child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent'.<sup>39</sup>

Cambodian domestic law on forced marriage complies with Cambodia's obligation under international law. However, implementation of the law remains problematic given the prevalence of informal settlements in rape and sexual violence cases, which often involve forced marriage.

#### Forced marriage: Recommendations

The following recommendations are offered which may be helpful in bringing Cambodia into compliance with its obligations under international law:

- Take measures where possible to enquire into any marriage to ensure each party is freely and voluntarily consenting to the union, in line with Cambodia's international obligations under article 16(1) (b) of CEDAW and article 23(3) of the ICCPR.



- Where the Court is made aware, rescind informal settlement agreements involving allegations of sexual abuse or rape which include the forced marriage of the perpetrator with the victim, in line with Cambodia's international obligations under article 16(1) (b) of CEDAW<sup>40</sup> and article 23(3)<sup>41</sup> of the ICCPR.

## 5.2 India

### 5.2.1 Child and early marriage

South Asia is home to almost half (42%) of all child brides worldwide. India alone accounts for one third of the global total,<sup>42</sup> with the highest number of child brides in the world. An estimated 47 per cent of girls in India are married before their 18th birthday.<sup>43</sup> Child marriage is more common in rural (56%) than urban (29%) areas.<sup>44</sup>

Gender inequality, poverty, lack of education, violence against women and girls and high rates of sex-selective abortion leading to fewer girls in some parts of India, are all contributory factors.<sup>45</sup>

#### Child and early marriage: law

The Constitution of India 1950 guarantees a range of fundamental rights relevant to the right to marry and to protection against child, early or forced marriage, including the rights to life,<sup>46</sup> freedom of expression and movement,<sup>47</sup> equality<sup>48</sup> and non-discrimination.<sup>49</sup> Article 14 prohibits the state from denying any person equality before the law or the equal protection of law. Article 15 prohibits discrimination against any person on the grounds of religion, race, caste, sex or place of birth.

**Prohibition of Child Marriage Act 2006:** This is the most relevant law that prohibits child marriage. This specifies that the legal age for marriage is 18 years for girls and 21 for boys.<sup>50</sup> Section 3 makes child marriages voidable at the option of the contracting party who was a child at the time of the marriage. It allows for a petition to be filed declaring the marriage void within two years of the child attaining their majority.<sup>51</sup> A woman is permitted to file a petition till she reaches the age of 20 and a man till he reaches the age of 23. Exceptionally, a child marriage may be declared void even before the child reaches the age of 18, when the child has been abducted, kidnapped, trafficked or compelled to marry under force, deceit, coercion or misrepresentation.<sup>52</sup>

A penalty of rigorous imprisonment of up to 2 years or a fine up to 1 lakh rupees or both may be imposed on any adult male who marries a child,<sup>53</sup> anyone who performs, conducts, directs or abets any child marriage,<sup>54</sup> and anyone who solemnises a child marriage including by promoting such a

marriage, permitting it to be solemnised or negligently failing to prevent the marriage.<sup>55</sup> All such offences are cognisable and non-bailable.<sup>56</sup> Injunctions may be sought to prohibit child marriages including *ex parte* interim injunctions. Any child marriage solemnised in contravention of an injunction order will be void.<sup>57</sup>

State Governments are authorised to appoint Child Marriage Prohibition Officers empowered to prevent and prosecute child marriages and to create public awareness on the issue.<sup>58</sup>

**Indian Penal Code 1860:** Section 375 of the penal code criminalises any sexual intercourse with a child under 15 years of age, whether or not she is married.<sup>59</sup>

**Hindu Marriage Act 1955:** Although this lays down the minimum age of marriage as 21 years for men and 18 years for women,<sup>60</sup> it does not expressly invalidate marriages by minors. A marriage where either party is below the prescribed minimum age is neither void nor voidable under the act though the persons concerned, i.e. the parents/guardians that gave permission for the minor to marry, any person who performed the marriage, and any male aged 21 and over who was party to the marriage, would be punishable under the act.<sup>61</sup>

**Indian Christian Marriage Act 1872 (ICMA):** Under section 19 if either party is a minor, the consent of their father, if living, or, the prior consent of their guardian or the mother, is essential to solemnise a marriage.<sup>62</sup> Such a marriage is voidable at the option of a contracting party who was a minor (aged 18–21 years) at the time of marriage.

**Other laws:** Other laws that may provide protection to a child bride include the Juvenile Justice (Care and Protection of Children) Act 2000, Protection of Women from Domestic Violence Act 2005, and the Protection of Children from Sexual Offences Act 2012.

Child and early marriage: key judgment

### **Seema v Ashwani Kumar [2006] INSC 74 (14 February 2006)**

**Key points:**

- Compulsory registration of marriage to prevent child marriages

[The Indian Supreme Court heard a petition where] it was noted with concern that in a large number of cases some unscrupulous persons are denying the existence of marriage taking advantage of the situation that in most of the States there is no official record of the marriage. [...].

### Case 5.1 Seema v Ashwani Kumar

Without exception, all the States and the Union Territories indicated their stand to the effect that registration of marriages is highly desirable.

It has been pointed out that compulsory registration of marriages would be a step in the right direction for the prevention of child marriages still prevalent in many parts of the country. In the Constitution of India, 1950 (in short the 'Constitution') List III (the Concurrent List) of the Seventh Schedule provides in Entries 5 and 30 as follows:

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

30. Vital statistics including registration of births and deaths. It is to be noted that vital statistics including registration of deaths and births is covered by Entry 30. The registration of marriages would come within the ambit of the expression 'vital statistics'.

From the compilation of relevant legislations in respect of registration of marriages, it appears that there are four Statutes which provide for compulsory registration of marriages. They are: (1) The Bombay Registration of Marriages Act, 1953 (applicable to Maharashtra and Gujarat), (2) The Karnataka Marriages (Registration and Miscellaneous Provisions) Act, 1976 (3) The Himachal Pradesh Registration of Marriages Act, 1996, and (4) The Andhra Pradesh Compulsory Registration of Marriages Act, 2002. In five States provisions appear to have been made for voluntary registration of Muslim marriages. These are Assam, Bihar, West Bengal, Orissa and Meghalaya. The 'Assam Moslem Marriages and Divorce Registration Act, 1935', the 'Orissa Muhammadan Marriages and Divorce Registration Act, 1949' and the 'Bengal Muhammadan Marriages and Divorce Registration Act, 1876' are the relevant statutes. In Uttar Pradesh also it appears that the State Government has announced a policy providing for compulsory registration of marriages by the Panchayats and maintenance of its records relating to births and deaths. [...].

Accordingly, we are of the view that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States, where the marriage is solemnized.

Accordingly, we direct the States and the Central Government to take the following steps:

- (i) The procedure for registration should be notified by respective States within three months from today. This can be done by amending the existing Rules, if any, or by framing new Rules. However, objections from members of the public shall be invited before bringing the said Rules into force. In this connection, due publicity shall be given by the States and the matter shall be kept open for objections for a period of one month from the date of advertisement inviting objections. On the expiry of the said period, the States shall issue appropriate notification bringing the Rules into force.
- (ii) The officer appointed under the said Rules of the States shall be duly authorized to register the marriages. The age, marital status (unmarried, divorcee) shall be clearly stated.

The consequence of non-registration of marriages or for filing false declaration shall also be provided for in the said Rules.

(continued)

Needless to add that the object of the said Rules shall be to carry out the directions of this Court.

- (iii) As and when the Central Government enacts a comprehensive statute, the same shall be placed before this Court for scrutiny.
- (iv) Learned counsel for various States and Union Territories shall ensure that the directions given herein are carried out immediately.

### 5.2.2 Forced marriage

#### Forced marriage: law

**Hindu Marriage Act 1955:** In India a Hindu marriage may take place anywhere subject to meeting the requirements prescribed in the Hindu Marriage Act 1955 (HMA). This includes the conduct of customary rites and ceremonies of either party.<sup>63</sup>

Under the HMA, to contract a valid marriage the parties must have capacity to marry and must have capacity to give consent (otherwise the marriage is voidable at the request of the other party).<sup>64</sup> A marriage entered into without valid consent may be voidable under the HMA if it can be established that the consent of either party to the marriage was obtained by fraud or force<sup>65</sup> and it may be annulled by a court.

**Indian Christian Marriage Act 1872 (ICMA):** This governs marriage under Christian law, and allows for solemnisation of marriages either in church or before a Marriage Registrar. Consent is an essential element of a valid Christian marriage, as the parties to the marriage have to make a written declaration of consent before the marriage can be solemnised<sup>66</sup> and registered. If either party's consent is obtained under duress, s/he may seek annulment of the marriage, under the Indian Divorce Act 1869.<sup>67</sup>

**Special Marriage Act 1954:** Many couples who marry of their own choice, including those in inter-religious or inter-caste relationships, opt to do so under this law. Such marriages are registered before the Marriage Officer, who is required to maintain registers of solemnised marriages in accordance with the procedure provided.<sup>68</sup> Each party must freely consent to the marriage, and is required to make a declaration that s/he takes the other as their lawful spouse.<sup>69</sup> A marriage may be voidable at the option of one party on grounds, *inter alia*, of non-consummation of marriage, or lack of consent resulting from coercion or fraud.<sup>70</sup>

**Muslim Personal Law:** Any Muslim male or female of sound mind, who has reached puberty, may enter into a contract of marriage. A person who is not of sound mind, or has not yet reached puberty, may also be married

if consent to the marriage is given by their respective guardian.<sup>71</sup> The two adult parties to a marriage must consent, or the marriage will be invalid.<sup>72</sup> It seems that all sects of Islam are unanimous that a contract of marriage is complete and binding only when there is mutual consent on behalf of both the parties, when the parties see one another, and of their own accord agree to bind themselves, both being of the capacity to do so.<sup>73</sup> If a Muslim woman is married off by her father or other guardian before reaching 15 years of age, she may repudiate the marriage before reaching 18, provided the marriage is not consummated.<sup>74</sup>

**Protection of Women from Domestic Violence Act 2005:** This act may be used to prevent child/forced marriages, as forced marriage is understood as a form of domestic violence.<sup>75</sup>

**The Indian Penal Code 1860:** This includes certain offences which may be invoked in case of forced marriage. For example, abduction is defined as 'forcible compulsion or inducement by deceitful means of any person to go from any place.'<sup>76</sup> In cases of forced marriage involving an adult woman, where either of the parents, by deceitful means, induce their daughter to go to another place for the purpose of marriage, then they may be said to have abducted her. If a woman is either kidnapped or abducted with the intent that she may be compelled, or knowing it to be likely that she may be compelled, to marry any person against her will, then an offence would be committed under section 366 of the IPC. The maximum penalty is imprisonment for ten years and fine.

Section 503 of the IPC defines the offence of criminal intimidation which includes threat with any type of injury to cause her to consent to the marriage or to cause harm to her. This offence is punishable by up to two years' imprisonment or a fine or both and is a non-cognisable offence.

Forced marriage: key judgment

### **Lata Singh v State of U.P. & another [2006] INSC 383 (7 July 2006)**

Key points:

- Inter-caste marriage and violence
- An adult male and female may marry who they want

The petitioner is a young woman now aged about 27 years who is a graduate and at the relevant time was pursuing her Masters course in Hindi in the Lucknow University.

[...].

It is alleged by the petitioner that on 2.11.2000 she left her brother's house of her own free will and got married at Arya Samaj Mandir, Delhi to one Bramha

Nand Gupta who has business in Delhi and other places and they have a child out of this wedlock.

Thereafter on 4.11.2000, the petitioner's brother lodged a missing person report at Sarojini Nagar Police Station, Lucknow and consequently the police arrested two sisters of the petitioner's husband along with the husband of one of the sisters and the cousin of the petitioner's husband. [...].

It is further alleged that the petitioner's brothers Ajay Pratap Singh, Shashi Pratap Singh and Anand Pratap Singh were furious because the petitioner underwent an inter-caste marriage [...]. They also lodged a false police report alleging kidnapping of the petitioner against her husband and his relatives at Police Station Sarojini Nagar, Lucknow. [...].

A final report was submitted by the SHO, Police Station Sarojini Nagar, Lucknow before the learned Judicial Magistrate inter-alia mentioning that no offence was committed by any of the accused persons and consequently the learned Sessions Judge, Lucknow enlarged the accused on bail on furnishing a personal bond on 16.5.2001 by observing that neither was there any offence nor were the accused involved in any offence. [...].

### Case 5.2 Lata Singh v State of U.P. & another

This case reveals a shocking state of affairs. There is no dispute that the petitioner is a major and was at all relevant times a major. Hence she is free to marry anyone she likes or live with anyone she likes. There is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law.

Hence, we cannot see what offence was committed by the petitioner, her husband or her husband's relatives.

We are of the opinion that no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the Court as well as of the administrative machinery at the instance of the petitioner's brothers who were only furious because the petitioner married outside her caste. We are distressed to note that instead of taking action against the petitioner's brothers for their unlawful and high-handed acts (details of which have been set out above) the police has instead proceeded against the petitioner's husband and his relatives.

Since several such instances are coming to our knowledge of harassment, threats and violence against young men and women who marry outside their caste, we feel it necessary to make some general comments on the matter. The nation is passing through a crucial transitional period in our history, and this Court cannot remain silent in matters of great public concern, such as the present one.

*(continued)*

(continued)

The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

We sometimes hear of 'honour' killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.

In the circumstances, the writ petition is allowed. [...].

The warrants against the accused are also quashed. The police at all the concerned places should ensure that neither the petitioner nor her husband nor any relatives of the petitioner's husband are harassed or threatened nor any acts of violence are committed against them. If anybody is found doing so, he should be proceeded against sternly in accordance with law, by the authorities concerned.

We further direct that in view of the allegations in the petition (set out above) criminal proceedings shall be instituted forthwith by the concerned authorities against the petitioner's brothers and others involved in accordance with law. Petition allowed.

## 5.3 Pakistan

### 5.3.1 Child and early marriage

It is estimated that 21 per cent of girls in Pakistan are married before the age of 18.<sup>77</sup> In Pakistan, as in other countries of South Asia, early marriage is more common in rural areas.<sup>78</sup> Child marriage in Pakistan is connected with tradition, culture, and harmful traditional practices.<sup>79</sup> It sometimes involves the transfer of money, settlement of debts<sup>80</sup> or exchange of daughters (Vani/Swara or Watta Satta) sanctioned by a Jirga or Panchayat (council of elders from the community).<sup>81</sup> Such practices include giving women in marriage to the Holy Qur'an.<sup>82</sup>

### Child and early marriage: law

**The Constitution of Pakistan:** Article 1973 guarantees the rights to equal protection of the law,<sup>83</sup> right to life and security of person<sup>84</sup> for citizens and non-citizens alike. In addition, it secures for citizens the rights to freedom of movement,<sup>85</sup> equality before the law and equal protection of the law, non-discrimination on the ground of sex and special measures for the protection of women and children.<sup>86</sup>

The Constitution of Pakistan also provides for Principles of state policy which, though not justiciable, may be taken into consideration by courts when interpreting the scope of fundamental rights. One such Principle provides for the State to protect ‘the marriage, the family, the mother and the child’, and has been cited in judgments upholding women’s right to marry without the consent of their parents.<sup>87</sup>

A writ petition may be filed before any High Court for enforcement of fundamental rights under Article 199 of the Constitution. The writ of habeas corpus is usually the most effective in cases relating to rights of entry into marriage. A habeas corpus petition enables the court to determine whether any person is being illegally or unlawfully confined or detained. Accordingly, it is frequently used in order to secure the liberty of individuals who may be confined or restrained in connection with the threat of or actual forced marriage. At the district level, section 100 of the Code of Criminal Procedure 1898 empowers a magistrate to make a similar order.

The laws concerning marriage of minors are contained in the Child Marriage Restraint Act 1929 (CMRA Pakistan) read with the Majority Act 1875 and other relevant personal status laws.

**Majority Act 1875:** The general rule is that every person domiciled in Pakistan is deemed to attain majority on reaching 18 years of age.<sup>88</sup> However, a lower age of majority is determined according to personal law for the purposes of, among other things, marriage.<sup>89</sup>

Traditionally, under the Muslim law of personal status, the age of majority for marriage was considered to be puberty, which was presumed at the age of 15 for girls.<sup>90</sup> Prior to reaching puberty, such persons could be married on the basis of consent given on their behalf by their guardians. Under general principles of the Muslim law of personal status, the guardian for marriage of a minor is the father, followed successively by paternal relations, including the grandfather, the brother and other male relations, and in default, the mother, or other maternal relations, such as the maternal uncle or aunt.<sup>91</sup>

**Child Marriage Restraint Act 1929:** The CMRA defines a child to mean a person who, if a male, is under 18 years of age, and if a female, is under 16



years of age.<sup>92</sup> Although the CMRA does not invalidate child marriages, it penalises those responsible for such marriages (where the groom is below 18 and the bride below 16 years) with a maximum sentence of one month imprisonment and a fine of Rs. 1,000 or both. The persons liable include the parent/guardian who does any act to promote a child marriage or permits it to be solemnised or negligently fails to prevent it being solemnised,<sup>93</sup> any male adult party to the marriage or any person who performs, conducts or directs the marriage.<sup>94</sup>

Prosecutions under the CMRA are rare, and given the very lenient penalty applicable have little potential deterrent effect. Thus, a Muslim female aged 16 years and a male aged 18, though still minors under the Majority Act 1875, would generally be considered by the courts to have capacity to contract a marriage of their own free will.<sup>95</sup>

**Dissolution of Muslim Marriages Act 1939:** If a girl is married off by her father or other guardian before she is 16, she may repudiate the marriage on turning 18, provided the marriage is not consummated.<sup>96</sup> Thus, unless and until repudiated, a marriage involving a minor may not be treated as invalid.

Marriage registration has implications for preventing child marriages and is compulsory for marriages solemnised under the Christian Marriage Act 1872 and the Special Marriages Act 1872. Any marriage contracted by a Pakistani Muslim must be registered in accordance with the terms of the Muslim Family Law Ordinance.<sup>97</sup> The Nikah (marriage) Registrar's duties before registering a marriage are to ensure the capacity of the parties to contract marriage, their ages and whether they are acting of their own free will, and he may proceed to register the marriage only after ensuring that its basic requirements have been fulfilled.<sup>98</sup>

Child and early marriage: key judgment

### **Issa Khan v Mst Ramza 1991 SCMR 2454**

Key points:

- Promise of marriage by relatives on behalf of a female child
- Circumstances leading to forced consent

Leave to appeal has been sought against the dismissal by the High Court of petitioner's Civil Revision. The respondent had filed a suit disputing the petitioner's claim that he had been betrothed with her for marriage. The suit was dismissed by the trial Court but in appeal it was decreed. The petitioner's Civil Revision in the High Court against the appellate order, having been dismissed he has now sought leave to appeal.

### Case 5.3 Issa Khan v Mst Ramza

[...].

2. [...]. It is pertinent to mention here that Mst. Ramza is hardly eleven years of age as clearly indicated from her statement recorded in the Court. Obviously contract presupposes consent for consideration of dower in presence of two adult witnesses. This aspect is conspicuously missing in instant case. Petitioner's own case is of betrothal as disclosed from his statement and other evidence adduced by him.

[...].

4. It may be mentioned here that in most of the betrothal agreements in our society the parents or other elders do so on behalf of the two persons who are intended to be united in the wedlock of marriage in future. To bind a girl with such an agreement in the nature of betrothal in such a manner that she should be compelled to give her consent at the time of marriage or for that matter that a decree for conjugal rights or for a direction for marriage be passed against a female in the above circumstances is unimaginable. The whole fabric of Islamic Law and jurisprudence on this subject is against such a notion. The lady remains free to give or to withhold consent for marriage till the moment when marriage contract takes place. There should be no doubt about it. Coming to the observations made in the impugned judgment of the High Court that the betrothal agreement is generally customary and is also generally arrived at between the relations of the parties with a view to enter into future contract of marriage, therefore, it does not create any civil right, is correct in so far as the claim of the male (in the present case also) for forcing the female to enter into a marriage is concerned. He has no such right. However, his insistence that she is betrothed to him and making claim about, it (if denied by the respondent female) creates two civil, rights amongst others, in her favour. One that while she is entitled to be known as unattached lady, the claim of the petitioner would put her under a label of attached lady through a betrothal. Her chance, sphere and scope for absolutely free choice for marriage would be absolutely restricted. ... Therefore, the claim of the petitioner acts as a clog on the future opportunity of freedom of contract of marriage in so far as this opportunity and right belong to the respondent female, hence she could and did maintain rightly a suit for stopping the petitioner from making the claim of betrothal with the petitioner. The other right is a corollary from the first mentioned right to undiluted reputation. For example, if the betrothal is claimed to be with the consent of the female or in a more liberal context if it is claimed to be directly between the male and the female for future contract of marriage, she would suffer a reputation of having attached herself voluntarily with a male so as to enter into future marriage. Depending upon social conditions of the two sides it can cause harm to her reputation in some areas of our social sector immensely. Therefore; such a claim depending upon the circumstances of each case also affects right of the female respondent to normal good reputation in the context of her own social conditions. We, therefore, with respect do not agree with the learned Judge of the High Court that the respondent had no enforceable civil right.
5. With these remarks judgment of dismissal of petitioner's Civil Revision by the High Court is upheld and leave to appeal is refused.

**Forced marriage: law**

Although forced marriage is an offence under the laws of Pakistan (discussed below), it remains prevalent. In extreme cases, coercion or duress may be used to extract consent from a woman or girl at varying levels, from emotional pressure to confinement, to outright violence.<sup>99</sup> Formal laws operate in the context of the widespread prevalence of tribal or customary practices. Such violence against women in the name of ‘honour’ restricts rights regarding marriage, and continues to be condoned to a degree by the criminal justice system.<sup>100</sup>

Article 9 of the Constitution of Pakistan guarantees the right of every person to liberty, which arguably includes the rights to choose a spouse and to enter into marriage with full consent. Forced marriage involves the lack of free and full consent and is clearly a violation of Article 9.<sup>101</sup>

**Muslim Personal Law:** Under Muslim law as applicable in Pakistan, the requirements for validity of a marriage (nikah) include, among others, free and full consent of both parties if adults (but note that a guardian may give a minor in marriage).<sup>102</sup> A marriage in which an adult sane party does not consent, or where their consent is obtained under force or fraud, is no marriage in law.<sup>103</sup> It is a settled proposition of law that in Islam a sui juris woman can contract a nikah of her own free will and a nikah performed under coercion is no nikah in law.<sup>104</sup> The term ‘consent’ means a conscious expression of one’s desire without any external intimidation or coercion.<sup>105</sup>

**Pakistan Penal Code 1860:** Forced marriage is a crime under the Pakistan Penal Code 1860.<sup>106</sup> On the issue of choice in marriage, remedies may be invoked under various statutes and pursuant to judgments of the higher courts.<sup>107</sup> Cases of forced marriage may also give rise to the offences of kidnapping/abduction/inducing a woman to compel marriage as defined under Section 365B of the Pakistan Penal Code.

**Code of Criminal Procedure 1898:** In addition to prosecution for the above offences, remedies available under the Code of Criminal Procedure (CrPC) include those which would enable release of the victim from confinement, or provide her with compensation or enable action to be taken against any officials responsible such as: orders of habeas corpus,<sup>108</sup> search warrant,<sup>109</sup> orders for restoration of an abducted female,<sup>110</sup> and compensation.<sup>111</sup>

**Forced marriage: key judgment****Hafiz Abdul Waheed v Asma, Jehangir PLD 2004 SC 219****Key points:**

- A woman can marry without consent of wali/guardian/parents
- Free consent essential for a valid marriage

This is a key case on the issue of forced marriage. In this case leave to appeal was granted by the Supreme Court to examine as to whether consent of the ‘Wali’ [guardian] was essential to the validity of marriage of a sui juris Muslim girl. The Supreme Court held that:

*Consent of ‘Wali’ is not required and a sui juris Muslim female can enter into valid Nikah/marriage of her own free will. Marriage is not invalid on account of the alleged absence of consent of Wali.*

## 5.4 Thailand

### 5.4.1 Child and early marriage

Adolescents make up approximately 13 per cent of the population in Thailand, translating into roughly 8,604,000 young persons.<sup>112</sup> Of that 8.6 million, 16 per cent of adolescent girls reported being in a marriage or living in a union in 2016.<sup>113</sup> Another 4 per cent of women aged 20 to 24 years admitted to being married at 15 years of age while 22 per cent responded that they were married by 18 years of age.<sup>114</sup> Related to early marriage, Thailand has one of the highest rates of adolescent pregnancy in the world.<sup>115</sup> Between 1996 and 2011 the rates of adolescent pregnancy increased steadily, peaking in 2011.<sup>116</sup> Although adolescent pregnancy has decreased in recent years, it remains amongst the highest in the world. In 2016, 60 of every 1,000 births were to an adolescent mother,<sup>117</sup> amounting to roughly 13 per cent of all births.<sup>118</sup> Early marriage has been cited as both a cause and consequence of adolescent pregnancy.<sup>119</sup> It is not uncommon for adolescents in Thailand to get married to their partner after becoming pregnant to ‘save face’ or to avoid legal sanctions which could arise as a result of statutory rape provisions under section 277 of the Criminal Code.<sup>120</sup>

#### Child and early marriage: law

Thai law does not prohibit child marriage.<sup>121</sup> The minimum age to enter into a marriage is 17 years of age,<sup>122</sup> and the court may grant permission to adolescents younger than 16 years to be married.<sup>123</sup> It would seem that a child as young as 13 years of age can be married under Thai law with the permission of the court.<sup>124</sup> For example, an adolescent under the age of 18 years who has had sexual relations with another adolescent between 13 and 15 years of age can avoid criminal prosecution for the crime of statutory rape if the perpetrator marries the victim with the Court’s permission as per section 277, paragraph 5 of the Criminal Code.<sup>125</sup> A marriage entered into with a person under the minimum age of 17 years is not, on its own, a basis to annul or void the marriage.<sup>126</sup>

### Child and early marriage: recommendations

- Interpret and apply the Civil and Commercial Code to prohibit any adolescents under 18 years of age from betrothing or entering into marriage.
- Interpret and apply sections the Civil and Commercial Code to restrict adolescents and adolescents' parents from initiating a marriage unless the court can find exceptional reasons to justify the union, and prohibit in all circumstances any marriage involving adolescents under 16 years of age.
- Interpret and apply section 277 paragraph 5 of the Thai Criminal Code to prohibit without exception all marriages involving allegations of sexual abuse irrespective of the age of the perpetrator.

#### 5.4.2 Forced marriage

##### Forced marriage: law

There is no explicit prohibition against forced marriage under Thai law.<sup>127</sup> However, there is a requirement that each party must give their consent for a marriage to be valid. Under section 1455 of the Thai Civil and Commercial Code, each party to a marriage must give written and oral consent, witnessed by the two individuals to be married.<sup>128</sup> Section 1458 further states that marriage can be made only when a man and a woman agree to be husband and wife and they have to show their consent publicly so that the Registrar may record.<sup>129</sup> Moreover section 1495 states that a marriage without the consent of both parties (pursuant to section 1458) 'shall be void' under Thai law.<sup>130</sup>

**International obligations:** as a State party to CEDAW<sup>131</sup> Thailand is obligated under section 16 to 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.'<sup>132</sup> Specifically, under article 16(1) (b) Thailand must take measures to ensure that women and men have an equal right to '[freely] choose a spouse and to enter into marriage only with their free and full consent'.<sup>133</sup> Under article 16(2) Thailand must take measures to ensure that the 'betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage'.<sup>134</sup> The CEDAW Committee and the UN Committee on the Rights of the Child issued a joint general recommendation in which child marriage was defined as 'any marriage where at least one of the parties is under 18 years of age'.<sup>135</sup> The CEDAW Committee and UN Committee noted that 'child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent'.<sup>136</sup> While there is a some allowance to permit adolescents under 18 years to exercise their evolving capacity to enter into

early marriage, it is only 'allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law'.<sup>137</sup>

Sections 1448, 1454 and 1436 of the Civil and Commercial Code contravene Thailand's obligations under article 16(2) of CEDAW in allowing children below 18 years of age (17 years) to be married with the permission of their parents. Thailand is in further violation of CEDAW in allowing children as young as 13 years of age to be married with the permission of the court.

Section 277(5) of the Criminal Code contravenes Thailand's obligations to prohibit forced marriage under Article 16(1) (b) of CEDAW and Article 23(3) of the International Covenant on Civil and Political Rights 1966.<sup>138</sup> It also contravenes Thailand's obligations under international law in permitting perpetrators (under 18 years) having sexual relations with children below the age of consent (15 years) to avoid criminal prosecution by marrying their victims (above 13 years of age) with the court's permission.

The UN Committee on the Rights of the Child in its 2012 Concluding Observations called on Thai Government to raise the minimum age of marriage to 18 years and remove any exceptions to the prosecution and punishment of perpetrators of sexual abuse and statutory rape of children.<sup>139</sup> In its 2016 Universal Periodic Review before the Human Rights Council, Thailand was again urged to raise 'the minimum age of marriage [to] 18 for both boys and girls'<sup>140</sup> and to remove any 'legal provision that states that the age limit of marriage could be lowered to 13 years old in cases where children were sexually abused'.<sup>141</sup>

#### Forced marriage: Recommendations

The following recommendations are offered which may be helpful in bringing Thailand into compliance with its obligations under international law:

- Interpret and apply sections 1448, 1435, 1436 and 1454 of the Civil and Commercial Code to prevent parents or guardians from granting permission to adolescents under 18 years of age and above 16 years from betrothing or entering into marriage;<sup>142</sup>
- Interpret and apply sections 1448, 1435, 1436 and 1454 to restrict the marriage of adolescents under 18 years unless the Court can find exceptional reasons to justify the union, and prohibit in all circumstances any marriage involving adolescents under 16 years of age in line with Thailand's obligations under article 16(2) of CEDAW;<sup>143</sup>
- Interpret and apply section 277 paragraph 5 of the Thai Criminal Code to prohibit without exception all marriages involving

allegations of sexual abuse and statutory rape irrespective of the age of the perpetrator, in line with Thailand's international obligations under article 16(1) (b) of CEDAW and article 23(3) of the ICCPR.<sup>144</sup>

## Notes

- 1 UNICEF, *The State of the World's Children 2016* (UNICEF, June 2016), page 158, [https://www.unicef.org/publications/files/UNICEF\\_SOWC\\_2016.pdf](https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf)
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- 6 Constitution of the Kingdom of Cambodia 2008, Article 31.
- 7 Ibid, Article 31, para 2.
- 8 Ibid, Article 45.
- 9 The Civil Code of Cambodia 2003, Chapter Three – Marriage, Section I – Formation of Marriage, Sub-Section I – Requirements for marriage, art 948, <https://cambodianbusinesscorner.files.wordpress.com/2013/01/civil-codeen.pdf> accessed 9 December 2016
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- 12 Ibid, Article 953, para 3.
- 13 Ibid, Article 960.
- 14 Ibid, Article 961, para 1.
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- 22 Ibid, para 54(f).
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- 25 Ibid.
- 26 Ibid.
- 27 'Report on Violence against Women: How Cambodian Laws Discriminate against Women' (CAMBOW, 2007), [https://www.licadho-cambodia.org/reports/files/112CAMBOWViolenceWomenReport2007\\_ENG.pdf](https://www.licadho-cambodia.org/reports/files/112CAMBOWViolenceWomenReport2007_ENG.pdf) accessed 9 November 2015.
- 28 Ibid, chapter 3.
- 29 Constitution of the Kingdom of Cambodia, Article 31 [2].
- 30 Ibid, Article 45.
- 31 The Civil Code of Cambodia, 2007 Chapter Three – Marriage, Section I – Formation of Marriage, Sub-Section I – Requirements for marriage, articles 958, 960 and 963.

- 32 Ibid, Article 958.
- 33 Ibid, Article 963(1).
- 34 Ibid, Article 963(2).
- 35 Ibid, Article 16(1).
- 36 Ibid, Article 16(1) (b).
- 37 See chapter 3, section 3.5.
- 38 CEDAW Committee, General recommendation No. 21, Equality in marriage and family relations', 1994 [16].
- 39 Ibid.
- 40 '[T]he marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage', art 16(2) CEDAW.
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- 47 Article 19.
- 48 Article 14.
- 49 Article 15.
- 50 Section 2 (a).
- 51 Section 3 (3).
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- 57 Section 14.
- 58 Section 16.
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- 60 Section 5(iii).
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- 66 Section 51.
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- 70 Section 25.
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- 76 Section 362.
- 77 Girls not Brides, 'Child Marriage around the World: India' (2015), <http://www.girlsnotbrides.org/child-marriage/india/> accessed 10 December 2015.
- 78 UNICEF, 'Early Marriage in South Asia: A Discussion Paper' (2001), [www.unicef.org/rosa/earlymarriage\(lastversion\).doc](http://www.unicef.org/rosa/earlymarriage(lastversion).doc) accessed 14 November 2015.
- 79 Girls not Brides, 'Child Marriage around the World: India' (2015), <http://www.girlsnotbrides.org/child-marriage/india/> accessed 10 December 2015.
- 80 This is now a punishable offence under Section 310-A of the Pakistan Penal Code where a woman is given or compelled into marriage in settlement of a criminal liability or a civil dispute.
- 81 'Child Marriage around the World: Pakistan' (Girls not Brides, 2015), <http://www.girlsnotbrides.org/child-marriage/pakistan/> accessed 10 December 2015.
- 82 This refers to certain practices of requiring a woman to forgo her right to marry, through taking an oath on the Holy Qur'an. This is now a punishable offence under section 498-C, PPC, punishable with imprisonment of three to seven years and a fine of Rs 500,000.
- 83 Article 4.
- 84 Article 9.
- 85 Article 15.
- 86 Article 25.
- 87 Article 35. See *Saima v State*, PLD 2003 Lahore 747 where the High Court relied on Article 35 of the constitution and Article 16 of CEDAW.
- 88 Section 3.
- 89 Section 2.
- 90 *Bakshi v Bashir Ahmed* PLD 1970 SC 323 at 324 para A and *Zafar Khan v Muhammad Ashraf Bhatti* PLD 1975 Lahore 234 [235].
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- 92 Section 2(a).
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- 94 Sections 4 and 5.
- 95 *Usman v The State* 1984 PCr.LJ 2908 (where the Court determined the age of capacity for marriage by reference to the *Hudood Ordinance*).
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- 101 *Ibid.*
- 102 *Humaira Mehmood v State* PLD 1999 Lahore 495 at paras 9 and 10, and *Muhammad Aslam v The State* 2012 PCr.LJ 11, para 9 at page 17.
- 103 *Matloob Hussain v Mst. Shahida & 2 others* PLD 2006 SC 489 at 496.
- 104 *Ibid.*
- 105 *Ibid.*
- 106 Section 498-B of the Pakistan Penal Code (PPC) inserted in December 2011. It carries a sentence of imprisonment of three to seven years and fine of Rs. 500,000. Section 310-A, PPC is also applicable where a woman is given or compelled in into marriage in

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## Chapter 6

# Domestic Violence

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### Objectives

This chapter focuses on the issue of domestic violence in the target countries, i.e. its symptoms, causes and legal and other responses by state organs to address domestic violence. The aim is to sensitise and enable judges and other stakeholders to make informed and human rights compliant decisions when dealing with cases of domestic violence.

This chapter consists of four sections. Section 6.1 focuses on domestic violence (DV) in Cambodia, i.e. its symptoms, causes and legal and other responses by state organs to address DV. Section 6.2 focuses on DV in India, i.e. its symptoms, causes and legal and other responses by state organs to address DV. Section 6.3 focuses on DV in Pakistan, i.e. its symptoms, causes and legal and other responses by state organs to address DV. Section 6.4 focuses on DV in Thailand, i.e. its symptoms, causes and legal and other responses by state organs to address DV.

The most common form of violence experienced by women and girls around the world is physical violence inflicted by an intimate partner. On a global average, at least one in three women is beaten, coerced into sex, or otherwise abused by an intimate partner in the course of her lifetime.<sup>1</sup>

Women and girls are often in great danger in the place where they should be safest: within their families. For many, 'home' is where they face violence at the hands of somebody close to them – somebody they should be able to trust. Those victimised suffer physically and psychologically. They are in many cases unable to make decisions, voice their own opinions or protect themselves and their children for fear of further repercussions. Their human rights are denied and their lives ruined by the ever-present threat of violence.<sup>2</sup>

Across the Asia Pacific, as elsewhere, domestic violence includes violence perpetrated by intimate partners and other family members, and is manifested in a number of ways:

- Physical abuse which includes slapping, beating, arm twisting, stabbing, strangling, burning, choking, kicking, threats with an object or weapon, and murder. It also includes traditional practices harmful to women such as child, early and forced marriage and

wife inheritance (the practice of passing a widow, and her property, to her dead husband's brother);

- Sexual abuse which includes coerced sex or sexual acts through threats, intimidation or physical force;
- Psychological abuse which includes behaviour that is intended to intimidate and persecute, and takes the form of threats of abandonment or abuse, confinement to the home, surveillance, threats to take away custody of the children, destruction of objects, isolation, verbal aggression and constant humiliation; and
- Economic abuse which includes acts such as the denial of funds, refusal to contribute financially resulting in denial of food and basic needs, and controlling access to health care and employment.<sup>3</sup>

Acts of omission are also a form of violence against women and girls. Gender bias that discriminates in terms of nutrition, education and access to health care amounts to a violation of women's rights. It should be noted that although the categories above are listed separately, they are not mutually exclusive. Indeed, they often go hand in hand.<sup>4</sup>

About 35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence. According to one estimate, of all women killed globally in 2012, almost half were killed by intimate partners or family members, compared to less than six per cent of men killed in the same year.<sup>5</sup> The most common perpetrators of sexual violence against young women are current or former husbands, partners or boyfriends.<sup>6</sup>

In the past few years, many countries across Asia have stepped forward to adopt laws tackling domestic violence. In many cases these are directly linked to their implementation of obligations under CEDAW, the Beijing Declaration and the PFA.<sup>7</sup>

## 6.1 Cambodia

### 6.1.1 Domestic violence

Domestic violence remains the single most prevalent form of violence against women and girls in Cambodia.<sup>8</sup> In 2015 the World Health Organization conducted a national study on the impact of violence against women and girls in Cambodia. In that survey, a representative national sample of 3,568 women were interviewed on their experiences of violence. It was found that violence by intimate partner was the most frequent form of violence with just over one in five women reporting physical and/or sexual violence by their intimate partner at least once in their lifetime.<sup>9</sup> Of the 21 per cent of

women who had experienced sexual and physical violence, 75 per cent were subjected to severe violence. One in three women surveyed reported being subjected to emotional abuse.<sup>10</sup>

A 2013 United Nations Study<sup>11</sup> interviewed 1,863 Cambodian men to gain a better understanding of men's use of different forms of violence against women (specifically intimate partner violence and non-partner rape).<sup>12</sup> The study found that 21 per cent of ever-partnered men<sup>13</sup> had raped a partner at least once in their lives.<sup>14</sup> The study further found that 16.4 per cent of ever-partnered men had committed physical violence against an intimate partner at least one time in their lives.<sup>15</sup> Approximately 32.8 per cent of ever-partnered men admitted to committing either sexual or physical or both sexual and physical violence against a partner at least once in their lifetimes.<sup>16</sup>

Cultural and strong patriarchal attitudes play a significant role in propagating domestic violence. In a 2015 WHO survey, almost half of the women interviewed believed that their partners were justified in beating them.<sup>17</sup> Of the women who admitted to experiencing physical and sexual violence, almost 58 per cent accepted that a husband could beat his wife in particular situations.<sup>18</sup> And 19 per cent of all ever-partnered women believed they were not entitled to refuse sex from their husbands.<sup>19</sup> It is also significant to note that more than half of respondents (55%) who had been subjected to intimate partner violence in the WHO survey reported that they have never fought back against the violence.<sup>20</sup>

Impunity and under-reporting play a significant role in enabling domestic violence. Most women do not tell anyone about their victimisation or report domestic violence to the relevant authorities.<sup>21</sup> Few victims of domestic violence seek assistance from police or the criminal justice system. Reasons for victims' silence over their abuse included: (1) lack of formal services available to women in Cambodia, especially in rural settings;<sup>22</sup> (2) difficulty and prohibitive costs in accessing townships from rural areas;<sup>23</sup> (3) lack of sensitisation among agencies and police, magistrates and health services for victims;<sup>24</sup> (4) lack of sensitisation among community leaders, who often pressure victims to reconcile with their partners;<sup>25</sup> and (5) weaknesses in the current legal system which encourage settlements and discourage prosecution.<sup>26</sup>

There are strong beliefs that domestic violence is a private matter in which courts or other authorities should not be involved.<sup>27</sup>

#### Domestic violence: law

**Constitution of Cambodia 2008:** The Constitution of the Kingdom of Cambodia 'recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and

the covenants and conventions related to human rights, women's rights and children's rights.<sup>28</sup> Article 38 'prohibits all physical abuse of any individual. The law protects the life, honour and dignity of citizens.'<sup>29</sup>

Article 31(2) guarantees that all 'citizens shall be equal before the law, enjoying the same rights and freedoms and obligations regardless of race, colour, sex, language, religious belief, political tendency, national origin, social status, wealth or other status.'<sup>30</sup>

Article 31(2) is important in placing priority on the need to address gender inequality in the domestic violence framework. It is recommended that judges use Article 31 and Article 38 to inform how laws and cases involving domestic violence are handled.

#### **The Law on the Prevention of Domestic Violence and the Protection of Victims 2005:**

Article 1 sets out three objectives: 'prevent domestic violence; protect the victims; and strengthen the culture of non-violence and the harmony within the households in society in the Kingdom of Cambodia.'<sup>31</sup> The emphasis on harmony within households must be balanced against the judiciary's obligation to comply with articles 31 and 38 of the Constitution and Cambodia's obligations under CEDAW to eliminate all forms of violence against women, while also ensuring victims' access to justice, remedies and reparations.

Article 2 sets out the scope of the Act, where it states, '[d]omestic violence is referred to as violence that happens and could happen towards: (1) Husband or wife; (2) Dependent children; (3) Persons living under the roof of the house and who are dependent of households.'<sup>32</sup> It should be noted that neither informal unions nor former spouses are recognised within the scope of the Act. Taking such a narrow scope potentially excludes certain groups of women and girls who are victims of domestic violence yet do not fall into one of the enumerated categories. It is recommended that an inclusive approach be taken in cases involving domestic violence to ensure that all potential victims are captured within the protections of the Act.

Articles 3 to 7 provide substantive definitions for domestic violence. Article 3(2) states that '[domestic] violence includes: Acts affecting life; Acts affecting physical integrity; Torture or cruel acts; Sexual aggression.'<sup>33</sup> Articles 4 to 7 provide substantive definitions for each of the above-mentioned four categories.

Article 4 enumerates conduct which constitutes acts affecting life: 'Premediated homicide; Intentional homicide; Unintentional homicide resulted from other intentional acts of the perpetrators; unintentional homicide.'<sup>34</sup>

Article 5 addresses conduct affecting physical integrity: ‘Physical abuses with or without using a weapon, with getting or not getting wounded; Torture or Cruel acts.’<sup>35</sup>

Article 6 addresses the substantive meaning of torture: ‘Torture or cruel acts include: Harassment causing mental/psychological, emotional, intellectual harms to physical persons within households.’<sup>36</sup> Article 6(2) adds further elements that tend to widen the definition such as ‘[m]ental/psychological and physical harms exceeding morality and the boundaries of the law.’<sup>37</sup> The wider framing of torture and cruel treatment under article 6 allows for the possibility of capturing certain non-physical forms of domestic violence, such as emotional abuse and controlling behaviour.

Article 7 defines sexual aggression. Article 7 states, ‘Sexual aggression includes: Violent rape; Sexual harassment; Indecent exposures.’<sup>38</sup> Using a qualifier to include only ‘violent’ rape is problematic. It fails to recognise non-violent marital rape as a form of domestic violence.

Complex terms such as ‘sexual harassment’ have not been defined. A definition of sexual harassment is set out at article 250<sup>39</sup> of the Criminal Code; however, it is confined to situations where a person abuses a position of authority to obtain sexual favours. In the absence of such a definition within the domestic legislation, guidance may be taken from international human rights as article 31 of the constitution requires. The Declaration on the Elimination of Violence against Women 1993 offers a general definition of violence as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women ... whether occurring in public or private life’<sup>40</sup>, which could be used to inform what is meant by ‘sexual harassment’. According to article 7 and 16 of CEDAW, States parties must take appropriate measures to eliminate discrimination against women by state and non-state actors in all spheres. Article 16 specifically calls for the elimination of discrimination against women in matters relating to marriage and family relations.<sup>41</sup>

Article 8 of the Law on the Prevention of Domestic Violence and the Protection of Victims discusses threatening and harassing behaviour but it does not define what constitutes threatening or harassing behaviour. Article 8(2) introduces a qualification, allowing threats and harassing behaviour under the guise of ‘disciplining and teaching’ if it is undertaken with a ‘noble nature’ and in line with principles of the United Nations Conventions. However, such a qualifier is problematic as it reinforces the perception that some forms of family-based violence such as threats or harassment are acceptable. It is recommended that in assessing whether conduct is threatening or harassing, Cambodia’s obligations under CEDAW, notably to



eliminate all forms of violence against women, should be used to inform how this provision is interpreted and applied.

Articles 13 to 19 set out provisions for the protection of domestic violence victims. Article 13 calls for urgent intervention, including seizing weapons or concrete objects that have been used or could be used by the perpetrators;<sup>42</sup> removing perpetrators from the situation;<sup>43</sup> and offering protection assistance to victims.<sup>44</sup> Article 13 allows for mediation to facilitate reconciliation.<sup>45</sup>

Article 14 empowers authorities to issue protection orders or other temporary measures against the perpetrator to prevent further domestic violence and ensure the protection of victims and household members.<sup>46</sup>

Article 16 empowers the victim to file a complaint with the provincial or municipal courts for a protection order.<sup>47</sup>

Article 17 prevents authorities from mediating or reconciling conduct which constitutes a felony crime or a severe misdemeanour crime.<sup>48</sup> Article 19 requires authorities to investigate and bring a prosecution (where sufficient evidence is found) for conduct amounting to a felony crime or severe misdemeanour.<sup>49</sup>

Articles 20 to 25 set out the authority of the Court to issue protection orders. A protection order is a civil measure intended to protect victims.<sup>50</sup> Judges have the authority and duty to issue protection orders and alter and change them according to the situation. A protection order can impose any sort of conditions on an accused to do or not do something so long as it is related to the protection of a victim of domestic violence.<sup>51</sup> The orders are made in two stages: (1) Stage 1 where the order is issued for two months, during the emergency period when the domestic violence incident first comes to the Court; (2) Stage 2 where the order is issued up to six months during the investigation, pre-trial and trial period.<sup>52</sup>

Article 25 lists the different forms of protection orders: (a) prohibition on certain behaviour; (b) prohibition from approaching or entering certain premises; (c) no-contact orders between the victim and perpetrator; (d) prohibition from destroying or liquidating property or assets.<sup>53</sup>

Articles 26 to 32 discuss reconciliation. Article 26 recommends reconciliation or mediation for offences involving mental/psychological or economic acts, as well as other minor misdemeanours or petty crimes. Article 26 requires both parties' agreement for mediation or reconciliation. It should be noted that Article 26 allows household members such as parents and relatives of the victim or perpetrator to act as arbitrators in the reconciliation. Buddhist monks, elders, village chiefs, and commune councillors may also act as mediators. Article 26 emphasises the importance of 'preserving harmony within the household in line with the nation's good custom and tradition[s]'.<sup>54</sup>

Article 27 encourages courts and judges to reconcile domestic violence cases; however, it cautions against pressuring or forcing parties to reconcile.<sup>55</sup>

Article 28 imposes a special duty to keep the court apprised of cases involving children. The courts must take measures to ensure the protection and safety of child victims in handling domestic violence cases.

Chapter 7 addresses penalties. Article 35 states that ‘any acts of domestic violence that are considered criminal offences shall be punished under the penal law in effect.’<sup>56</sup> However, in practice, prosecutors have tended to treat all domestic violence offences similarly using a single generic offence under article 222 of the Criminal Code which reads, ‘[i]ntentional acts of violence shall be punishable by imprisonment from two to five years and a fine from four million to ten million Riels if they are committed by a spouse or partner of the victim.’<sup>57</sup> In doing this, domestic violence involving serious human rights abuses such as rape or sexual violence go unpunished with victims continuing to live without access to justice, remedies and reparations for domestic violence. In this respect, Article 35 has had a negative impact, enabling impunity for domestic violence related crimes, notably marital or spousal rape.<sup>58</sup>

**Criminal Code of Cambodia 2010:** Offences against the person, any physical or sexual violence or threat of physical or sexual violence perpetrated against an intimate partner may be prosecuted under the Cambodian Criminal Code.<sup>59</sup>

**International obligations:** Cambodia is obligated under international human rights law to exercise ‘due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.’<sup>60</sup> If State officials or authorities fail to take sufficient steps to investigate or punish acts of domestic violence or obstruct or interfere with any such efforts, Cambodia may be in violation of its obligations under international law.<sup>61</sup>

As a State party to CEDAW, Cambodia must ‘condemn discrimination against women in all its forms’<sup>62</sup> committed ‘by any person, organization or enterprise.’<sup>63</sup> Domestic violence is recognised as a form of gender-based discrimination and violence,<sup>64</sup> which involves ‘acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty’.<sup>65</sup>

In practical terms, Cambodia must take measures to criminalise acts of domestic violence against women;<sup>66</sup> remove underlying legal, social and cultural barriers including gender stereotypes that may prevent women from exercising and claiming their rights and impede their access to effective remedies;<sup>67</sup> investigate allegations and, where sufficient evidence is found, prosecute domestic violence allegations before an independent and impartial tribunal with the intention of punishing the accused with a sentence

commensurate with the gravity of the offence. This obligation falls on all branches of government, including the judiciary.<sup>68</sup>

There are notable weaknesses in the Law on the Prevention of Domestic Violence and the Protection of Victims. First, the emphasis on reconciliation and mediation propagates a perception that domestic violence is a 'private family matter'. It also trivialises family-based violence against women and undermines victims' access to justice, remedies and reparations. The focus on reconciliation can also discourage victims from coming forward as there is little prospect of justice or long-term protection.

Article 26 allows for the reconciliation and mediation of domestic violence cases involving mental/psychological abuse, in which immediate family members can be appointed as arbitrators. The use of family members as mediators to facilitate settlements is problematic for several reasons. First, it denies victims the right to an impartial and independent hearing or investigation into the domestic violence case, thus undermining victims' right to access remedy and reparations for family-based violence against women. Second, it endangers the victim and any affected children, denying them the very-much-needed protection and separation from their family members, who often enable or acquiesce in the domestic violence and abuse. Third, it tacitly supports the strongly patriarchal values, again undermining victims' voices and trivialising the gravity of domestic violence.

The second key weakness of the domestic violence legislation is the lack of any penalties or punitive measures for acts of domestic violence, or the breach of protection orders. The lack of any punishment weakens the overall protection mechanisms for victims. Again, the lack of criminal or legal sanctions for domestic violence inculcates a culture of impunity for domestic violence.

There is also a demonstrated lack of understanding about the Domestic Violence Law and its relevance to victims and local authorities.<sup>69</sup> Despite the stated requirement to educate the public on the law and domestic violence generally under Article 33, as of 2007 the Government had not made any sustained effort to educate its citizens about the law.<sup>70</sup>

#### Domestic violence: recommendations

The following recommendations offered to the judiciary may help in bringing Cambodia into compliance with its obligations under international law. As a starting point, it is recommended that the provisions of CEDAW and the Declaration on the Elimination of Violence against Women be used to inform the interpretation and application of domestic laws related to domestic violence. In respect of specific issues, it is recommended that:

- An inclusive approach must be taken in interpreting the scope of the Law on the Prevention of Domestic Violence and the Protection of Victims to ensure all potential victims are captured within the protections of the Domestic Violence Act
- The safety and protection of women and any affected children, and their right to access justice, remedies and reparations for domestic violence must be placed above the need for reconciliation;<sup>71</sup>
- All acts of domestic violence which could amount to a criminal offence must be subject to a full investigation, and where necessary a prosecution under the most appropriate criminal charge before an independent and impartial tribunal, resulting in a sentence commensurate with the gravity of the offence;<sup>72</sup>
- Victims of domestic violence should not be precluded from accessing justice, remedies and reparations if a case is handled through mediation or reconciliation<sup>73</sup>
- Measures be taken to ensure the safety and best interests of any affected child or children in any decisions involving the mediation or reconciliation of domestic violence;
- Mediation or reconciliation be invoked only when the victim specifically requests it – it should not be suggested or offered<sup>74</sup>
- Mediation be prohibited without exception where one or more of the allegations involves serious human rights abuses or grievous injury or harm
- Family members be prevented from acting as mediators in claims, and instead only independent and impartial parties adjudicate or mediate domestic violence<sup>75</sup>
- Where possible, courts exercise their discretion to provide gender-sensitive and protection measures in the Court to ensure the safety of victims and witnesses. Measures could include<sup>76</sup>
  - (a) Protection orders and other measures to ensure the safety and security of victims throughout the judicial process;
  - (b) Publication bans, in-camera proceedings and other measures to ensure the confidentiality and privacy of victims;
  - (c) Video-link testimony, screens or other visual barriers to ensure victims are not required to face their perpetrator while testifying;
  - (d) Separate entrances and waiting areas for victims before, during and after court proceedings.

## 6.2 India

### 6.2.1 Domestic violence

In its annual report of 2016, Amnesty International said:

*Although nearly 322,000 crimes against women, including over 37,000 cases of rape, were reported in 2014, stigma and discrimination from police officials and authorities continued to deter women from reporting sexual violence. A majority of states continued to lack standard operating procedures for the police to deal with cases of violence against women.*

*In over 86% of reported rape cases, the victims knew the alleged offenders. Statistics released in August showed that nearly 123,000 cases of cruelty by husbands or relatives were reported in 2014. In March, the central government announced that it was considering allowing for the withdrawal of a complaint of cruelty if a compromise is reached between the parties.*

*In July, a committee appointed to evaluate the status of women made key recommendations on prevention, protection and access to justice for women and girls facing violence. Among other recommendations, it urged the government to make rape within marriage a criminal offence, introduce a special law on honour crimes, and not dilute laws relating to cruelty by husbands.*

*In December, the government stated in Parliament that it intended to amend the Penal Code to criminalize marital rape.*

*Caste-based village bodies continued to order sexually violent punishments for perceived social transgressions. Discrimination and violence against women from marginalized communities remained widespread, but reporting and conviction rates were low.<sup>77</sup>*

In 2014, 426 cases were reported under the Protection of Women from Domestic Violence Act 2005; with 91 per cent being from five states – Kerala (140 cases), Bihar (112 cases), Uttar Pradesh (66 cases), Madhya Pradesh (53 cases) and Rajasthan (17 cases).<sup>78</sup> The NCRB reported a total of 337,922 cases of crime against women (under the IPC and special and local laws affecting women) in the country in 2014 as compared to 309,546 in 2013, including 8,455 dowry deaths, 122,877 cases of cruelty by a husband or husband's relative, and 10,050 cases under the Dowry Prohibition Act.<sup>79</sup>

**Domestic violence: law**

**Indian Penal Code 1860 (IPC):** Section 498A of the IPC criminalises cruelty by a husband or his family towards a married woman punishable by a maximum of three years' imprisonment or fine. Section 304B states that:

*Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death.*

Whoever commits dowry death shall be punishable with not less than seven years' imprisonment, but this may extend to life imprisonment.

**Indian Divorce Act 1869 (IDA):** A wife may divorce her husband if he treats her with such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with him.<sup>80</sup>

**Indian Evidence Act 1872:** If a woman commits suicide within seven years of her marriage and if there is evidence that she was subjected to cruelty by her husband or his relative, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.<sup>81</sup>

**Dissolution of Muslim Marriages Act 1939:** A woman married under Muslim law may get an order of dissolution from a competent court, if her husband 'treats her with cruelty'.<sup>82</sup>

**Hindu Marriage Act 1955:** Either spouse may seek judicial separation<sup>83</sup> or divorce on the ground of 'cruelty'.<sup>84</sup>

**Dowry Prohibition Act 1961:** This Act penalises the acts of demanding, giving and taking any dowry.<sup>85</sup>

**Commission of Sati (Prevention) Act 1987:** This Act prohibits and criminalises any commission and glorification of sati,<sup>86</sup> defined as 'burning or burying alive of a widow along with the body of her deceased husband or any other relative'.<sup>87</sup>

**Protection of Women from Domestic Violence Act 2005:** This Act covers physical, sexual abuse, verbal and emotional and economic abuse. Section 3 defines 'domestic violence' to include all forms of actual abuse or threat of abuse of physical, sexual, verbal, emotional and economic nature that can harm, cause injury to, endanger the health, safety, life, limb or well-being, either mental or physical of the aggrieved person. The definition is wide enough to cover child sexual abuse, harassment caused to a woman or her relatives by unlawful dowry demands, and marital rape.

Section 2(f) defines 'domestic relationship' as 'a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a

relationship in the nature of marriage, adoption or are family members living together as a joint family’.

The Act grants a number of rights to women victims of domestic violence which include: the right to reside in a shared household,<sup>88</sup> and the right to obtain assistance of Police Officers, Protection Officers, Service Providers,<sup>89</sup> Shelter Homes,<sup>90</sup> and medical establishments.<sup>91</sup>

Under the Act a victim of domestic violence may get the following orders issued in her favour through the courts once the offence is prima facie established: protection orders; residence orders; monetary relief; custody orders; and compensation orders.<sup>92</sup>

The Act imposes certain duties on Police Officers, Service Providers and Magistrates to inform the aggrieved person of her right to apply to obtain a relief or the various orders granted under the Act: the availability of services of Service Providers and Protection Officers; her right to obtain free legal services; and her right to file a complaint under Section 498A of the Indian Penal Code.<sup>93</sup>

The aggrieved person or any other witness of the offence on her behalf may approach a Police Officer, Protection Officer, and Service Provider, or directly file a complaint with a Magistrate for obtaining orders or relief under the Act.<sup>94</sup>

#### Domestic violence: key judgments

#### **Indra Sarma v V.K.V. Sarma [2013] INSC 1051 (26 November 2013)**

##### Key points:

- Definition of marriage and a live-in relationship
- Domestic violence in a live-in relationship

[...].

4. Appellant and respondent were working together in a private company. The Respondent, who was working as a Personal Officer of the Company, was a married person having two children and the appellant, aged 33 years, was unmarried. Constant contacts between them developed intimacy and in the year 1992, appellant left the job from the above-mentioned Company and started living with the respondent in a shared household. [They had had a son from this relationship]. [...]. Respondent’s family constantly opposed their live-in relationship and ultimately forced him to leave the company of the appellant and it was alleged that he left the company of the appellant without maintaining her.
5. Appellant then preferred Criminal Misc. No. 692 of 2007 under Section 12 of the DV Act before the III Additional Chief Metropolitan Magistrate, Bangalore [...].



### Case 6.1 Indra Sarma v V.K.V. Sarma

6. [...]. The learned Magistrate found proof that the parties had lived together for a considerable period of time, for about 18 years, and then the respondent left the company of the appellant without maintaining her. Learned Magistrate took the view that the plea of domestic violence had been established, due to the non-maintenance of the appellant and passed the order dated 21.7.2009 directing the respondent to pay an amount of Rs.18,000/- per month towards maintenance from the date of the petition.
7. Respondent, aggrieved by the said order of the learned Magistrate, filed an appeal before the Sessions Court under Section 29 of the DV Act. [...]. The appellate Court also concluded that the appellant has no source of income and that the respondent is legally obliged to maintain her and confirmed the order passed by the learned Magistrate.
8. The respondent took up the matter in appeal before the High Court. [...]. The High Court held that the relationship between the parties would not fall within the ambit of relationship in the nature of marriage and [...] allowed the appeal and set aside the order passed by the Courts below. Aggrieved by the same, this appeal has been preferred.  
[...].
52. Live-in relationship, as such, as already indicated, is a relationship which has not been socially accepted in India, unlike many other countries. [...].
55. [The Supreme Court of India provided the following guidelines]. [...]. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.
  1. Duration of period of relationship: Section 2(f) of the DV Act has used the expression at any point of time, which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.
  2. Shared household: The expression has been defined under Section 2(s) of the DV Act and, hence, need no further elaboration.
  3. Pooling of Resources and Financial Arrangements: Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.
  4. Domestic Arrangements: Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or up keeping the house, etc. is an indication of a relationship in the nature of marriage.
  5. Sexual Relationship: Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.
  6. Children: Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.
  7. Socialization in Public: Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.
  8. Intention and conduct of the parties: Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship. [...].
65. We are, therefore, of the view that the appellant, having been fully aware of the fact that the respondent was a married person, could not have entered into a live-in relationship in the



(continued)

nature of marriage. All live-in relationships are not relationships in the nature of marriage. Appellants and the respondent's relationship is, therefore, not a relationship in the nature of marriage because it has no inherent or essential characteristic of a marriage, but a relationship other than in the nature of marriage and the appellant's status is lower than the status of a wife and that relationship would not fall within the definition of domestic relationship under Section 2(f) of the DV Act. If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship, would not amount to domestic violence under Section 3 of the DV Act.

66. We have, on facts, found that the appellant's status was that of a mistress, who is in distress, a survivor of a live-in relationship which is of serious concern, especially when such persons are poor and illiterate, in the event of which vulnerability is more pronounced, which is a societal reality. Children born out of such relationship also suffer most which calls for bringing in remedial measures by the Parliament, through proper legislation.
67. We are conscious of the fact that if any direction is given to the respondent to pay maintenance or monetary consideration to the appellant, that would be at the cost of the legally wedded wife and children of the respondent, especially when they had opposed that relationship and have a cause of action against the appellant for alienating the companionship and affection of the husband/parent which is an intentional tort.
68. We, therefore, find no reason to interfere with the judgment of the High Court and the appeal is accordingly dismissed.

### **Shalu Ojha v Prashant Ojha [2014] INSC 447 (18 September 2014)**

#### **Key points:**

- DV explained
- Gross abuse of judicial process

[...].

2. This is an unfortunate case where the provisions of the Protection of Women from Domestic Violence Act, 2005 are rendered simply a pious hope of the Parliament and a teasing illusion for the appellant.
3. The appellant is a young woman who got married to the respondent on 20.04.2007 in Delhi according to Hindu rites and customs. [...].
4. According to the appellant, she was thrown out of the matrimonial home within four months of the marriage on 14.8.2007. Thereafter, the respondent started pressurizing the appellant to agree for dissolution of marriage by mutual consent. As the appellant did not agree for the same, the respondent filed a petition for divorce being H.M.A. No.637 of 2007 under Section 13(1) of the Hindu Marriage Act, 1955 on 17.10.2007 before the Additional District Judge, Tis Hazari Courts, Delhi. The said petition was dismissed by an order dated 03.10.2008. [...].

### Case 6.2 Shalu Ojha v Prashant Ojha

After appeals at various forums, the matter reached the Supreme Court of India. The Supreme Court said the following:]

[...].

20. Domestic violence is defined under Section 3 as any act, omission or commission or conduct of any adult male who is or has been in domestic relationship. Section 3. Definition of domestic violence. For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it harms or injures or endangers the health, safety, life, limb or well-being whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or otherwise injures or causes harm, whether physical or mental, to the aggrieved person.
21. The expression domestic relationship is defined under Section 2(f) [1]. The expressions physical abuse, sexual abuse, verbal and emotional abuse and economic abuse are explained in Explanation-1 to Section 3.
22. Section 12 of the Act recognizes the right of an aggrieved person [2] (necessarily a woman by definition) to present application to the Magistrate seeking one or more reliefs under the Act. The reliefs provided under the Act are contained in Sections 17 to 22. Section 17 creates a right in favour of a woman/aggrieved person to reside in a shared household defined under Section 2(s) [3].
23. Section 18 deals with various orders that can be passed by the Magistrate dealing with the application of an aggrieved person under Section 12. Section 19 provides for various kinds of residence orders which a Magistrate dealing with an application under Section 12 can pass in favour of a woman. Section 20 authorizes the Magistrate dealing with an application under Section 12 to direct the respondent to pay monetary relief to the aggrieved person. Section 20 reads as follows: Section 20. Monetary reliefs.
  1. While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but is not limited to, ... the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.
  2. The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.
  3. The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.
  4. The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in-charge of the police station within the local limits of whose jurisdiction the respondent resides.

(continued)

5. The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).
  6. Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent. (emphasis supplied).
24. Section 21 deals with the jurisdiction of the Magistrate to pass orders relating to custody of children of the aggrieved person. Section 22 deals with compensation orders which authorizes the Magistrate to pass an order directing the respondent to pay compensation and damages for the injuries including mental torture and emotional distress caused by the act of domestic violence committed by the respondent. The Magistrate receiving a complaint under Section 12 is authorized under the Act to pass any one of the orders under the various provisions discussed above appropriate to the facts of the complaint.
25. Section 29 provides for an appeal to the Court of Session against any order passed by the Magistrate under the Act either at the instance of the aggrieved person or the respondent.
26. One important factor to be noticed in the context of the present case is that while Section 23 expressly confers power on the Magistrate to grant interim orders, there is no express provision conferring such power on the Sessions Court in exercise of its appellate jurisdiction. Section 23 reads as follows:
- Power to grant interim and ex parte orders*
1. In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.
  2. If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.
27. It can be seen from the DV Act that no further appeal or revision is provided to the High Court or any other Court against the order of the Sessions Court under Section 29.
28. It is in the background of the abovementioned Scheme of the DV Act this case is required to be considered. The appellant made a complaint under Section 12 of the DV Act. The Magistrate in exercise of his jurisdiction granted maintenance to the appellant. The Magistrate's legal authority to pass such an order is traceable to Section 20(1) (d) of the DV Act.
34. [...]. We are of the opinion that the conduct of the respondent is a gross abuse of the judicial process. We do not see any reason why the respondent's petition CrI. MC No. 1975 of 2013 should be kept pending. [...].
35. We also direct that the maintenance order passed by the magistrate be executed forthwith in accordance with law. [...].

## 6.3 Pakistan

### 6.3.1 Domestic violence

Up to 90 per cent of women in Pakistan face some form of domestic violence in their families and from their husband or in-laws.<sup>95</sup> In the extreme forms of such violence, women are used as exchangeable goodwill tokens in resolution of family or community feuds, abused, attacked, burnt, set on fire and killed in the name of 'honour' or after petty quarrels, or in relation to conflicts over dowry, property, and marriage choices. Lack of comprehensive and structured legal protection mechanisms notwithstanding, in the common perception, domestic violence in its varied forms is largely understood as a 'private family matter', rather than a criminal offence.<sup>96</sup>

According to the Pakistan Demographic and Health Survey 2012–13:

- 32 per cent of ever-married women aged 15–49 have experienced physical violence at least once since age 15, and 19 per cent experienced physical violence within the 12 months prior to the survey;
- overall, 39 per cent of ever-married women aged 15–49 reported ever having experienced physical and/or emotional violence from their spouse, and 33 per cent reported having experienced it in the past 12 months;
- among ever-married women who experienced spousal physical violence in 12 months, 35 per cent reported experiencing physical injuries;
- One in 10 women reported experiencing violence during pregnancy; and
- 52 per cent of Pakistani women who experienced violence never sought help or never told anyone about the violence they had experienced.<sup>97</sup>

As noted, very few women appear to seek justice: as reported by one well-established women's organisation, the Aurat Foundation, only 3,472 cases of domestic violence were reported in the five years between 2008 and 2013.<sup>98</sup>

#### Domestic violence: law

**Constitution of Pakistan 1973:** Several provisions of the constitution may be relied on in cases of domestic violence. Article 4 states that enjoying protection of law and treatment in accordance with law is the inalienable right of everyone. It further states that in particular 'No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.'<sup>99</sup>

Article 9 states that 'No person shall be deprived of life or liberty save in accordance with law'.

Article 14 guarantees the right to ‘dignity’ and ‘the privacy of home’. Article 9 is a fundamental right and ‘Any law, or any custom or usage having the force of law, in so far as it is inconsistent with [fundamental rights], shall, to the extent of such inconsistency, be void.’<sup>100</sup>

**Pakistan Penal Code 1860:** The penal code does not expressly define or address domestic violence but specific provisions of it are employed in cases of domestic violence. For instance, section 332 defines ‘hurt’ as follows:

1. Whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables [disfigures, defaces] or dismembers any organ of the body or part thereof of any person without causing his death, is said to cause hurt.

Several other sections starting from 333 to 337L of the penal code deal with harm or hurt to the human body. The superior courts have historically relied on these provisions of the constitution and the penal code when dealing with cases of domestic violence. The Lahore High Court has extensively discussed these provisions and their relevance to and application in cases of domestic violence in *Ali Muhammad*.<sup>101</sup>

**Criminal Law (Second Amendment) Act 2011:** This Act amended the PPC 1860 to incorporate a new offence of hurt being caused by acid, a crime of which women are the most common victims. It also amended the section on hurt to include the effects of acid, i.e. disfigurement or defacing and causing hurt by corrosive substance, penalised by up to life imprisonment and a fine of one million rupees.<sup>102</sup>

Honour killing is an offence under section 302 of the penal code.<sup>103</sup>

**Dissolution of Muslim Marriages Act 1939:** A wife who has been married under Muslim law has the right to divorce a husband who treats her with cruelty.<sup>104</sup>

**Dowry and Bridal Gifts (Restriction) Act 1976:** This act restricts the amount of dowry, presents and bridal gifts that may be given to the parties to a marriage.<sup>105</sup> This potentially reduces the scope for a husband or his family to demand dowry after marriage. ‘Dowry’ includes ‘any property given before, at or after the marriage’.<sup>106</sup>

**Prevention of Anti-Women Practices – Criminal Law (Third Amendment) Act 2011:** This amended the PPC to criminalise anti-women customs,<sup>107</sup> such as preventing women from inheriting their property, and forced marriages.<sup>108</sup>

There are provincial laws dealing specifically with domestic violence:

- The Domestic Violence (Prevention and Protection) Act 2013 Sindh
- The Baluchistan Domestic Violence (Prevention and Protection) Act 2014

- The Punjab Protection of Women against Violence Act 2015
- The KPK Domestic Violence Bill 2014 (under consideration by the Council of Islamic Ideology).

Section 5 of the Sindh Domestic Violence Act 2013 defines DV thus:

*Domestic Violence includes but is not limited to, all acts of gender based and other physical or psychological abuse committed by a respondent against women, children or other vulnerable persons, with whom the respondent is or has been in a domestic relationship.*

Domestic violence: key judgments

### Zafar Iqbal v The State 2010 SCMR 401

Key points:

- Throwing acid and disfigurement
1. Zafar Iqbal seeks leave to appeal from the judgment dated 10-6-2009 of a learned Judge in Chambers of Lahore High Court, Rawalpindi Bench, whereby, criminal revision filed by the petitioner was dismissed and his conviction under section 336/34, P.P.C. was upheld along with sentence to imprisonment for 7 years and payment of Arsh to the tune of Rs.500,000.

#### Case 6.3 Zafar Iqbal v The State

2. Zafar Iqbal, along with his co-accused Ghulam Hussain and Adnan is said to have thrown acid on Mst. Sahib Bibi, wife of complainant Muhammad Iqbal, as a result of which, she sustained acid burns on her face, neck and left arm, covering 17 per cent of the body area.
3. The occurrence is sufficiently proved by the injured lady, who herself appeared in Court, carrying the marks of occurrence. Her statement is duly supported by the medico-legal report (P.86). [...]. [...].
5. Even disfigurement is sufficient to constitute offence under section 336, P.P.C. and hence the petitioner was rightly convicted there under. However, it is to be noticed that the principal sentence is that of Arsh and the Court can also award sentence of imprisonment to the extent of 10 years, in the given circumstances of each case. We We have found that the facial disfigurement is only to the extent of five per cent, which might be a scar of small size, the compensation (Arsh) to the extent of Rs.500,000 and the sentence of 7 years over and above is a bit on the heavier side.
6. Consequently, the petition after conversion into appeal is partially accepted to the extent of sentence alone. The petitioner is sentenced to the payment of Rs.300,000 as Arsh and an imprisonment of 5 years with benefit under section 382-B, Cr.P.C. The imprisonment in default will remain intact.

## Muhammad Ameer v The State PLD 2006 SC 283

### Key points:

- Honour killing
- Informal justice system

This petition is directed against the judgment, dated 27-5-2003 passed by the Lahore High Court, Lahore in Murder Reference No.111 of 1999, Criminal Appeal No.203 of 1999 and Criminal Revision No.186 of 1999 whereby the sentence of death awarded to the petitioner by the learned Sessions Judge, Mianwali, under section 302(b), P.P.C. was converted into imprisonment for life with the direction to pay compensation of rupees one lac to the legal heirs of deceased under section 544-A, Cr.P.C. and in default thereof to undergo R.I. for two years. The benefit of section 382-B, Cr.P.C. was also allowed to the petitioner and his criminal appeal with reduction of sentence was dismissed. The murder reference was answered in the negative and criminal revision filed by the complainant was also dismissed.

### Case 6.4 Muhammad Ameer v The State PLD

[...].

This is a case of two versions and we having put the prosecution case in juxtaposition to the defence version, according to which the petitioner having felt insulted because of immoral act of the deceased, reacted and fired at him, have found that nothing was brought on record to suggest that petitioner at any time, had seen his daughter Mst. Shamim Akhtar and the deceased together at any place. The case of the petitioner was that he having come to know about the immoral act of deceased with his daughter, lost self-control and in the heat of passion due to Ghairat under grave and sudden provocation fired at the deceased. This version of the petitioner even if is given full weight, still the element of grave and sudden provocation would be missing and it could hardly be suggested that the petitioner on receiving the information about the act of deceased, was provoked and instead of setting the machinery of law at motion against the deceased took the law in his own hands on the excuse of grave and sudden provocation. The commission of an offence due to Ghairat or family honour must be differentiated from the grave and sudden provocation in consequence to which crime is committed in the light of facts and circumstances of each case. The plea of grave and sudden provocation may not be available to an accused who having taken plea of Ghairat and family honour, committed the crime with premeditation. The petitioner in the present case, with the intention to take revenge of the immoral act of the deceased of outraging the modesty of his daughter having prepared himself to commit the crime, armed with gun, went to the place of occurrence and fired successive shots at the deceased, therefore, his action would not be covered by the provisions of section 302(c), P.P.C., which may attract in a case, in which the essential ingredients of Qatl-i-Amd punishable under section 302(a) and (b), P.P.C. are missing. Learned counsel has also not been able to convince us that the case against the petitioner would not fall within the ambit of section 302(b), P.P.C. or that it was a case of lesser punishment under section 302(c), P.P.C.

6. In the light of foregoing discussion, this petition being without any substance, is accordingly, dismissed. Leave is refused.

## Morrison Bhatti v The State 2008 MLD 866

### Key points:

- Rising domestic violence in society

According to the prosecution, on 6-6-2006, at about 8-30 hours, applicant Morrison Bhatti, subjected his wife Shaleen Rossana Oliver to domestic violence in his house situated in Drig Road, Cant Bazar, Karachi. She was working as Manager Nursing, in Liaquat National Hospital, Karachi. On the day of incident, she proceeded for duty and as soon as she came out from her house the applicant pushed her back into the house, bolted the door from inside, and started giving her blows with an iron bar on head and other parts of the body, as a result of which she fell down and started bleeding. He then took a pair of scissors and cut off tip of her nose. She was rushed to Liaquat National Hospital and after giving her first aid she was referred to Jinnah Post-Graduate Medical Centre, Karachi. The matter was reported to police by her brother Salman William on the same day at 17.10 hours.

### Case 6.5 Morrison Bhatti v The State

Learned counsel for the applicant contends that out of the six wounds suffered by the victim on her eye, head and nose, the injuries at serials Nos. 2 and 4 have been declared as 'Shajjah-e-Mediha', while final opinion regarding injury on the left eye mentioned at serial No.1 of the certificate has not been given as yet. Surprisingly, the nose injury has been declared as 'Shajjah-e-Khafifah', supposedly for the reason that there was no fracture of any bone. This seems to be due to lack of legal knowledge.

In the F.I.R. also section 334 of the Pakistan Penal Code, 1860 (P.P.C.) has been incorrectly applied. The correct section applicable in the case will be 336, P.P.C. Cutting of nose, even a part of it, clearly causes permanent disfigurement which according to section 335, P.P.C. comes within the purview of 'Itlaf-i-Udw' and the offence is punishable under section 336, P.P.C., inter alia, with imprisonment up to 10 years.

The Court while considering the question of bail in the case like the present one, cannot ignore the increasing tendency of domestic violence in our society. The violence committed by the applicant is also a worst type of domestic violence. Moreover, most of the witnesses, including the victim, have already been examined and the case is near completion.

For all these reasons, the case is not fit for the grant of bail. Accordingly, the application is dismissed.



## 6.4 Thailand

### 6.4.1 Domestic violence

Domestic violence is a pervasive and widespread problem in Thailand.<sup>109</sup> According to the Ministry of Public Health, 13,265 women sought assistance from the one-stop crisis centres (OSCCs) for domestic violence between October 2014 and September 2015.<sup>110</sup> Of these victims, 67 per cent reported physical abuse, while 22 per cent reported sexual abuse.<sup>111</sup> According to the Ministry of Social Development and Human Security, 294 cases of domestic violence were reported in 2015, compared with 233 cases reported in 2014.<sup>112</sup> Of those 294 cases, victims in only 69 cases pursued criminal charges: victims in the other 117 cases chose not to access the justice system.<sup>113</sup>

In a 2016 UN Study, 44 per cent of Thai women admitted to being the victim of physical violence or sexual violence or both by an intimate partner in their lifetime.<sup>114</sup> Another 22 per cent admitted to being subjected to physical violence or sexual violence or both within the last 12 months.<sup>115</sup> Previous studies have shown that as many as one in three households experienced some form of domestic violence over the course of the year.<sup>116</sup>

Prevailing cultural and strong patriarchal attitudes play a significant role in enabling domestic violence in Thailand. There is a well-known saying in Thai culture that a woman is the ‘hind legs of the elephant’ following the man’s front legs.<sup>117</sup> It is not uncommon for women and girls to believe they are partially to blame for incidents of physical abuse, or to agree that in some circumstances a man may be justified in abusing his intimate partner.<sup>118</sup> In a UN study conducted in 2005, 53.4 per cent of women who had previously experienced some form of intimate partner violence believed that a man was justified in beating his wife or intimate partner under certain circumstances.<sup>119</sup>

#### Domestic violence: recommendations for the judiciary

- Any incident of domestic violence involving an allegation of violence or a serious human rights abuse should not be resolved through informal settlements or mediation.<sup>120</sup>
- Victims should not be precluded from accessing judicial remedies even if the domestic violence matter is handed through settlement or a ‘reconciliation process’.<sup>121</sup>
- Family members should be prevented from acting as mediators in domestic violence claims, and instead only independent and impartial parties should adjudicate and mediate domestic violence.<sup>122</sup>

- Victims should not be precluded from compensation and other forms of reparation or civil remedy, including filing for divorce, if the domestic violence claim is handled through reconciliation.
- The safety and protection of the victim and any affected child should be the paramount concern in any judicial decisions, protection orders, reconciliation agreements or judgments involving domestic violence.<sup>123</sup>

#### Domestic violence: law

**Domestic Violence Victim Protection Act, B.E. 2550 (2007):** This special law introduced measures intended to support and protect victims and family members affected by domestic violence. It provides a wide definition of ‘family member’ covering ‘spouse, former spouse, person who lives and cohabits, or used to live and cohabit together as husband and wife without registering marriage, legitimate child, adopted child, family member, including any dependent person who has to live in the same household’.<sup>124</sup> The wide definition of family member allows protection to be extended to women and girls in both formal and informal unions, including current and former spouses, and cohabitants.

The Act also seeks to improve victims’ access to remedy and reparations for domestic violence. Article 5 of the Act introduces a mandatory reporting requirement for any person who encounters an act of domestic violence.<sup>125</sup> Articles 6 and 8 allow an investigating official to make medical, psychological and psychosocial assistance available to victims of domestic violence.<sup>126</sup> Article 10 allows the senior administrative officer or senior police officer tasked with investigating the complaint to issue orders for financial relief to the victims. Article 9 safeguards the privacy of parties involved, prohibiting the publication or dissemination of the complaint or the alleged perpetrator’s name.<sup>127</sup>

Finally, Article 10 empowers the senior investigating officer to issue an array of different protection measures in the interests of the victim, notwithstanding victims’ consent. Such orders include: (1) sending a domestic violence perpetrator to receive medical examinations and treatment;<sup>128</sup> (2) forbidding or restraining the perpetrator from going near the victim, the victim’s family members or the family residence;<sup>129</sup> (3) arranging or specifying childcare arrangements.<sup>130</sup>

**The Criminal Code of Thailand B.E. 2499 (1956):** This code also provides a legal avenue for victims of domestic violence, particularly when the abuse results in a criminal offence such as rape, grievous bodily harm or death.

Under section 276, rape by a spouse (or marital rape) is criminalised; however, a judge may reduce the sentence if the perpetrator and victim are married and wish to continue to live together.<sup>131</sup>

Under section 297, '[w]hoever causes injury to the other person in body or mind is said to commit bodily harm.'<sup>132</sup> Under section 297, if the bodily harm involves more serious and permanent injuries, it amounts to 'grievous bodily harm,' for which the punishment is imprisonment from six months to 10 years.<sup>133</sup>

Under Section 290, if a perpetrator through an act of domestic violence inflicts 'injury upon the body of [another] person without [the] intent to cause death' yet does in fact cause the death of the victim, it is culpable homicide for which the punishment is 'imprisonment of 3 to 15 years.'<sup>134</sup> Under section 288, if a perpetrator intends to kill the victim in the context of domestic violence, it is murder. The punishment is imprisonment of 15 to 20 years.<sup>135</sup>

**Civil and Commercial Code 1925:** Under section 1516, domestic violence is a basis to seek a divorce in a marriage. Section 1516 (2) (c) states that sustaining 'excessive injury or trouble' as a result of being in the marriage is a basis to seek a divorce.<sup>136</sup> Section 1516(3) further provides that causing any 'bodily harm or torture' is a basis to seek a divorce.<sup>137</sup>

Thailand is obligated under international human rights law to exercise 'due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.'<sup>138</sup> If state officials fail to take sufficient steps to investigate or punish acts of domestic violence or obstruct or interfere with any such efforts, Thailand may be in violation of its obligations under international law.<sup>139</sup>

**International obligations:** As a State party to CEDAW, Thailand must 'condemn discrimination against women in all its forms'<sup>140</sup> committed 'by any person, organization or enterprise.'<sup>141</sup> Domestic violence is recognised as a form of gender-based discrimination and violence,<sup>142</sup> which involves 'acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.'<sup>143</sup>

In practical terms, Thailand must take measures to criminalise acts of domestic violence against women;<sup>144</sup> remove underlying legal, social and cultural barriers including gender stereotypes that may prevent women from exercising and claiming their rights and impede their access to effective remedies;<sup>145</sup> investigate allegations and where sufficient evidence is found, prosecute domestic violence allegations before an independent and impartial tribunal with the intention of punishing the accused with a sentence commensurate with the gravity of the offence. This obligation falls on all branches of government, including the judiciary.<sup>146</sup>

The Domestic Violence Victim Protection Act places strong emphasis on reconciliation and mediation to ‘preserve[e] good relationships within the family’. Emphasising reconciliation and mediation over formal justice encroaches on Thailand’s due diligence obligations to investigate, prosecute and punish perpetrators for domestic violence offences. It also directly interferes with victims’ right to protection from all forms of gender-based violence.

The repeated emphasis on reconciliation and ‘preserving good relationships within the family’<sup>147</sup> in the Remarks section of the Act further undermines the gravity of domestic violence and trivialises the protection needs of victims. By urging reconciliation and mediation to give ‘offenders a chance to behave one self and refrain from repeating the offence, as well as preserving good relationships within the family’,<sup>148</sup> domestic violence is relegated to a minor annoyance which must be resolved in the interests of the family and community. The emphasis on reconciliation and mediation thus has far-reaching implications in how family-based violence against women is perceived in society and handled by the justice system.

The classification of domestic violence as a ‘compoundable offence’ under Thai law has had a further and more profound impact on the way domestic violence is handled procedurally, affecting how victims are able to access Thai law. Compoundable offences are generally viewed as resolvable between parties, and as such parties are often urged to engage in reconciliation to prevent the matter from coming before the formal justice system. A compoundable offence also means the State is not able to initiate an investigation into an allegation on its own; it may only initiate proceedings and investigation where the victim files a complaint. If, however, the victim decides to settle the case through reconciliation or mediation, then the complaint must be withdrawn, in which case legal proceedings initiated by the state must cease.<sup>149</sup> A compoundable offence is also subject to a three-month prescription period. As such, if a victim of domestic violence does not make a report within three months of the incident, they are precluded from accessing justice, remedy or reparations. Compoundable offences also have lesser sentences and no minimum sentences. The classification of domestic violence as a ‘compoundable offence’ comports with the overall emphasis on reconciliation over justice and accountability. Article 15 places specific emphasis on ‘settling’ domestic violence incidents, requiring the court to ‘try and attain a settlement between litigants’ at ‘any stage of proceedings’ with the aim of achieving ‘peaceful cohabitation within the family’.<sup>150</sup> Classifying domestic violence offences as compoundable directly interferes with the State’s obligation to investigate incidents of domestic violence, thus contravening

due diligence obligations to prevent and prohibit family-based violence against women.

According to the Act, the senior competent official (investigating the case) or the court may appoint mediators to settle an incident of domestic violence; mediators could include family members such as the father or mother, brother or sister of either the complainant or alleged perpetrator.<sup>151</sup> The use of family members as mediators to facilitate settlements is problematic for several reasons. First, it denies victims the right to an impartial and independent hearing or investigation into the domestic violence cases, thus undermining victims' right to access remedy and reparations for family-based violence against women. Second, it endangers the victim and any affected children, denying them the very-much-needed protection and separation from their family members, who often enable or acquiesce to the domestic violence and abuse. Third, it tacitly supports the strongly patriarchal values, again undermining victims' voices and trivialising the gravity of domestic violence. Women's rights NGOs and activists have commented that the vast majority of cases involving domestic violence have been resolved through reconciliation with 'a significant gap between the number of incidents reported to police and those that reach the courts'.<sup>152</sup>

Any settlement of a domestic violence case must take into account the following four principles: (1) the rights of the victims; (2) preservation and protection of the marriage; (3) protection and assistance for the family; (4) assistance to enable the family to live in harmony.<sup>153</sup> Highlighting 'family harmony' and 'preservation and protection of marriage' as one of the guiding principles to inform settlements directly undermines victims' right to protection from violence perpetrated within the family, and contravenes Thailand's due diligence obligations to prevent and prohibit all forms of violence against women.

#### **Domestic violence: initiatives to remove barriers to victims' access to justice in Thailand**

Between 2010 and 2013, UN Women in partnership with the Thai judiciary engaged in a gender sensitivity and capacity-building programme, in which 304 judges and court staff received training to support the implementation of the Protection of Domestic Violence Victims Act.<sup>154</sup> The aim of the programme was to conduct gender-sensitive training for judges on discrimination and domestic violence.

Over the course of the training, participants were encouraged to adopt gender-sensitive justice measures, which included: (a) screening for domestic violence cases at the initial bail hearing and separating domestic violence

cases from other domestic criminal cases; (b) allowing domestic violence victims to testify behind partitions or in closed circuit TV; (c) installing a 'witness room' or safe area for domestic violence victims to wait while the court was not in session.<sup>155</sup>

### Domestic violence: Recommendations

The following recommendations are offered which may help in bringing Thailand into compliance with its obligations under international law:

- Prohibit without exception the resolution of any incident of domestic violence involving an allegation of a serious human rights abuse through informal settlements or mediation<sup>156</sup>
- Ensure women victims are not precluded from accessing judicial remedies even if the domestic violence matter is handled through settlement or a 'reconciliation process'<sup>157</sup>
- Prevent members of the family from acting as mediators in domestic violence claims, and instead ensure that only independent and impartial parties adjudicate and mediate domestic violence<sup>158</sup>
- Guarantee that woman victims are not precluded from compensation and other forms of reparation or civil remedy, including filing for divorce if the domestic violence claim is handled through reconciliation
- Place the safety and protection of the victim and any affected child as the paramount concern in any judicial decisions, protection orders, reconciliation agreements or judgments involving domestic violence.<sup>159</sup>

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## Chapter 7

# Rape

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### Objectives

This chapter focuses on the offence of rape in the target countries, i.e. its incidence and legal and other responses by state organs to address rape. The aim is to sensitise and enable judges and other stakeholders to make informed and human rights compliant decisions when dealing with cases of rape.

This chapter consists of four sections. Section 7.1 focuses on the offence of rape in Cambodia, i.e. its incidence and legal and other responses by state organs to address rape. Section 7.2 focuses on the offence of rape in India, i.e. its incidence and legal and other responses by state organs to address rape. Section 7.3 focuses on the offence of rape in Pakistan, i.e. its incidence and legal and other responses by state organs to address rape. Section 7.4 focuses on the offence of rape in Thailand, i.e. its incidence and legal and other responses by state organs to address rape.

## 7.1 Cambodia

### 7.1.1 Rape

Rape and sexual violence are a serious and pervasive problem in Cambodia. According to the UN Multi-country Study on Men and Violence in Asia and the Pacific, 20.4 per cent or 369 of the 1,812 male respondents in the study admitted to having committed rape at least once in their lifetime.<sup>1</sup> Of those 369 male respondents, 23 per cent admitted being involved in gang rape, 13 per cent admitted raping a non-partner, and 64 per cent admitted raping an intimate partner.<sup>2</sup> In 22 per cent of cases, men who had raped an intimate partner had also raped a woman who was not a partner.<sup>3</sup> In 49.7 per cent of cases, the male perpetrator had raped more than once and in 21.3 per cent of cases, there was more than one victim.<sup>4</sup> In 11.7 per cent of cases the perpetrator had raped four or more victims.<sup>5</sup> More than half of the male respondents (52% or 191 men) admitted to perpetrating their first rape prior to reaching 20 years of age.<sup>6</sup>

The motivations behind the decision to rape were cited as: 'sexual entitlement' (45%);<sup>7</sup> anger or punishment (42%);<sup>8</sup> 'fun or boredom' (27%);<sup>9</sup> and drinking or intoxication (14%).<sup>10</sup>

The women's rights group, Cambodian Human Rights and Development Association (ADHOC), recorded 131 rape cases in the first six months of 2015, compared to 80 cases in 2014 – a near 64 per cent increase. Of those 131 cases, 100 involved a child victim and in 63 cases the victim was between 10 and 18 years old; in 32 cases the victim was between five and 10 years of age; and in five cases the victim was younger than five years of age. Fifteen cases involved victims with disabilities, six involved multiple perpetrators, and three cases resulted in death of the victim.<sup>11</sup>

Impunity for rape continues to be widespread: 44.5 per cent of the male respondents who had admitted to perpetrating rape reported that they never faced any legal consequences (arrest or prosecution) for their actions.<sup>12</sup>

#### Rape: law

**Constitution of Cambodia 2008:** Article 31 of the constitution should be used as the starting point to address and protect victims of rape. Article 31 states, 'the Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, **women's rights and children's rights**' [emphasis added].<sup>13</sup> Article 31(2) states that all 'citizens shall be equal before the law, enjoying the same rights and freedoms and obligations regardless of race, colour, sex, language, religious belief, political tendency, national origin, social status, wealth or other status'.<sup>14</sup> Article 38 'prohibits any physical abuse of the individual'.<sup>15</sup> Article 45 states that '[a]ll forms of discrimination against women shall be abolished'.<sup>16</sup>

**Criminal Code 2009:** Article 239 of the Criminal Code states that "Rape" shall mean any act of sexual penetration with a sexual organ or an object committed against another person of either sex by violence, coercion, threat or by being opportunistic.<sup>17</sup> The requirement of non-consent as an element is substituted with 'violence, coercion, threat or by being opportunistic'.<sup>18</sup> The penalty for rape or attempted rape is imprisonment from five years to ten years.<sup>19</sup>

The age of consent is 15 years.<sup>20</sup> There is no exception for marital rape, which suggests that spouses may be criminally liable for raping their intimate partners.

The sentence for rape may be increased to 15 years if there are aggravating circumstances such as use of a weapon, use of a narcotic, exercising a position of authority over the accused, abusing a position of authority and multiple perpetrators.<sup>21</sup> If the rape is perpetrated against a vulnerable person, the sentence may be increased from seven to 15 years. Vulnerable persons include victims who by their age are vulnerable (young children or the

elderly), a victim who is pregnant, or a person who is vulnerable by reason of illness or disability.

Where the act of rape results in mutilation or disability, the sentence increases from 10 to 20 years.<sup>22</sup> If the act of rape involves torture or acts of cruelty, the penalty rises from 10 to 30 years.<sup>23</sup> The code does not define torture.

Where the act of rape causes the death of the victim, where there is no intent to kill or the suicide of the victim, the sentence is 15 to 30 years.<sup>24</sup> For example, the maximum penalty would be 15 years of imprisonment depending on the means used or connection with the perpetrator for committing rape (Article 240),<sup>25</sup> and where there are aggravating circumstances (Article 241).<sup>26</sup>

**Law on the Prevention of Domestic Violence and the Protection of Victims 2005:** Marital rape may also be considered a form of domestic violence under the category of ‘sexual aggression’ (Article 7) if it is assessed as ‘violent rape’.<sup>27</sup> Unfortunately, ‘violent rape’ is not clearly defined under the law, and there is no legal guidance on how to assess what constitutes violent rape.<sup>28</sup> In any event, given that there are no stated penalties in the Prevention of Domestic Violence and the Protection of Victims Act 2005, the only means of recourse for marital rape would be the criminal law, even if it were committed as a domestic violence offence. In practice, marital rape is seldom reported, investigated or prosecuted. According to LICADHO, ‘many police and judges do not really believe that rape of a wife by a husband is possible’.<sup>29</sup> Where a complaint is made to authorities, more often than not it is withdrawn before the matter goes to trial. Even when a victim perseveres within the criminal process, it is common for judges to give a suspended sentence to accused in marital rape cases.<sup>30</sup>

**International obligations:** Rape and other forms of sexual violence constitute a form of violence against women under Article 2 definition of the UN Declaration on the Elimination of Violence against Women.<sup>31</sup> Rape perpetrated by state and non-state actors also constitutes a gross human rights violation, amounting to a form of torture and other cruel, inhuman and degrading treatment and punishment.<sup>32</sup> Rape and other forms of sexual violence also impair or nullify the enjoyment of other human rights and freedoms under international law.<sup>33</sup>

As a State party to the UN Convention against Torture,<sup>34</sup> Cambodia is under an obligation to exercise due diligence to prevent, investigate, prosecute and punish private actors for their role in committing rape and other forms of gender-based violence.<sup>35</sup> The UN Committee against Torture has observed that ‘the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture [and rape] facilitates and enables non-State actors to commit acts impermissible under the

Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.<sup>36</sup>

As a State party to CEDAW, Cambodia has an immediate and continuous obligation to condemn discrimination in all its forms, which includes ensuring that women are protected against direct and indirect discrimination within legislation and also committed by state institutions such as the judiciary, public authorities and private individuals.<sup>37</sup>

#### **Rape: Discriminatory attitudes encouraging impunity**

There are several key weaknesses in Cambodian law which undermine state obligations to prevent and prohibit rape and sexual violence. Discrimination in legislation is perhaps the most obvious weakness in Cambodian law. Such discrimination not only reinforces and propagates gender-based stereotypes, but directly impacts impunity, affecting how rape and sexual violence are investigated, prosecuted and adjudicated in Cambodia. Impunity for rape is systemic in Cambodia, largely because of cultural attitudes, patriarchal social structures and corruption.

The elements of the crime of rape under Cambodian law are: (1) an act of sexual penetration with a sexual organ or an object; (2) using violence, coercion, threat or by being opportunistic. Non-consent (or the victim's lack of consent) is not enumerated as an element of the offence. Instead, evidence of violence, coercion or use of threats must be adduced to establish the victim's non-consent in a crime of rape. In other words, sexual interaction with a victim who is not consenting (in the absence of other evidence of resistance, physical violence or coercion) is not recognised as a form of rape or sexual violence under Cambodian law. It is only if the victim can show the presence of some other extenuating factor (e.g. violence, threat of violence, coercion) that a court will then be persuaded that the non-consensual sexual act amounted to rape. Framing sexual violence in this way is a form of discrimination against women. It has enormous implications in how rape and sexual violence are perceived in society; how victims are treated; how rape and sexual violence cases are investigated; how decisions to prosecute rape and sexual violence cases are made; and ultimately how a case of rape or sexual violence is adjudicated. It focuses the investigation, prosecution and adjudication of sexual violence on the conduct of the victim (e.g. was the victim resisting the accused sufficiently for it to constitute a crime of rape or sexual violence?). It makes the victim more susceptible to 'victim-blaming', and enables defendants to introduce evidence relating to the victims' behaviour, physical appearance and past sexual history as a basis to show implied consent. It propagates and reinforces discriminatory attitudes towards women which contribute to violence against women.

### Rape: cases

A 17-year-old girl went to visit her boyfriend at his house. She was raped by three men: her boyfriend, a friend of the boyfriend and a third man who she could not identify. The boyfriend and his friend were tried for rape but found innocent. According to the judge, the girl had gone of her own accord to her boyfriend's house and consented to have sex with him. As a result, the judge decided that none of the suspects was guilty of rape.<sup>38</sup>

The victim was a 35-year-old woman who was taken by her boyfriend to the house of one of his friends where they both raped her. The case went to trial and despite both being convicted of rape, the boyfriend was sentenced to 18 months in prison and the other man to one year. Though the judge was not explicit in his reasons for the sentences, NGO workers felt that the very light sentences might have been due to the fact that one of the perpetrators was the victim's boyfriend.<sup>39</sup>

A nine-year-old girl was raped five times by a 23-year-old neighbour. The victim's family reported the case to the commune police who negotiated a settlement with the suspect. The victim's family agreed that they would receive US\$1,200 in exchange for withdrawing the complaint. When they received the money, the police took US\$500 as a fee for facilitating the agreement, ensuring the case would not be further investigated and to cover transportation costs. The family received only US\$700.<sup>40</sup>

A 14-year-old girl was gang-raped by three men. One of the men was caught and brought to trial. Before the verdict was announced the families of the victim and perpetrator came to an agreement that the two would marry and that the perpetrator's parents would give a sum of money to the victim's family. They also gave money to the trial judge, who convicted the perpetrator of rape, sentenced him to 18 months in prison and then suspended the whole sentence. Victim support workers from LICADHO tried to discourage the family from going ahead with the marriage. The victim's mother did not want her daughter to get married but she thought that as they lived in the countryside it would be better for her daughter to get married and afterwards get a divorce rather than to remain unmarried with people knowing that she had been raped.<sup>41</sup>

A large proportion of rape cases are withdrawn from court because of settlements between the victim and perpetrator's families, often negotiated by police. Such settlements generally involve a payment of money, 'compensation' from the suspect (or his family) in exchange for the victim withdrawing their complaint. Sometimes the settlement involves the victim marrying the perpetrator. According to LICADHO, 'almost 100 per cent of cases settled by compensation involved a corrupt payment to the official involved [in the negotiation], either from the suspect or from the victim.'



In this respect, corruption plays a significant role in obstructing victims' access to justice, remedies and reparations. The amounts paid to victims' families tend to range from US\$500 to US\$4,000 or more. The share of the negotiating officer ranges from 5 per cent to 50 per cent of the settlement amount. Incentives to settle include: fear of public shame and stigma if the case goes to trial as loss of virginity affects the ability of a victim to get married and the reputation of a family; the practical challenges of pursuing a case through court (e.g. attending court, covering legal expenses) which can often take years; the power and influence of the accused and his family, which may compromise the impartiality and independence of the Court; and the likelihood of conviction and sentence (in many cases perpetrators are acquitted or granted suspended sentences).

#### Rape: Recommendations

The following recommendations are offered which may be helpful in bringing Cambodia in compliance with its obligations under international law:

- Non-consent to sexual conduct should be enough on its own to establish the offence of rape and sexual violence. There should be no requirement of evidence of violence, coercion, or opportunistic behaviour to prove a charge of rape.<sup>42</sup>
- The informal settlement of rape cases should not be permitted; and all settlements involving marriage should be rescinded, and any marriages entered into as a result of rape settlements should be annulled.<sup>43</sup>
- Suspended sentences should not be permitted in rape cases.
- No adverse inference should be drawn from any delay in reporting or filing the initial police complaint in a case of rape or sexual violence.<sup>44</sup>
- No evidence related to a complainant's character or past sexual history should be admitted in a rape trial as it is not relevant.<sup>45</sup>
- Rules or principles which reinforce e.g. the following discriminatory gender-based stereotypes should not be used:<sup>46</sup>
  - (a) The 'normal reaction' requirement which suggests that if a woman does not react in a certain way, she is not a 'virtuous or good' woman and as such not trustworthy or credible;
  - (b) The 'corroboration rule' or 'cautionary rule', which suggests that women are inherently deceptive, hysterical and irrational, and thus objective evidence from additional sources is required to corroborate a complainant's testimony.

- Protection orders and other measures must be issued to ensure the safety and security of victims throughout the judicial process (pre-trial, trial and post-trial/sentencing).
- Publication bans, in camera proceedings and other measures must be ordered during the judicial process to ensure the victim's right to privacy and confidentiality.
- Video-link testimony, screens or other visual barriers must be used to ensure victims are not required to face their perpetrator while testifying.
- Separate entrances and waiting areas must be available for victims before, during and after court proceedings.
- Victim support and assistance personnel must be available and permitted to accompany victims throughout the judicial process (especially for children).

## 7.2 India

### 7.2.1 Rape

The National Crimes Record Bureau of India recorded a 9 per cent increase in crime against women in 2014 compared to 2013, with 36,735 cases of rape, including 197 cases of custodial rape and 2,346 of gang rape.<sup>47</sup>

Rape: law

**Indian Penal Code 1860:** The laws on rape were revised following a prolonged and intense campaign by women's rights organisations and activists after Nirbhaya's case (after a woman, aged 23 years, was gang raped in a moving bus in Delhi in December, 2012). The Government mandated a former Chief Justice of India, Justice Verma, to head a committee and hold public hearings.<sup>48</sup> Pursuant to the committee's recommendations, the Criminal Law (Amendment) Act, 2013 was enacted amending various provisions of the IPC, Code of Criminal Procedure (CrPC) and the Evidence Act.

Section 375 of the Indian penal code as amended in 2013 has significantly changed the definition of rape. A man is said to commit rape if he:

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:
  1. against her will,
  2. without her consent,
  3. with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt,
  4. with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes to be lawfully married,
  5. with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she give consent,
  6. with or without her consent, when she is under 18 years of age,
  7. when she is unable to communicate consent.<sup>49</sup>

There is no consent if it is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception or if it is given by an insane person.<sup>50</sup>

Rape is no longer limited to acts of penile penetration. The definition is broadly worded and gender neutral in some aspects. The word penetration means 'penetration to any extent', and lack of physical resistance is immaterial for constituting an offence.<sup>51</sup> Except in certain aggravated situations, a minimum punishment of seven years' imprisonment is mandated, with ten years in case of aggravated situations. In both instances, the punishment may extend to life imprisonment and a fine. In addition, the law now provides a punishment for rape causing death or resulting in persistent vegetative state of the victim.<sup>52</sup> Another offence is having sexual intercourse with a woman by a person in authority or fiduciary relationship who abuses such position to induce any women in his custody or under his charge.<sup>53</sup> The penalty for gang rape is a maximum of life imprisonment and reasonable compensation sufficient to meet the victim's medical expenses and rehabilitation.<sup>54</sup>

Section 375 of IPC provides that sexual intercourse by a man with his own wife, if she is not under 15 years of age, is not rape. Forced sexual intercourse

is an offence only when the woman is living separately from her husband under judicial separation/custom.<sup>55</sup> The Protection of Women from Domestic Violence Act 2005 has, however, created a civil remedy for marital rape.

**Evidence Act 1872 (IEA):** Section 114A provides that the court may presume lack of consent from the complainant's statement to this effect, in cases of custodial rape, rape of a pregnant woman and gang rape. Section 155(4) of the IEA was repealed in 2002 because it required the complainant to prove that she was of 'good' character, which was a major barrier to women and girls securing justice in rape cases. Section 146 states that it is not permissible for the defence to put questions in cross-examination about a complainant's general moral character.

**Code of Criminal Procedure 1973 (CrPC):** Section 164(A) provides for medical examination of victims of rape, Section 53(A) for medical examination of accused of rape and Section 176(1A) (a) (b) for investigation by judicial magistrates of custodial rape and deaths. Section 357(A) of the CrPC deals with compensation schemes for victims of sexual assault.

Rape: key judgments

### **Tekan Alias Tekram v State of M.P. M.P (now Chhattisgarh) [2016] INSC 142 (11 February 2016)**

Key points:

- Sexual exploitation
  - Compensation scheme for victims of sexual exploitation
2. [...]. This is a case where the prosecutrix, who is blind and an illiterate girl, was subjected to sexual intercourse on the promise of marriage. [When she became pregnant, she asked him to marry her. The man refused to marry her. Her parents took the matter to a local Panchayat (local council of elders / notables) but even after their request, the man refused to marry her. The matter was investigated by the police and the case sent to court for trial]. [...].

#### **Case 7.1 Tekan Alias Tekram v State of M.P. M.P. (now Chhattisgarh)**

5. The trial court after appreciating the entire evidence [...] held that the prosecution was able to prove the guilt of the accused-appellant. Accordingly, the accused was convicted under Section 376 IPC and was sentenced to 7 years rigorous imprisonment.
6. [The accused appealed against his conviction to the High Court]. The High Court examined the facts and re-appreciated the entire evidence adduced from the side

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of the prosecution and recorded an independent finding and affirmed the judgment of conviction passed by the trial court. [...].

12. Before dealing with the present matter it is pertinent to mention briefly the amount payable to the rape victim and for rehabilitation under Victim Compensation Schemes notified by the other State Governments and Union Territories under Section 357A of the Cr.P.C. 1973. [...].
13. [...], it is clear that no uniform practice is being followed in providing compensation to the rape victim for the offence and for her rehabilitation. This practice of giving different amount ranging from Rs.20,000/- to Rs.10,00,000/- as compensation for the offence of rape under section 357A needs to be introspected by all the States and the Union Territories. They should consider and formulate a uniform scheme specially for the rape victims in the light of the scheme framed in the State of Goa which has decided to give compensation up to Rs.10,00,000/-.
14. While going through different schemes for relief and rehabilitation of victims of rape, we have also come across one Scheme made by the National Commission of Women (NCW) on the direction of this court in Delhi Domestic Working Women's Forum vs. Union of India and Ors. [Writ Petition (Cri) No. 362/93], whereby this Court inter alia had directed the National Commission for Women to evolve a scheme so as to wipe out the tears of unfortunate victims of rape. This scheme has been revised by the NCW on 15th April 2010. The application under this scheme will be in addition to any application that may be made under Section 357, 357A of the Code of Criminal Procedure as provided in paragraph 22 of the Scheme. Under this scheme maximum of Rs.3,000,000/- (Three lakhs) can be given to the victim of the rape for relief and rehabilitation in special cases like the present case where the offence is against a handicapped woman who required specialized treatment and care.
15. Coming to the present case in hand, victim being physically disadvantaged, she was already in a socially disadvantaged position which was exploited maliciously by the accused for his own ill intentions to commit fraud upon her and rape her in the garb of promised marriage which has put the victim in a doubly disadvantaged situation and after the waiting of many years it has worsened. It would not be possible for the victim to approach the National Commission for Women and follow up for relief and rehabilitation. Accordingly, the victim, who has already suffered a lot since the day of the crime till now, needs a special rehabilitation scheme. [...].
17. Indisputably, no amount of money can restore the dignity and confidence that the accused took away from the victim. No amount of money can erase the trauma and grief the victim suffers. This aid can be crucial with aftermath of crime.
18. The victim, being in a vulnerable position and who is not being taken care of by anyone and having no family to support her either emotionally or economically, we are not ordering the Respondent-State to give her any lump sum amount as compensation for rehabilitation as she is not in a position to keep and manage the lump sum amount. From the records, it is evident that no one is taking care of her and she is living alone in her Village. Accordingly, we in the special facts of this case are directing the respondent-State to pay Rs.8,000/- per month till her life time, treating the same to be an interest fetched on a fixed deposit of Rs.10,00,000/-. By this, the State will not be required to pay any lump sum amount to the victim and this will also be in the interest of the victim.
19. In the result, we dismiss the appeal having no merit and issue the following directions:
  1. All the States and Union Territories shall make all endeavour to formulate a uniform scheme for providing victim compensation in respect of rape/sexual exploitation with the physically handicapped women as required under the law taking into consideration the scheme framed by the State of Goa for rape victim compensation;
  2. So far as this case is concerned, the Respondent-State shall pay a sum of Rs. 8,000/- per month as victim compensation to the victim who is physically handicapped, i.e. blind, till her life time.

## Delhi Domestic Working Women's Forum v Union of India 1995 SCC (1) 14, JT 1994 (7) 183

### Key points:

- Measures for assisting victims of rape

This public interest litigation invokes the benign provision of Article 32 of the Constitution of India, at the instance of the petitioner Delhi Domestic Working Women's Forum to espouse the pathetic plight of four domestic servants who were subject to indecent sexual assault by seven army personnel.

### Case 7.2 Delhi Domestic Working Women's Forum v Union of India

The court said that speedy investigation and trial were essential prerequisites of law. The court had to spell out the parameters of expeditious investigation and trial in rape cases.

15. [...] We think it necessary to indicate the broad parameters in assisting the victims of rape.
  1. The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case.
  2. Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.
  3. The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.
  4. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.
  5. The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.
  6. In all rape trials anonymity of the victim must be maintained, as far as necessary.
  7. It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.
  8. Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

## 7.3 Pakistan

### 7.3.1 Rape

A study by a Pakistani NGO, War against Rape, gives an overview of the number and extent of reported rape cases.<sup>56</sup> According to these estimates, four women were raped every day across Pakistan during 2014, and a total of 1,582 cases were reported across the country in 2014<sup>57</sup> compared to 772 in 2013. In the same year, 3,508 children were sexually abused compared to 3,002 in 2013.<sup>58</sup> Around 67 per cent of these cases were reported from rural areas while the most vulnerable age bracket was of children between 11 and 15 years of age.<sup>59</sup>

#### Rape: law

Section 375 of the Pakistan penal code defines rape as follows:

*A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:*

1. *Against her will;*
2. *without her consent;*
3. *with her consent, when the consent has been obtained by putting her in fear of death or of hurt;*
4. *with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or*
5. *with or without her consent when she is under 16 years of age.*

*Explanation.* Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Section 375 covers marital rape as any sexual intercourse against the will or without consent of the woman constitutes rape. It does not exclude marital rape, as is commonly misunderstood. There is a clear difference between section 375 of the Indian penal code and the Pakistani penal code in that it does not allow marital rape whereas the amended Indian section 375 only prohibits rape where a man's wife is under 15 years old.

Section 376 provides punishment for rape:

1. *Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years and shall also be liable to fine.*

2. *When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.*

Section 496C provides punishment for making false allegation of adultery and fornication:

*Whoever brings or levels or gives evidence of false charge of fornication against any person, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees:*

*Provided that Presiding Officer of a Court dismissing a complaint under section 203C of the Code of Criminal Procedure, 1898 and after providing the accused an opportunity to show cause if satisfied that an offence under this section has been committed shall not require any further proof and shall forthwith proceed to pass the sentence.*

Rape: key judgments

### **Salman Akram Raja v The Government of Punjab through the Chief Secretary Pakistan Law Journal 2013 SC 107**

Key points:

- Police reluctance to register a rape case
- Compulsory DNA test
- Out of court settlement for victim of rape
- Measures for actors of justice

1. A 13-year-old girl Ayesha alias Aashi resident of Ratta Amral, Rawalpindi was subjected to gang-rape in March, 2012. Her father Muhammad Aslam approached the concerned Police Station on 21.03.2012 for registration of FIR. No formal FIR was registered, however, upon entry of the complaint in the Roznamach, Sub-Inspector Zafar Iqbal took the rape victim to District Headquarters Hospital, Dheenda Road, Rawalpindi for medical examination on 21.3.2012. The concerned medical officer gave his findings/opinion after eight days of examination. Despite confirmation of commission of the offence, the FIR could not be registered. The attitude of the investigating agencies, added to the plight of victim girl; she attempted to end her life by committing suicide on 16.04.2012. This incident was highlighted by the media, as such, it came into the notice of this Court, thus the suo moto action was initiated and the matter was registered as HRC No. 13728-P/2012.



### Case 7.3 Salman Akram Raja v The Government of Punjab through the Chief Secretary Pakistan Law Journal

The Prosecutor General, Punjab was directed to pursue the case against the accused persons as well as the concerned police officers/officials who delayed the registration of FIR. In pursuance whereof, on 18.4.2012 an FIR No. 178 of 2012 under Sections 375 & 376 of the Pakistan Penal Code, 1860 was registered at Police Station, Ratta Amral. On the direction of this Court, a 4-Member police investigation team headed by Additional IGP, Punjab was constituted, which submitted report before the Court, holding responsible therein DSP Taimur Khan, Sub-Inspectors Jawwad Shah and Zafar Iqbal for tempering the Roznamach and causing inordinate delay in the registration of FIR. Departmental proceedings were initiated against all the responsible police officers/officials, but on 22.05.2012 when the case was fixed before the Sessions Judge, Rawalpindi, the complainant Muhammad Aslam informed the Court that he had reached an out-of-Court settlement for a consideration of Rs. 1 million with the accused persons and would drop the charge of gang-rape against them.

2. In the above background, the petitioners, apprehending the acquittal of the accused u/S. 265-K of the Criminal Procedure Code, 1898 approached this Court by means of instant Constitutional Petition. According to them, in such like cases, the out-of-Court settlement constitutes a mockery of justice and abuse of law (Cr.P.C.) as such violates the fundamental rights of the victim because such offences i.e. rape etc. are not against a single person but affect the whole society.
16. [...] The petitioner has prayed that following points may be approved and the concerned public authorities be directed to enforce them through the course of investigation and prosecution of all rape matters in Pakistan:
  - (a) Every Police Station that receives rape complaints should involve reputable civil society organizations for the purpose of legal aid and counselling. A list of such organizations may be provided by bodies such as the National Commission on the Status of Women. Each Police Station to maintain a register of such organization. On receipt of information regarding the commission of rape, the Investigating Officer (IO)/Station House Officer (SHO) should inform such organizations at the earliest.
  - (b) Administration of DNA tests and preservation of DNA evidence should be made mandatory in rape cases.
  - (c) As soon as the victim is composed, her statement should be recorded under Section 164, Code of Criminal Procedure, 1898, preferably by a female magistrate.
  - (d) Trials for rape should be conducted in camera and after regular Court hours.
  - (e) During a rape trial, screens or other arrangements should be made so that the victims and vulnerable witnesses do not have to face the accused persons.
  - (f) Evidence of rape victims should be recorded, in appropriate cases, through video conferencing so that the victims, particularly juvenile victims, do not need to be present in Court.

When we inquired from the learned Advocate General and Prosecutor General, Punjab etc. that as to whether they had any objection, if the petition is disposed of in the light of the above said recommendations/prayers, they stated that they have no objection because such suggestions are already under consideration of the concerned authorities and legislation is likely to be made in this regard. Thus, the petition is disposed of in the above terms.

## Human Rights Case No. 42389-P of 2013 (Action taken on news clipping from Daily Dunya dated 4.11.2013 regarding rape on a deaf and mute lady at Nankana Sahib)

### Key points

- Police reluctance to register rape case
- Departmental proceedings against delinquent police officials

On having considered the gravity of the incident wherein a deaf and dumb women mother of three children molested report was called for from the Inspector General Punjab Police. In response to the order of this Court and on receipt of the report submitted by Muntazir Mehdi, DPO the following order was passed on 8.11.2013 [see box]:

#### Case 7.4 Human Rights Case No. 42389-P

An unfortunate incident of gang rape of a deaf and mute lady namely Mst. Fouzia, mother of three children, by more than two persons took place in District Nankana Sahib on 9.10.2013. Admittedly, she was running from pillar to post for redressal of her grievance but nobody listened to her. Consequently, she went to the Ilaqa Magistrate herself and submitted application praying for her medical examination. It was for the first time that on 12.10.2013, the learned Ilaqa Magistrate, ordered for her medical examination from the D.H.Q. Hospital, which was accordingly conducted and following injuries were noticed on her person:

'Two mild tears and very mild redness on vulva means inner side of wall of labia majora measuring .25 x .5 cm both no need to stitch just like abrasions. Progress with med.'

2. Perhaps on having smelled by the Police about adverse action being taken by the Magistrate or some other authority, FIR No.364/13 dated 14.10.2013, under section 376(2) PPC, was registered at Police Station Nankana Sahib on the application of her brother Muhammad Ibrahim, as the victim is deaf and mute. However, taking the advantage of same, the investigation of the case was not conducted honestly, in as much as the victim's statement was not recorded. When this matter was reported in newspaper "Duniya" on 4.11.2013, the same was brought to the notice of one of us (Justice Iftikhar Muhammad Chaudhry, CJ) by the office for perusal and report was called from the Inspector General of Police, on 6.11.2013. No report was submitted by the Inspector General of Police, Punjab, and it seems that instead of taking prompt action, he handed over the matter to some of his subordinate. In any case, on account of non-receipt of report on 7.11.2013, the case was ordered to be fixed in the Court with notice to the Advocate General, Punjab.

[...]. [District and Sessions Judge Chiniot was appointed to conduct an inquiry in this matter. His report found police negligence in this case].

[The Supreme Court found that] it appears that the DPO, Muntazir Mehdi being in supervisory position did not probe diligently into the inquiry conducted by his juniors and exonerated the culprits on the ground that there was contradiction in the statements of the victim and her brother as to number of the accused; as according to the victim, rape was committed by three accused whereas her brother (complainant) stated that they were six in numbers. Not only this, even one Shahid culprit who was prima facie found to be involved was allowed to go scot free in view of the affidavit which was obtained from the complainant. The complainant has stated in the Court that he had given the

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affidavit under influence. It is to be noted that as per the medical report the happening of the incident cannot be denied. The opinion of the medical officer is reproduced as under:

'Two mild tears and very mild redness on vulva means inner side of wall of labia majora measuring .25 x .5 cm both no need to stitch just like abrasions. Progress with med.

Mr. Muntazir Mehdi, DPO appeared in person and offer explanation pleading innocence but the facts noted hereinabove are sufficient to conclude that on account of his criminal negligence a poor lady who is deaf and dumb subjected to criminal act and the police knowing well about their negligence were trying to cover up their defects. In this view of the matter, we direct the Inspector General Police, Punjab to initiate criminal proceedings against all concerned delinquent police officers/officials including the said Muntazir Mehdi as early as could be possible. He shall make sure an independent investigation without being influenced by anyone who is allegedly involved in the case. In the meanwhile, for the purpose of initiating disciplinary proceedings against the DPO Muntazir Mehdi and other delinquents, the matter shall be referred to the concerned authority in accordance with law. The petition stands disposed of in the above terms.

A solitary statement of the rape victim is sufficient for conviction if it is in confidence inspiring and is supported by other evidence such as medical or circumstantial evidence.

## 7.4 Thailand

### 7.4.1 Rape

It has been suggested that a woman is a victim of rape every 15 minutes in Thailand.<sup>60</sup> According to the Thai Public Health Ministry, there were 31,866 incidents of rape reported in 2013<sup>61</sup> and the Thailand Development Research Institute estimates that as many as 30,000 rapes occur every year.<sup>62</sup> However only a small fraction of incidents are ever reported: from 2008 to 2013 only 4,000 cases of were reported to police annually, leaving some 87 per cent of rape cases unreported.<sup>63</sup>

Cultural attitudes and commonly held beliefs about women's role and behaviour impact how sexual violence is perceived, and often interfere with victims' ability to access justice, remedy and reparations for the rape.<sup>64</sup> Thailand is traditionally a patriarchal society.<sup>65</sup> Reporting or acknowledging sexual violence can invite shame not only to the victim but her family: it is inextricably linked with family honour and social belonging.<sup>66</sup> In the words of one female inquiry officer in Songkhla, 'the reality is that families [of victims of sexual violence] are too ashamed; they don't want the story to be known. "Saving face" is more important than justice.'<sup>67</sup> There are two words for rape in Thai: *kom-keun* which connotes forced intercourse without consent; and *plam*, a colloquial term denoting sex with force and without explicit consent. Both are socially accepted.<sup>68</sup> This latter form of sexual violence is often depicted in soap operas where female characters are perceived as 'bad girls' in need of punishing through rape, which then enables them to 'fall in love' and 'succumb' to their perpetrators.<sup>69</sup> Rape occurring in

marital relationships was long seen as acceptable, and not considered a criminal offence. It was only in 2008 that the Criminal Code was amended to remove the exception for marital rape under section 276.

#### Rape: law

**Criminal Code 2008:** Section 276<sup>70</sup> of the Criminal Code sets out two elements in the crime of rape: sexual intercourse with the victim and the inability of the victim to resist as a result of violence, threat of violence or coercion. Section 276 defines sexual intercourse as any act using the perpetrator's sexual organ or other things to penetrate the victim's sexual organ, anus or oral cavity.<sup>71</sup>

This definition is gender neutral - it can be committed by a male or female perpetrator against a female or male victim.<sup>72</sup> It is significant to note that while the exception to marital rape no longer exists under section 276, the court may reduce the sentence in the case of a marital rape if a victim expresses a desire to continue to live with the offender-spouse.<sup>73</sup>

Sexual intercourse with a child under 15 years of age is criminalised under Thai law.<sup>74</sup> However, an exception exists for marriage under section 277(1): 'consent given by a child under 15 years, who is not married to the alleged perpetrator will not be valid.'<sup>75</sup> In other words, a child above the age of 13 years who is married cannot seek protection from sexual abuse if the perpetrator is their spouse, unless the sexual abuse satisfies the elements of a crime of rape under section 276.

No such exception exists for children below the age of 13 years: [i]f the offence ... is committed against a child who is not over thirteen years old yet, the offender shall be punished with imprisonment of seven to twenty years and fine of fourteen thousand to forty thousand baht or imprisonment for life.<sup>76</sup>

Under section 277(5), an alleged perpetrator who is below the age of 18 years may avoid criminal liability for sexual abuse if he or she marries their victim (an adolescent between the ages of 13 and 15 years) and the court sanctions the marriage.<sup>77</sup>

**International obligations:** Rape and other forms of sexual violence constitute a form of violence against women covered by article 2 definition of the UN Declaration on the Elimination of Violence against Women.<sup>78</sup> Rape perpetrated by state and non-state actors constitutes a gross human rights violation, amounting to a form of torture and other cruel, inhuman and degrading treatment and punishment.<sup>79</sup> Rape and other forms of sexual violence also impair or nullify the enjoyment of other human rights and freedoms under international law.<sup>80</sup>

As a State party to the UN Convention against Torture,<sup>81</sup> Thailand is under an obligation to exercise due diligence to prevent, investigate, prosecute and punish private actors for their role in committing rape and other forms of gender-based violence.<sup>82</sup> The UN Committee against Torture has observed that 'the failure of the

State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture [and rape] facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.<sup>83</sup>

As a State party to CEDAW, Thailand has an immediate and continuous obligation to condemn discrimination in all its forms, which includes ensuring women are protected against direct and indirect discrimination within legislation and also committed by state institutions such as the judiciary, public authorities and private individuals.<sup>84</sup>

The tolerance and tacit acceptance of certain forms of sexual violence in mainstream society and media propagates a 'rape culture'<sup>85</sup> which contravenes Thailand's obligations under international law to exercise due diligence to investigate, prosecute and punish rape and other forms of sexual violence within the Thai justice system. These cultural attitudes not only exacerbate a culture of impunity for sexual violence (a 'rape culture'),<sup>86</sup> but directly deny victims access to justice, remedy and reparations for gender-based violence.

One of the most blatant examples of gender-based discrimination can be found in the definition of rape and sexual violence (indecent acts) under sections 276 and 278 of the Criminal Code: the definitions for rape and sexual violence do not recognise lack of consent as a specific element of the offences. Instead, evidence of resistance, use of violence or coercion must be adduced to establish a crime of rape or indecent act (sexual violence). In other words, any sexual interaction with a victim who is not consenting (in the absence of other evidence of resistance, physical violence or coercion) is not recognised as a form of rape or sexual violence under Thai law. This comports with societal attitudes towards rape and sexual violence. In colloquial Thai, non-consensual sex is known as 'plam': it is not condemned outright as a crime or even a form of rape and is regularly featured on Thai television dramas and movies<sup>87</sup> and has some social acceptance.

Requiring evidence of physical harm to establish rape is problematic for several reasons. It reinforces a culture of sexual entitlement with an implied presumption that the victim is a passive (and accepting) recipient of sexual conduct: a presumption which must then be displaced by the victim through evidence of resistance, coercion, or use of violence. Framing sexual violence in this way is a form of discrimination against women. It has enormous implications in how rape and sexual violence are perceived in society; how victims are treated; how rape and sexual violence cases are investigated; how decisions to prosecute rape and sexual violence cases are made; and ultimately how a case of rape or sexual violence is adjudicated. It focuses the investigation, prosecution and adjudication on the conduct of the victim (e.g. was the victim behaving a certain way? Did the victim resist enough for it to amount to a crime of rape or sexual violence?)

instead of examining the actions and intent of the accused. It makes the victim more susceptible to ‘victim-blaming’; and enables defendants to introduce evidence relating to the victims’ behaviour, physical appearance and past sexual history as a basis to show implied consent.

In a 2007 study of Supreme Court judgments in rape cases over the past 50 years, it was found that Thai courts focused or placed significant weight on the victims’ behaviour and injuries. ‘If a woman has a wound, it means that she was struggling against the forced sex ... the more wounds and the seriousness of the injury make evidence stronger for the court to listen.’<sup>88</sup>

It has been further shown that Thai judges place greater emphasis on a victim’s behaviour, applying a standard of the ‘reasonable response of a victim’ to inform their judgment on a legal finding of rape. For example, in the Thailand Supreme Court Case 4465/2530, the court held that the presence of a previous relationship between the victim and accused precluded the victim from bringing a complaint of rape.<sup>89</sup> The courts also looked closely at the issue of delay when considering the veracity of the victim’s complaint; if a woman failed to take immediate action to report a rape this was considered to imply consent.<sup>90</sup> In Supreme Court Case 536/252, the court decided that the 11-year-old victim was in fact consenting to the rape on the basis that she did not cry out for help.<sup>91</sup>

### Rape: key cases

#### Public Prosecutor of Pichit Province v Tui Singhanath

##### Key points:

- Delayed reporting of rape
- Relationship as a sign of consent

#### Case 7.5 Public Prosecutor of Pichit Province v Tui Singhanath

The complainant and the defendant (a married man) worked together in a rice mill. The complainant was a relative of the defendant’s wife. The complainant claimed that the defendant raped her twice, using force and a knife to threaten her. During the first rape, the complainant’s mother was not yet working at the rice mill or staying with the complainant. During the second rape, the mother was on duty in the rice mill. On both occasions, the complainant did not shout or make any noise, and the defendant warned her not to tell anyone. She told her mother about the rapes only several days later, after they had stopped working at the rice mill. Her father asked the defendant to leave his wife and marry the victim, and when he refused, a rape case was filed against him. Witnesses testified that they knew of the demand by the father and that they observed that the defendant and the complainant were close prior to the demand for marriage, and had a relationship.

The Court considered the victim’s failure to report the rape promptly to the mother, the filing of the complaint only after the defendant’s refusal to leave his wife and marry the victim, and the witnesses’ testimonies about the parties’ relationship as suspicious circumstances and upheld the acquittal of the defendant by the Court of Appeal.

## The Public Prosecutor of Uttradit Province v Mr Jeerasak Uambhrom

### Key points:

- Attributed consent
- Previous sexual intercourse

The defendant was charged with taking away a minor of around 16 years of age from her father ‘for lascivious reasons’, without her consent. The defendant was convicted by the trial court and sentenced to three years’ imprisonment. He appealed to the Supreme Court.

### Case 7.6 The Public Prosecutor of Uttradit Province v Mr Jeerasak Uambhrom

The Supreme Court of Thailand examined the testimonies of the litigants and found that the charge in question involved three incidents between the minor and the defendant. In the first, the defendant threatened her with a knife and raped her. In the second, the minor agreed to the sexual contact. In the third, the minor came from a ceremony accompanied by a neighbour, riding a bicycle, but when the bicycle tire was broken, the minor rode at the back of defendant’s bicycle and left the female neighbour to find a ride on her own. Thereafter, while passing by a rice paddy, the defendant threatened her with a knife and forcibly took her to a nearby hut where he raped her twice. The court held that there was no rape because the minor had had coitus with the defendant with her consent prior to that incident, and that on the day in question, the minor went voluntarily with the defendant. While the charge was under section 318 of the Criminal Code, the court held that the defendant was guilty under Section 319 instead, which penalises a person taking away a minor under guardianship with the minor’s consent. It also appeared that prior to the filing of the complaint, the defendant offered marriage but the parties could not agree on a dowry. The court considered this, as well as the fact that the defendant had no prior criminal record, and thus lowered the penalty to two years’ imprisonment and a fine of 2,000 baht.

### Rape: Procedural weaknesses

Section 281 introduces a lesser category for rape and sexual violence. Sexual violence may be classified as compoundable offence when: (1) the victim is over 15 years of age; (2) the alleged act does not occur in public; (3) the alleged act does not involve a grievous bodily injury; and (4) the perpetrator does not exploit a position of trust or authority.<sup>92</sup> When an offence is classified as compoundable, there are a number of implications. The parties may settle the matter through informal negotiations. If the parties reach a settlement, the victim is required to withdraw the case, and the state is then precluded from proceeding with the matter through the formal justice system. A compoundable offence is subjected to a three-month prescription period; as such the victim is obligated to file a report to the police within three months from the date of the incident or the offence.<sup>93</sup> If the victim fails to file a report



or notify authorities within three months of the incident, they are precluded from any remedy or reparations for the offence. Finally, the sentences in compoundable offences are significantly lower than non-compoundable offences and do not have minimum sentences.

Classifying rape and sexual violence as compoundable is directly discriminatory; e.g., rape is not compoundable in Pakistan. It punishes victims who delay in reporting the rape or sexual violence. It undermines the gravity of sexual violence generally by minimising rapes or sexual violence without physical injuries. It also introduces serious protection concerns for victims who are unable to report due to the prescription period or otherwise. Finally, it directly excludes the victim from accessing the full ambit of remedies and reparations. Creating a two-tier system for rape and sexual violence contravenes Thailand's due diligence obligations under international law, and undermines victims' rights to access remedy and reparations for gender-based violence.

#### Rape: Recommendations

The following recommendations are offered which may be helpful in bringing Thailand in compliance with its obligations under international law:

- Non-consent to sexual conduct should be enough on its own to establish the offence of rape and sexual violence. There should be no requirement of evidence of resistance, coercion, an act of violence or incapacity to establish the crime of rape.
- No adverse inference should be drawn from any delay in reporting or filing a police complaint in a case of rape or sexual violence.
- No evidence related to a complainant's character or past sexual history should be admitted in a trial of rape as it is not relevant.
- Rules or principles which reinforce e.g. the following discriminatory gender-based stereotypes should not be used:
  - (a) The 'normal reaction' requirement which suggests that if a woman does not react in a certain way, she is not a 'virtuous or good' woman and as such not trustworthy or credible;
  - (b) The 'corroboration rule' or 'cautionary rule' which suggests that women are inherently deceptive, hysterical and irrational, and thus objective evidence from additional sources is required to corroborate a complainant's testimony;
- Protection orders and other measures must be issued to ensure the safety and security of victims throughout the judicial process (pre-trial, trial and post-trial/sentencing).



- Publication bans, in-camera proceedings and other measures must be ordered during the judicial process to ensure the victim's right to privacy and confidentiality.
- Video-link testimony, screens or other visual barriers must be used to ensure victims are not required to face their perpetrator while testifying.
- Separate entrances and waiting areas must be available for victims before during and after court proceedings.
- Victim support and assistance personnel must be available and permitted to accompany victims throughout the judicial process (especially for children).

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## Chapter 8

# Sexual Harassment

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### Objectives

This chapter focuses on sexual harassment in the target countries, i.e. its incidence and legal and other responses by state organs to address sexual harassment. The aim is to sensitise and enable judges and other stakeholders to make informed and human rights compliant decisions when dealing with cases of sexual harassment.

This chapter consists of four sections focusing on sexual harassment in Cambodia, India, Pakistan and Thailand – each section detailing its incidence in that country and legal and other responses by state organs to address it.

Sexual harassment and other forms of sexual violence in public spaces are an everyday occurrence for women and girls around the world. This reality reduces women's and girls' freedom of movement and ability to participate in school, work and in public life. It limits their access to essential services, and enjoyment of cultural and recreational opportunities. It also negatively impacts upon their health and well-being.<sup>1</sup>

Sexual harassment is experienced in workplaces and educational institutions, and in both private and public organisations. Despite concerted national and international efforts to eliminate sexual harassment, there is no single definition of what constitutes prohibited behaviour. The CEDAW Committee has defined sexual harassment as follows:

*Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.<sup>2</sup>*

Increasingly, sexual harassment is being recognised as a violation of human rights and an affront to the dignity of persons, which seriously undermines equality of opportunity and treatment between men and women.<sup>3</sup> Over the

past ten years, many initiatives against sexual harassment have been initiated in the Asia and Pacific region. Women's organisations have advocated change, governments have adopted new legislation or policies or taken up specific programmes, the judiciary have recognised the offence and provided remedies, and workers and employers have taken steps against it.<sup>4</sup>

## 8.1 Cambodia

### 8.1.1 Sexual harassment

Women face a daily risk of sexual harassment working in the hospitality, tourism and garment sectors in and around the workplace. Women make up 51.4 per cent of the workforce in Cambodia, with a large percentage working in the garment industry.<sup>5</sup> There continues to be no explicit definition of sexual harassment under Cambodian law. Legal recourse for victims of sexual harassment is limited, and few workers and employers are aware of their rights and obligations in respect of sexual harassment. Although there are some studies on sexual harassment in the workplace, the prevalence and gravity of sexual harassment in the workplace is largely unknown due to under-reporting and under-investigation. International non-governmental organisations such as CARE have recently embarked on initiatives to raise awareness on sexual harassment in the workplace; advocate for stronger and more comprehensive laws; and for the development of national guidelines for the prevention and response to sexual harassment in the workplace.<sup>6</sup>

#### Sexual harassment: law

**Constitution of Cambodia 2008:** Article 31 of the Constitution should be used as the starting point to inform how provisions related to sexual harassment laws are interpreted and applied. Article 31 states, 'the Kingdom of Cambodia recognises and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's rights and children's rights.'<sup>7</sup> Article 31(2) states that all 'citizens shall be equal before the law, enjoying the same rights and freedoms and obligations regardless of race, colour, sex, language, religious belief, political tendency, national origin, social status, wealth or other status.'<sup>8</sup> Article 38 'prohibits any physical abuse of the individual.'<sup>9</sup> Article 45 states that '[a]ll forms of discrimination against women shall be abolished.'<sup>10</sup>

**Criminal Code 2010:** Section 250 defines sexual harassment as 'the abuse by one person of the authority conferred by his or her functions against another person for the purpose of applying pressure repeatedly in order to obtain sexual favours.'<sup>11</sup> There is no explicit definition of what conduct constitutes 'applying

pressure'. The sentence for sexual harassment offences is imprisonment from six days to three months and a fine of 100,000 to 500,000 Riels.<sup>12</sup>

**Labour Law of Cambodia 1997:** While there is no explicit provision on sexual harassment, section 172 makes mention of 'sexual violations' in respect of child labourers, apprentices and female employees.<sup>13</sup> Article 172 states that 'all forms of sexual violation (harassment) is strictly forbidden'.<sup>14</sup> The Labour Code, however, does not define sexual harassment, nor does it outline procedures for complaints, or create channels for workers to secure a safe working environment.<sup>15</sup>

**Law on the Prevention of Domestic Violence and Protection of Victims 2005:** This law mentions sexual harassment under the framework of 'sexual aggression' – a form of domestic violence. However, it does not relate to sexual harassment in the workplace. Equally, there is no definition or enumeration of what constitutes sexual harassment in the framework of domestic violence.

**International obligations:** As a State party to CEDAW, Cambodia has an immediate and continuous obligation to 'condemn discrimination against women in all its forms'.<sup>16</sup> The CEDAW Committee defines discrimination to include 'violence that is directed against a woman because she is a woman or that affects women disproportionately'.<sup>17</sup> Under the Declaration on the Elimination of Violence against Women, violence against women is defined to include '[p]hysical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, *sexual harassment* and intimidation at work'.<sup>18</sup> The CEDAW Committee has defined sexual harassment as 'unwelcome sexually determined behaviour [such] as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions'.<sup>19</sup> The committee explains that '[s]uch conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment'.<sup>20</sup>

The lack of a comprehensive definition of sexual harassment providing adequate protection to employees in the workplace leaves thousands of women workers exposed and vulnerable to harassment, intimidation and violence. It also encourages the culture of impunity amongst employers and businesses which enables discrimination and violence against women. In the absence of national legislation defining sexual harassment, it is recommended that articles 31, 38 and 45 of the Constitution be used as a basis to read into the law the definitions of sexual harassment set out in

international law, notably under articles 1 and 2 of the Declaration on the Elimination of Violence against Women.

### Sexual harassment: Recommendations

The following recommendations are offered which may be helpful in bringing Cambodia in compliance with its obligations under international law:

- Investigate, prosecute and punish allegations of sexual harassment as a criminal offence under section 250 of the Criminal Code
- Ensure victims of sexual harassment are able to access remedies and reparations for sexual harassment under the civil code for damages (e.g. lost wages) incurred as a result of harassment in the workplace
- Engage in more public awareness raising on the issue of sexual harassment.

## 8.2 India

### 8.2.1 Sexual harassment

According to the National Crime Records Bureau of India, 82,235 cases of assault on women with intent to outrage their modesty and 9,735 cases of insult to the modesty of women were reported in 2014.<sup>21</sup>

#### Sexual harassment: law

**Indian Penal Code 1860:** The Penal Code criminalises a number of acts relating to sexual harassment. These include singing lewd songs directed at women in public spaces;<sup>22</sup> demanding sexual favours despite indication of disinterest and making unwanted physical contact against a woman's will;<sup>23</sup> watching, capturing or sharing images of a woman engaging in a private act without her consent; following someone with or without their knowledge;<sup>24</sup> and using any word, gesture or act intended to insult the modesty of a woman, etc.<sup>25</sup> The Code further criminalises any act of threatening to harm a woman or her reputation or property when she makes a clear refusal of sexual advances.<sup>26</sup>

**The Information Technology Act 2000 (ITA):** This Act criminalises the posting of any obscene or defamatory material on a public online platform intending to harass women and children.<sup>27</sup>

**Protection of Children from Sexual Offences Act 2012:** This Act defines sexual harassment and prescribes penalties for it.<sup>28</sup> It also specifies the duties of the media, studio and photographic facilities to report cases of sexual harassment and prescribes penalties for failure to report or record such cases.<sup>29</sup> It designates a special court to ensure speedy trial of such offences.<sup>30</sup> It also



seeks to fast track the investigation and hearing of such cases, by setting a 90-day time limit for any inquiry into a sexual harassment complaint.

Section 11 of this Act defines sexual harassment as follows: 'A person is said to commit sexual harassment upon a child when such person with sexual intent':

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
- (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or
- (iii) shows any object to a child in any form or media for pornographic purposes; or
- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- (vi) entices a child for pornographic purposes or gives gratification therefor.

*Explanation.* Any question which involves 'sexual intent' shall be a question of fact.

**Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013:** This Act prohibits the sexual harassment of any adult woman at the workplace. Section 2(n) defines sexual harassment as:

Any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:

- (i) physical contact and advances; or
- (ii) a demand or request for sexual favours; or
- (iii) making sexually coloured remarks; or
- (iv) showing pornography; or
- (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

The 2013 Act prohibits the following acts as well:

- (i) implied or explicit promise of preferential treatment in her employment; or
- (ii) implied or explicit threat of detrimental treatment in her employment: or

- (iii) implied or explicit threat about her present or future employment status; or
- (iv) interference with her work or creating an intimidating or offensive or hostile work environment for her; or
- (v) humiliating treatment likely to affect her health or safety.<sup>31</sup>

The Act requires every employer to constitute an internal complaints committee, and a local complaint committee, specifies the procedure for lodging complaints to these two committees and empowers a Metropolitan or a Judicial Magistrate of the first class to take cognisance of an offence of sexual harassment.<sup>32</sup>

### Sexual harassment: key judgments

#### **Vishaka & Ors v State of Rajasthan & Ors [1997] INSC 665 (13 August 1997)**

##### **Key points:**

- Measures for sexual harassment

A social worker in a village in Rajasthan was brutally gang raped. A women's rights organisation, which saw the failure of the state authorities to intervene in this case as a violation of fundamental rights to gender equality and the right to life and liberty, filed a writ petition before the Supreme Court. It argued that the executive and legislature had failed to take effective preventive measures against sexual harassment in the workplace and petitioned the Supreme Court for the enforcement of the fundamental rights of working women as guaranteed by the Constitution of India, assisting in finding suitable methods for realisation of the true concept of 'gender equality', and for directives to prevent sexual harassment of working women in all workplaces through judicial process, to fill the vacuum in existing legislation.

#### **Case 8.1 Vishaka & Ors v State of Rajasthan & Ors**

The Supreme Court, after a discussion of domestic law, CEDAW and general recommendation 19, laid down the following guidelines:

The **GUIDELINES and NORMS** prescribed herein are as under:

HAVING REGARD to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993, TAKING NOTE of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time, It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

(continued)

(continued)

1. Duty of the Employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- (a) physical contact and advances;
- (b) a demand or request for sexual favours;
- (c) sexually coloured remarks;
- (d) showing pornography;
- (e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps:

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

- (a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
- (b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
- (c) As regards private employers' steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.
- (d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

(continued)

(continued)

5. Disciplinary Action:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women.

Further, to prevent the possibility of any under pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative:

Employees should be allowed to raise issues of sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in suitable manner.

10. Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.

## Apparel Export Promotion Council v A. K. Chopra 1999

### Key points:

- Clarifying definition of sexual harassment

Brief facts of the case are that Ms. X was a junior employee of the Apparel Export Promotion Council. The respondent, Mr C, worked as a private secretary to the chairman of the Council. On several occasions Mr C made unwelcome sexual advances to Ms. X. She complained to the Council Directorate which suspended him and set up an inquiry.

The Enquiry Officer concluded that Miss X was molested by the respondent at Taj Palace Hotel on 12th August, 1988 and that the respondent had tried to touch her person in the Business Centre with ulterior motives despite reprimands by her. The Disciplinary Authority agreeing with the report of the Enquiry Officer, imposed the penalty of removing him from service with immediate effect on 28th June, 1989. Aggrieved, by an order of removal from service, the respondent [made several appeals reaching to the Supreme Court of India].

### Case 8.2 Apparel Export Promotion Council v A.K. Chopra

The Supreme Court said:

An analysis of the above definition, shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty the two most precious Fundamental Rights guaranteed by the Constitution of India. [...].

The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. [...]. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law. [...]. In the instant case, the High Court appears to have totally ignored the intent and content of the International Conventions and Norms while dealing with the case. The observations made by the High Court to the effect that since the respondent did not actually molest Miss X but

(continued)

(continued)

only tried to molest her and, therefore, his removal from service was not warranted rebel against realism and lose their sanctity and credibility. In the instant case, the behaviour of respondent did not cease to be outrageous for want of an actual assault or touch by the superior officer.

In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression molestation. They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance. The High Court overlooked the ground realities and ignored the fact that the conduct of the respondent against his junior female employee, Miss X, was wholly against moral sanctions, decency and was offensive to her modesty. Reduction of punishment in a case like this is bound to have demoralizing effect on the women employees and is a retrograde step. There was no justification for the High Court to interfere with the punishment imposed by the departmental authorities. [...]. Any lenient action in such a case is bound to have demoralizing effect on working women. Sympathy in such cases is uncalled for and mercy is misplaced. Thus, for what we have said above the impugned order of the High Court is set aside and the punishment as imposed by the Disciplinary Authority and upheld by the Departmental Appellate Authority of removal of the respondent from service is upheld and restored. The, appeals, thus succeed and are allowed. We, however, make no order as to costs.

## 8.3 Pakistan

### 8.3.1 Sexual harassment

‘All too often, working women have tales of their perversions: the lesser ones include gaze and glance, the occasional grope, the unwanted text message, the innuendo; the bigger ones include invitations to meet outside the office, over lunch or dinner – with plum assignments, promotions, job security and professional reputations hanging in the balance.’<sup>33</sup>

#### Sexual harassment: law

There are general and special laws prohibiting sexual harassment in general and in the workplace. Section 509 of the Pakistan Penal Code states that:

*Whoever*

- (i) *intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman;*
- (ii) *conduct sexual advances, or demand sexual favours or uses verbal or non-verbal communication or physical conduct of a sexual nature*

*which intends to annoy, insult, intimidate or threaten the other person or commits such acts at the premises of workplace, or makes submission to such conduct either explicitly or implicitly a term or condition of an individual's employment, or makes submission to or rejection of such conduct by an individual a basis for employment decision affecting such individual, or retaliates because of rejection of such behaviour, or conducts such behaviour with the intention of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment;*

*(iii) shall be punished with imprisonment which may extend to three years or with fine up to five hundred thousand rupees or with both.*

Explanation 1: Such behaviour might occur in public place, including, but not limited to, markets, public transport, streets or parks, or it might occur in private places including, but not limited to workplaces, private gathering, or homes.

Explanation 2: Workplace means the place of work or the premises where an organisation or employer operates, this may be a specific building, factory, open area or a larger geographical area where the activities of the organisation are carried out. Sexual advances may occur after working hours and outside the workplace. It is the access that perpetrator has to the person being harassed by virtue of a job situation or job-related functions and activities.

Section 377A of the Pakistan Penal Code defines sexual abuse as follows:

*Whoever employs, uses, forces, persuades, induces, entices, or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where age of person is less than eighteen years, is said to commit the offence of sexual abuse.*

Section 377B states that: 'Whoever commits the offence of sexual abuse shall be punished with imprisonment of either description for a term which may extend to seven years and liable to fine which shall not be less than five hundred thousand rupees or with both.'

The special law dealing with sexual harassment in workplace is the Protection against Harassment of Women at the Workplace Act 2010. Section 2(h) defines sexual harassment as:

*Any unwelcome sexual advance, request for sexual favours or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the*

*attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment.*

The Act also requires both public and private organisations to constitute an inquiry committee authorised to deal with and inquire into complaints of sexual harassments in the workplace; lays down the procedure of inquiry and entitles victims to make complaints either to the inquiry committee or an ombudsman.<sup>34</sup> The Schedule to the Act lays down a Code of Conduct to be followed by the every employee including those in management and the owners of an organisation to ensure protection and safety of women against harassment in the workplace.

Sexual harassment: key judgments

### **Muhammad Sharif v The State, P L D 1957 Supreme Court (Pak.) 201**

Key points:

- Sexual harassment
- Impartiality of judges (they cannot be theologians)

This is a case about a group of college girls who went on a college picnic. They were followed by a group of boys at the picnic spot and harassed by the boys asking to sing love songs for them and making obscene gestures. The girls reported the incident to the college principal who informed the police. The police found the boys guilty and charged them under sections 294, 354 and 509 of the Pakistan Penal Code. The Magistrate found three boys guilty and sentenced each one of them for one year's rigorous imprisonment under section 509 for insulting the modesty of women.

The Additional Sessions Judge, on appeal, acquitted the boys. The government appealed to the High Court against the decision of the Sessions Judge. The following discussion by the High Court following the views of the Supreme Court are illuminating in respect of internal bias and equal rights to enjoyment of outdoor activities by girls and boys.

The learned Judges found it impossible to sustain the conclusions of the learned Additional Sessions Judge, which both on matters of fact and of law appeared to them to be wholly untenable, set aside the order of acquittal and restored the order of the Additional District Magistrate with this modification that the conviction of Muhammad Rafiq petitioner under section 354 and the consequent sentence were set aside and he was convicted of an offence under section 352 and sentenced to three months' rigorous imprisonment under that section.



### Case 8.3 Muhammad Sharif v The State

[On appeal, the Supreme Court rejected all objections of the petitioners] except that relating to the illegality of the sentence of rigorous imprisonment for the conviction under section 509.

[The Supreme Court said that] the learned Additional Sessions Judge displayed a serious lack of judicial equilibrium in preaching a sermon to the management of the college that girls should not be permitted to go out unescorted and without purdah and that the conduct attributed to the young men who followed and pestered them was perfectly natural. With his experience the learned Judge should have realised that his sole function, as an appellate Judge, was to consider whether the offence of which they had been convicted had been proved against the petitioners and that he was neither called upon nor expected to pronounce his own opinion as to [whether] in College authorities should permit their girl students to enjoy a holiday. In such matters there can always be room for some difference of opinion and a Judge should not assume the role of an adviser or theologian. The measure in which girl students should be allowed freedom is essentially the responsibility of those who manage an educational institution. It may be that in the present instance the College authorities considered that girls are as much entitled to fresh air as boys and that by permitting them to go unescorted and without purdah they are fostering in them a feeling of independence, confidence and self-reliance. The fact that a girl old enough to look after herself decides to walk in a public place without someone to look after her and without purdah can never be a ground for a miscreant to tease or annoy her for that reason. If the learned Judge thought that the appearance of educated girls in public places furnishes excusable provocation to the young men who come to or happen to be in that place then he was propounding an extremely pernicious doctrine which in its essentials comes perilously near the argument that because a mother adorns her infant daughter with costly ornaments and permits her to go to a neighbour's house, an evil minded person would have a justifiable excuse to rob her of her ornaments. This approach to the case was responsible for a basic error in the Additional Sessions Judge's judgment because he never addressed himself to the fundamental question in the case, namely, why did the several girls and at least two local men give evidence against the petitioners, which, if believed, would undoubtedly bring the case within the four corners of section 509.

In regard to the application of section 509 there can be no question that the acts attributed to the petitioners, particularly to Muhammad Rafiq, did amount to an insult to the modesty of the girls. If a party of young men follow a group of college girls who are holidaying in a public place, pass indecent remarks on and make obscene gestures to them, ask one of them to sing a love song and refer to one of them as kafir (beloved) they must, in the present state of society in Pakistan, be held to intend to insult the modesty of the girls and unless the law is reduced to a farce the application of section 34 to other members of the party would be fully justified, where the girls are followed and pestered persistently and systematically for several hours. The High Court was, therefore, right in holding that the matter had not been approached by the learned Additional Sessions Judge in a correct manner and that he was wrong in setting aside the trial Court's judgment of conviction.

## **Ms. Tahrir Tahir v Vice Chancellor of Quaid-e-Azam University, Islamabad, 2013 MLD 225**

### **Key points:**

- Sexual harassment of students by teachers

This is a case of sexual harassment of a university student by her teacher. She complained to the university management who set up an inquiry and found the teacher guilty of blackmail and sexually harassing his female student. The inquiry recommended termination of the teacher. The teacher appealed against the decision to the Federal Ombudsman.

### **Case 8.4 Ms. Tahrir Tahir v Vice Chancellor of Quaid-e-Azam University**

The Ombudswoman's discussion is reproduced below:

9. [...] I have gone through the statements of appellant, respondent No.2 and the witnesses and have examined the annexed documents. The question to ponder is whether the Protection Against Harassment of Women at Workplace Act, 2010 is applicable to educational institutions and whether it only permits an employee of any organization to make a complaint. It will be useful to reproduce section 2, subsections (l) and (c) which reads as under:
 

'Section 2 subsection (l) "Organization" means a Federal or Provincial Government Ministry, Division or department, a corporation or any autonomous or semi-autonomous body, Educational Institutes, Medical facilities (sic) established or controlled by the Federal or Provincial Government or District Government or registered civil society associations or privately managed a commercial or an industrial establishment or institution, a company as defined in the Companies Ordinance, 1984 (XLVII of 1984) and includes any other registered private sector organization or institution.

'Further subsection (n) "Workplace" means the place of work or the premises where an organization or employer operates and includes building, factory, open area or a larger geographical area where the activities of the organization or of employer are carried out and including any situation that is linked to official work or official activity outside the office.

'Section 2(e) "Complainant" means a woman or man who has made a complaint to the Ombudsman or to the Inquiry Committee on being aggrieved by an act of harassment.'
10. From the plain reading of the above sections it is clear that the university being an educational institution is an organization within the meaning of section 2 subsection (L) of the Act. Further under section 2 subsection (e) the application of the Act is not restricted to the employees of an organization. Sexual harassment as defined is not in any way limited in its application to the employees of an organization. In view of this it is held that the female students even otherwise being part of the university cannot be deprived of the remedy provided by the Act if sexually harassed. The objection of the appellant that the Act is not applicable to the educational institutions has no force in it, therefore this argument is rejected.

*(continued)*

(continued)

11. The arguments of the learned counsel for appellant that the Act is not applicable to the students as it only permits an employee of an organization, is not based on legal hypothesis. The fact remains that work means physical and mental effort or activity directed to the production or accomplishment of something that one is doing, making or performing especially as an occupation or undertaking a duty or a task therefore, the Act equally applies to employer, employee and students.
12. On 29-7-2011, the members of syndicate resolved to designate the syndicate as management and competent authority under section 2(j) and (d) of the Protection against Harassment of Women at Workplace Act, 2010. The syndicate again met on 20-8-2011 to discuss the report of inquiry committee along with show cause notice issued to the appellant. The record shows that Dr. Wasim did not attend the meeting of the syndicate held on 20-8-2011 as he was member of the committee who conducted inquiry in case of the appellant.
13. The arguments of the learned counsel for appellant that Ms. Tehrim Tahir (respondent No.2) made a complaint against the appellant just to pressurize him to grant her more marks is unfounded as respondent No.2 made complaint at the advice of her fellow students.
14. This is also evinced from the minutes of the seventh meeting of the committee held on 20-7-2011 that the appellant was given an opportunity to cross examine respondent No.2 and her witnesses but he declined to cross examine any of them. A certificate in this regard duly signed by the appellant is on record.
15. In the view of foregoing, it is held that the appeal in hand strictly falls within the definition of harassment under section 2 subsection (h) of Protection against Harassment of Women at Workplace Act 2010. The appellant Noor Mustafa Awan is found guilty of sexually harassing respondent No.2 through verbal communication of sexual nature and sexually demeaning attitude, and have failed to make out a case in appeal justifying interference of this forum.
16. In the wake of what has been discussed above this appeal is dismissed.

## 8.4 Thailand

### 8.4.1 Sexual harassment

Sexual harassment has become a more visible issue in recent years. There has been more public and political discourse on what constitutes sexual harassment and what legal recourse, if any, is available to victims of sexual harassment.

#### Sexual harassment: law

**Labour Protection Act 1998:** Section 16 of the Labour Protection Act prohibits and penalises sexual harassment, stating that a work chief, supervisor or inspector is not permitted to sexually harass an employee. Under section 147, any person who violates section 16 may be fined up to 20,000 baht. This prohibition does not extend to harassment among employees of the same ranking. The law does not provide a definition of

what conduct constitutes sexual harassment, nor does it enumerate a list of behaviours which may be classified as harassment.<sup>35</sup>

**The Civil and Commercial Code 1925:** Section 420 allows an employee who has been sexually harassed to claim compensation for damages incurred as a result of the harassment.<sup>36</sup>

**Criminal Code 2008:** Sexual harassment may be prosecuted as ‘public bullying or harassment’ under section 397 or an ‘indecent act’ under section 278. Under section 278, a perpetrator is subjected to a fine of up to 20,000 baht and up to 10 years’ imprisonment. The sentence under section 397 was amended in February 2015 to increase punishment from one month’s imprisonment to five years’ imprisonment and from a fine of 1,000 baht to a fine of 10,000 baht.<sup>37</sup> In both cases, there is no minimum sentence for an offence involving sexual harassment.

The Cabinet of the Thai government issued a Cabinet Resolution on sexual harassment in June 2015. The resolution introduced a preliminary definition of sexual harassment. Accompanying the Cabinet Resolution was a set of guidelines on how to address and prevent sexual harassment.

**International obligations:** As a State party to CEDAW, Thailand has an immediate and continuous obligation to ‘condemn discrimination against women in all its forms’.<sup>38</sup> The CEDAW Committee defines discrimination to include ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’.<sup>39</sup> The Declaration on the Elimination of Violence against Women has defined violence against women to include ‘[p]hysical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, *sexual harassment* and intimidation at work’.<sup>40</sup> The CEDAW Committee has defined sexual harassment as ‘unwelcome sexually determined behaviour [such] as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions’.<sup>41</sup> The committee explains that ‘[s]uch conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment’.<sup>42</sup>

Thailand’s laws related to sexual harassment remain largely undeveloped. There is at present no clear or explicit definition of sexual harassment in the law, and the current legal recourse and remedies for sexual harassment do not appreciate the gravity or seriousness of the offence.

Discriminatory attitudes continue to pervade all levels of investigation, prosecution and adjudication of sexual harassment. As such, victims of

sexual harassment continue to suffer with little or no access to justice, remedy or reparations for this form of gender-based violence.

### Sexual harassment: Recommendations

The following recommendations are offered which may be helpful in bringing Thailand in compliance with its obligations under international law:

- Allegations of sexual harassment should be treated as criminal offences under sections 397 or 278 of the Criminal Code.
- Victims should not be precluded from accessing remedies and reparations for sexual harassment under the civil code if a compoundable claim of sexual harassment is settled through an informal agreement.
- More public awareness raising must be undertaken on the issue of sexual harassment.

### Notes

- 1 UN Women, 'Quito: a city committed to preventing sexual harassment in public spaces' (2015) <http://www.unwomen.org/en/news/stories/2015/4/quito-a-city-committed-to-preventing-sexual-harassment-in-public-spaces> accessed 13 October 2015.
- 2 CEDAW Committee, General Recommendation No. 19, 1992, para 18.
- 3 S. Pradhan-Malla, 'Sexual Harassment in the Workplace in Asia', Expert paper submitted in Expert Group Meeting organised by the UN Division for the Advancement of Women, held in Vienna, Austria (2005), <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/pradhanmalla.sh.pdf> accessed 11 October 2015.
- 4 N Haspels et al, 'Action against Sexual Harassment at Work in Asia and the Pacific' (ILO, Bangkok, 2001), [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_bk\\_pb\\_159\\_en.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_bk_pb_159_en.pdf) accessed 13 October 2015.
- 5 CARE, 'Safe Workplaces, Safe Communities (SWSC) – Violence against women, both domestic and in the workplace, is commonplace' (2015), <http://www.care-cambodia.org/swsc> accessed 10 January 2017.
- 6 CARE 'New research from CARE explores perceptions of sexual harassment in Cambodia' (2014), <http://www.care-cambodia.org/single-post/2014/11/25/New-research-from-CARE-explores-perceptions-of-sexual-harassment-in-Cambodia> accessed 1 December 2017.
- 7 Constitution of Kingdom of Cambodia 2008, Article 31.
- 8 Ibid, Article 31, para 2.
- 9 Ibid, Article 38.
- 10 Ibid, Article 45.
- 11 Criminal Code of the Kingdom of Cambodia 2010, Article 250.
- 12 Ibid.
- 13 The Labour Code of the Kingdom of Cambodia 1997, section 8, Article 172.
- 14 Ibid.
- 15 Human Rights Watch 'Work Faster or Get Out: Labour Rights Abuses in Cambodia's Garment Industry' (2015), <https://www.hrw.org/report/2015/03/11/work-faster-or-get-out/labor-rights-abuses-cambodias-garment-industry> accessed 15 October 2015.
- 16 See chapter 2, section 2.5 of this book.
- 17 Ibid.

- 18 Declaration on the Elimination of Violence against Women, UNGA Res 48/104 (20 December 1993) UN Doc. A/RES/48/104, Article 1.
- 19 CEDAW Committee, General Recommendation No. 19, 1992.
- 20 Ibid.
- 21 National Crime Records Bureau, 'Incidence of IPC Crimes under Sexual Offences During 2014' (2014), <http://www.ncrb.gov.in/StatPublications/CII/CII2014/Table%201.7.pdf.pdf> accessed 1 December 2017.
- 22 Section 294.
- 23 Section 354A.
- 24 See sections 354C and 354D.
- 25 Section 509.
- 26 Section 503.
- 27 Section 67 and 67B.
- 28 See sections 12 and 18.
- 29 See sections 20 and 21.
- 30 Section 28.
- 31 Section 3.
- 32 See sections 4, 6, 9 and 27.
- 33 Rafia Zakaria, 'The hell of harassment', *Dawn* (Karachi, 10 February 2016), <http://www.dawn.com/news/1238495> accessed 4 November 2016.
- 34 See sections 3–4 and 8.
- 35 Baker & Mckenzie, Thailand (2015), [http://www.bakermckenzie.com/files/Uploads/Documents/Supporting%20Your%20Business/Global%20Markets%20QRGs/Termination,%20Discrimination%20and%20Harassment/qr\\_thailand\\_terminationdiscriminationharassmentguide\\_2009.pdf](http://www.bakermckenzie.com/files/Uploads/Documents/Supporting%20Your%20Business/Global%20Markets%20QRGs/Termination,%20Discrimination%20and%20Harassment/qr_thailand_terminationdiscriminationharassmentguide_2009.pdf) accessed 15 October 2015.
- 36 Commercial and Civil Code, Book 2, page 320.
- 37 The Royal Thai Gazette, 'Amendment to Criminal Code of Thailand B.E. 2557 (2014)' (only in Thai, December 2014), [http://www.nitipohnchai.com/uploads/4/2/1/1/42116973/%E0%B8%9E.%E0%B8%A3.%E0%B8%9A.%E0%B9%81%E0%B8%81%E0%B9%89%E0%B9%84%E0%B8%82%E0%B9%80%E0%B8%9E%E0%B8%B4%E0%B9%88%E0%B8%A1%E0%B9%80%E0%B8%95%E0%B8%B4%E0%B8%A1\\_%E0%B8%9B.%E0%B8%AD%E0%B8%B2%E0%B8%8D%E0%B8%B2\\_%E0%B8%84%E0%B8%A7%E0%B8%B2%E0%B8%A1%E0%B8%9C%E0%B8%B4%E0%B8%94%E0%B8%A5%E0%B8%AB%E0%B8%B8%E0%B9%82%E0%B8%97%E0%B8%A9.pdf](http://www.nitipohnchai.com/uploads/4/2/1/1/42116973/%E0%B8%9E.%E0%B8%A3.%E0%B8%9A.%E0%B9%81%E0%B8%81%E0%B9%89%E0%B9%84%E0%B8%82%E0%B9%80%E0%B8%9E%E0%B8%B4%E0%B9%88%E0%B8%A1%E0%B9%80%E0%B8%95%E0%B8%B4%E0%B8%A1_%E0%B8%9B.%E0%B8%AD%E0%B8%B2%E0%B8%8D%E0%B8%B2_%E0%B8%84%E0%B8%A7%E0%B8%B2%E0%B8%A1%E0%B8%9C%E0%B8%B4%E0%B8%94%E0%B8%A5%E0%B8%AB%E0%B8%B8%E0%B9%82%E0%B8%97%E0%B8%A9.pdf) accessed 10 December 2016.
- 38 See chapter 2, section 2.5 of this book.
- 39 Ibid.
- 40 Declaration on the Elimination of Violence against Women, UNGA Res 48/104 (20 December 1993) UN Doc. A/RES/48/104, para 1.
- 41 CEDAW Committee, General Recommendation No. 19, 1992.
- 42 Ibid.

## **Annex 1**

# **Convention on the Elimination of All Forms of Violence against Women 1979<sup>[1]</sup>**

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The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

## **PART I**

### **Article I**

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the



basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

### **Article 2**

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

### **Article 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

**Article 4**

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

**Article 5**

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

**Article 6**

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

**PART II****Article 7**

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

#### **Article 8**

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

#### **Article 9**

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

### **PART III**

#### **Article 10**

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;

- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same Opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

#### **Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
  - (a) The right to work as an inalienable right of all human beings;
  - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
  - (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
  - (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
  - (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
  - (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
  - (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
  - (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
  - (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

#### **Article 12**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

#### **Article 13**

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

#### **Article 14**

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
  - (a) To participate in the elaboration and implementation of development planning at all levels;
  - (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
  - (c) To benefit directly from social security programmes;
  - (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
  - (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
  - (f) To participate in all community activities;
  - (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
  - (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

## **PART IV**

### **Article 15**

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

**Article 16**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
  - (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
  - (c) The same rights and responsibilities during marriage and at its dissolution;
  - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
  - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
  - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
  - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
  - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

**PART V****Article 17**

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high

moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
4. Elections of the members of the committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
5. The members of the committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the committee.
6. The election of the five additional members of the committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the committee.
7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the committee shall appoint another expert from among its nationals, subject to the approval of the committee.
8. The members of the committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the committee's responsibilities.



9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the committee under the present Convention.

#### **Article 18**

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:
  - (a) Within one year after the entry into force for the State concerned;
  - (b) Thereafter at least every four years and further whenever the committee so requests.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

#### **Article 19**

1. The committee shall adopt its own rules of procedure.
2. The committee shall elect its officers for a term of two years.

#### **Article 20**

1. The committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.
2. The meetings of the committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the committee.

#### **Article 21**

1. The committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the committee together with comments, if any, from States Parties.
2. The Secretary-General of the United Nations shall transmit the reports of the committee to the Commission on the Status of Women for its information.

**Article 22**

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

**PART VI****Article 23**

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

**Article 24**

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

**Article 25**

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

**Article 26**

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

**Article 27**

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

**Article 28**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

**Article 29**

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

**Article 30**

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

**Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 1999<sup>[2]</sup>**

The States Parties to the present Protocol,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Also noting that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Recalling that the International Covenants on Human Rights and other international human rights instruments prohibit discrimination on the basis of sex,

Also recalling the Convention on the Elimination of All Forms of Discrimination against Women<sup>4</sup> (“the Convention”), in which the States Parties thereto condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women,

Reaffirming their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms,

Have agreed as follows:

**Article 1**

A State Party to the present Protocol (‘State Party’) recognizes the competence of the Committee on the Elimination of Discrimination against Women (‘the committee’) to receive and consider communications submitted in accordance with article 2.

**Article 2**

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

**Article 3**

Communications shall be in writing and shall not be anonymous. No communication shall be received by the committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

**Article 4**

1. The committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.
2. The committee shall declare a communication inadmissible where:
  - (a) The same matter has already been examined by the committee or has been or is being examined under another procedure of international investigation or settlement;
  - (b) It is incompatible with the provisions of the Convention;
  - (c) It is manifestly ill-founded or not sufficiently substantiated;
  - (d) It is an abuse of the right to submit a communication;
  - (e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

**Article 5**

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.
2. Where the committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

**Article 6**

1. Unless the committee considers a communication inadmissible without reference to the State Party concerned, and provided that the individual or individuals consent to the disclosure of their identity to that State Party, the committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.
2. Within six months, the receiving State Party shall submit to the committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

**Article 7**

1. The committee shall consider communications received under the present Protocol in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party concerned, provided that this information is transmitted to the parties concerned.
2. The committee shall hold closed meetings when examining communications under the present Protocol.
3. After examining a communication, the committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.
4. The State Party shall give due consideration to the views of the committee, together with its recommendations, if any, and shall submit to the committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the committee.
5. The committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the committee, in the State Party's subsequent reports under article 18 of the Convention.

**Article 8**

1. If the committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information

available to it, the committee may designate one or more of its members to conduct an inquiry and to report urgently to the committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the committee, submit its observations to the committee.
5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

#### **Article 9**

1. The committee may invite the State Party concerned to include in its report under article 18 of the Convention details of any measures taken in response to an inquiry conducted under article 8 of the present Protocol.
2. The committee may, if necessary, after the end of the period of six months referred to in article 8.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

#### **Article 10**

1. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the committee provided for in articles 8 and 9.
2. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

#### **Article 11**

A State Party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the committee pursuant to the present Protocol.

#### **Article 12**

The committee shall include in its annual report under article 21 of the Convention a summary of its activities under the present Protocol.

**Article 13**

Each State Party undertakes to make widely known and to give publicity to the Convention and the present Protocol and to facilitate access to information about the views and recommendations of the committee, in particular, on matters involving that State Party.

**Article 14**

The committee shall develop its own rules of procedure to be followed when exercising the functions conferred on it by the present Protocol.

**Article 15**

1. The present Protocol shall be open for signature by any State that has signed, ratified or acceded to the Convention.
2. The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

**Article 16**

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

**Article 17**

No reservations to the present Protocol shall be permitted.

**Article 18**

1. Any State Party may propose an amendment to the present Protocol and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify her or



him whether they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

#### **Article 19**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 or any inquiry initiated under article 8 before the effective date of denunciation.

#### **Article 20**

The Secretary-General of the United Nations shall inform all States of:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 18;
- (c) Any denunciation under article 19.

#### **Notes**

- 1 The text of CEDAW was taken from the official website of the UN High Commissioner for Human Rights: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>> accessed 4 November 2016.
- 2 The text of the OP-CEDAW was taken from the official website of the UN High Commissioner for Human Rights: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx>> accessed 4 November 2016.

## Annex 2

### Table of Treaties

No	Treaty Title	Cambodia	India	Pakistan	Thailand
1	Convention on the Elimination of all Forms of Discrimination against women 1979	Acceded to on 15.10.1992	Ratified on 09.07.1993	Acceded to on 12.03.1996	Acceded to on 09.08.1985
2	Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against women 1999	Ratified on 13.10.2010	Not yet	Not yet	Ratified on 14.06.2000
3	International Covenant on Civil and Political Rights 1966	Acceded to on 26.05.1992	Acceded to on 10.04.1979	Ratified on 23.06.2010	Acceded to on 29.10.1996
4	Optional Protocol to the International Covenant on Civil and Political Rights 1966	Signed on 27.09.2004	Not yet	Not yet	Not yet
5	International Covenant on Economic, Social and Cultural Rights 1966	Acceded to on 26.05.1992	Acceded to on 10.04.1979	Ratified on 17.04.2008	Acceded to on 05.09.1999
6	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 2008	Not yet	Not yet	Not yet	Not yet
7	Convention on the Rights of the Child 1989	Acceded to on 15.10.1992	Acceded to on 11.12.1992	Ratified on 12.11.1990	Acceded to on 27.03.1992
8	Optional Protocol to the Convention on the Rights of Child on the sale of Children, child prostitution and child pornography 2000	Signed on 05.10.2001	Ratified on 16.08.2005	Ratified on 05.07.2011	Acceded to on 11.01.2006
9	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949	Signed on 27.09.2004	Ratified on 09.01.1953	Ratified on 11.07.1952	Not yet

(continued)

No	Treaty Title	Cambodia	India	Pakistan	Thailand
10	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transitional Organized Crime 2000	Ratified on 02.07.2007	Ratified on 05.05.2011	Not yet	Ratified on 17.10.2013
11	Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (the SAARC Convention) 2002		Ratified 2002	Ratified 2002	
12	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984	Acceded to on 15.10.1992	Signed on 14.10.1997	Acceded to on 23.6.2010	Acceded to on 02.10.2007