



# MYANMAR LAWS AND CEDAW

## The Case for Anti-Violence Against Women Laws

Briefing Paper :  
Background, Legal Analysis and Case Studies from  
Cambodia, Thailand and Vietnam

Gender Equality Network  
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## Executive Summary

Gender equality recognizes that while women and men are physically different, they are entitled to the same opportunities for self realization and the same human dignity. Enhancing women's security, establishing institutional practices and laws that do not reinforce power imbalances, and providing appropriate mechanisms for redress -- are essential elements to ensure equality. Whilst laws and policies may state formally that men and women are equal, they must also take into account the prevailing conditions that prevent women from actually experiencing equality.

Myanmar acceded to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1997. As part of its treaty obligations, Myanmar has committed to ensuring that its laws uphold women's rights and advance women's equality. This Briefing Paper aims to provide background information relevant to women's rights and protection in Myanmar, analysis of existing laws and their compliance with CEDAW norms, and comparative experience from three ASEAN neighbours. The Paper supports the creation of Anti-Violence Against Women Laws as part of larger law reform strategies.

Myanmar's legal framework is drawn from a mix of colonial and traditional sources. Many of its laws are not compatible with CEDAW, as they incorporate restrictive gender stereotypes and are inconsistent with the promotion and protection of women's rights to substantive equality.

While the *Constitution of the Republic of the Union of Myanmar, 2008*, guarantees women's equality, it does not satisfy CEDAW requirements to also define and prohibit direct and indirect discrimination against women. Some constitutional provisions also reinforce notions that women are incapable of doing the same work as men or are in need of protection because they are weaker than men, rather than ensuring that they have the same opportunities for choice. There are no specific definitions of

gender discrimination or penalties for such acts of discrimination as violence against women. Descriptions in the *Penal Code, 1860*, of offences involving sexual and gender-based violence do not reflect the contemporary values of Myanmar society, and do not adequately address women's lived experiences of violence. Marital rape is only criminalized if the wife is younger than 14, and there are no specific laws to prevent domestic violence and to allow women to seek restraining orders. Laws to eradicate violence should be revised to ensure that they respect women's physical and mental integrity, and that they promote access to justice.

Laws relating to sex work are unlikely to realise the intended objectives, and often have a negative impact on women who are already vulnerable. While the *Anti-Trafficking in Persons Law, 2005*, meets the criteria in the UN *Protocol on Trafficking in Persons*, it could be strengthened to protect victims' rights and ensure that they have access to appropriate services.

Reproductive health laws prevent women from exercising autonomy over their own bodies. Abortion is illegal, except to save a woman's life, and sterilization is restricted. Giving consideration to making these procedures legal and more readily available would help to ensure the health and safety of Myanmar women.

The laws that apply in matters relating to marriage vary according to the religion of the man and woman. A single standard age for consent by the parties, and mandatory registration would help to prevent coerced and underage marriages. Women are more restricted than men in initiating divorces and must consider the prospect of foregoing entitlement to marital property with negligible maintenance in divorce. In addition to Anti-Violence Against Women laws, the creation of a harmonized family law, reflecting the values and context of Myanmar's diverse contemporary society, would streamline settlement of family decisions and bolster women's personal and economic rights.

With regard to women's labour, at present, women are not entitled to such benefits as paid parental leave, and there are no laws for the prevention of unwanted sexual advances in the workplace.

Women are underrepresented in senior government positions and thus limited in their abilities to influence law reform. While there are many reasons for this, women's representation in government could be made more equitable by introducing affirmative action laws, and giving consideration as to how the adoption of quota systems and other mechanisms might effectively contribute towards women's participation in all levels of government.

Anti-Violence Against Women laws could enhance women's security in all aspects of their lives, a fundamental step in promoting equality. They could fill some of the gaps in existing legislation and serve as a platform from which to initiate further law reform. The process of law reform could fruitfully draw on the experiences of other countries in the region, such as Thailand, Cambodia and Vietnam, which share many of the same issues with regard to gender equality.

## A Note on Terms

### Why Anti-Violence Against Women Laws?

The genesis for this Briefing Paper rests with the Gender Equality Network, formerly the Women's Protection Technical Working Group. The paper provides information relevant to women's rights and protection in Myanmar and three neighbouring countries, and is intended to inform discussion related to law reform and the drafting of Anti-Violence Against Women laws. The prevention of sexual and gender-based violence, and the protection of women who have been made vulnerable to abuse, because of socio-economic conditions, cultural stereotypes or conflict, are critical aspects of the struggle to enable all societies to achieve greater gender equality. Ensuring women's security, in terms of physical, mental and emotional safety and economic self-sufficiency, is the foundation to their enjoyment of other rights.

Attitudes that view women as fundamentally weaker than men and in need of support or protection *because they are women*, undermine efforts to achieve gender equality. A gender equality approach recognizes that while women and men are physically different, they are entitled to the same opportunities for self realization and the same human dignity, including the rights to make decisions about their lives, their bodies, their education, their occupations, their relationships, and their roles in public life. Protecting these interrelated rights - by enhancing women's security, changing institutions and laws that perpetuate socially constructed power imbalances, and providing appropriate mechanisms for redress -- are essential parts of ensuring equality.

There is need for Anti-Violence Against Women laws that recognize women and men as equal and prohibit discrimination (including all forms of violence) on the basis of sex or gender, giving consideration to how those ends can best be practically achieved.

### CEDAW

In this paper, "CEDAW" and "the Convention" are used interchangeably to refer to the Convention on the Elimination of All Forms of Discrimination Against Women. For clarity, the Committee on the Elimination of All Forms of Discrimination Against Women is referred to as "the CEDAW Committee" and "the Committee."

### Women

Throughout the document, the term "women" generally refers to women of all ages, including girls.

### Gender

The term "Gender" refers to the range of socially-constructed roles and relationships, personality traits, attitudes, behaviours, values, relative power and influence that society ascribes to the two sexes on a differential basis. Whereas, biological sex is determined by genetic and anatomical characteristics, gender is an acquired identity that is learned, changes over time, and varies widely within and across cultures.<sup>1</sup>

### Substantive Equality

"Substantive equality" entails going beyond guarantees of identical treatment and focusing instead on equality of results. It is not enough that laws and policies state formally that men and women are equal; they must take into account prevailing social and other conditions that prevent women from actually experiencing equitable opportunities for physical and economic security and personal realization.

### Temporary Special Measures

"Temporary special measures" to accelerate *de facto* equality are such provisions as affirmative action programs which help to realize substantive equality by allowing women preferential access to positions, for example in government or employment, or benefits, for example those that accommodate maternity.

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<sup>1</sup> INSTRAW Glossary of Gender-related Terms and Concepts, [www.un-instraw.org/en/index](http://www.un-instraw.org/en/index)

**Customary Law**

“Customary law” refers to social and religious rules and practices traditionally used to sanction or recognize relationships between parties, such as marriages, and to resolve disputes. Many customary laws are not codified. In this paper, the term “Buddhist customary law” is used to refer to the rules codified in the *Dhammathats*, governing (among other things) family law matters when the parties are Buddhists. It should be noted that ethnic groups in Myanmar, especially those that are not Buddhist, often follow their own customary laws.

## Background and Legal Analysis

### Introduction

Myanmar acceded to CEDAW in 1997. CEDAW requires States Parties to take comprehensive measures to address women's equality rights in civil, political, economic, social and cultural spheres. As part of its obligations, Myanmar has committed to ensuring that its laws protect and promote women's rights and advance women's equality, taking into account both direct and indirect discrimination and ensuring that the laws, in their effect, enhance women's substantive equality.

The Optional Protocol to CEDAW is an additional treaty which may be signed and ratified by, or acceded to by, States Parties to CEDAW. It provides a communications procedure, whereby individuals or groups of individuals can submit a complaint to the Committee about violations of CEDAW, and an inquiry procedure, which enables the Committee to investigate grave and systematic women's human rights abuses in countries that are States Parties to the Optional Protocol. Myanmar has not signed the Optional Protocol.

This Briefing Paper aims to assess existing laws in Myanmar and their compliance with CEDAW norms. Assessment was undertaken with reference to the laws themselves, where available, as well as to secondary sources, including commentaries produced by a variety of organizations. Because of limits on time and resources, this assessment looks almost exclusively at *de jure* law and does not attempt to address with any rigor the enforcement of the laws. That said, as the CEDAW Committee has stressed repeatedly in its Concluding Observations to States Parties, enforcement of the laws is as important as what the laws say. Enhancing women's access to the legal remedies and ensuring that the laws are applied in practice are critical, if the legal system is to advance women's equality. It is hoped that further, more holistic initiatives can examine more closely the impact of laws on women's lives.

### Methodology

Studies undertaken by UNIFEM<sup>2</sup> have generated CEDAW Legal Indicators to assess whether countries' laws conform to the Convention's principles. It is beyond the scope of this Briefing Paper to exhaustively apply these indicators to the available body of Myanmar laws. They have been used generally as a guide and may be instructive in conducting a fuller legal analysis.

### Context

As a multi-ethnic country whose history includes periods of colonial occupation, Myanmar has a complex legal system with several sources of law. Prior to occupation by the British, Myanmar had its own systems of customary laws. Buddhists relied on the codification of Buddhist law known as the *Dhammathats*. Myanmar's various ethnic groups employed their own customary laws, many of which were unwritten. The British extended to Myanmar many of the laws from British India. Today, Myanmar is a common law legal system that draws on a combination of legislation, case law, and customary law. In the period following independence, new laws were created, but many of the laws still in use, such as the *Penal Code*, date back to the 19<sup>th</sup> century. Additionally, Myanmar has recently promulgated the 2008 Constitution and enacted a number of other laws to deal with emerging situations (such as the *Anti Trafficking in Persons Law*, 2005) and its international treaty obligations (such as the *Child Law*, 1993).

Given that Myanmar's legal framework is drawn from a mix of colonial and traditional sources, it is not surprising that the laws incorporate patriarchal attitudes and socially constructed ideas about gender that view women as requiring protection because they are weaker and less capable than men. Many laws are not compatible with CEDAW, and the law does not sufficiently promote and protect women's rights to substantive equality.

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<sup>2</sup> For example, *Translating the CEDAW into Law; Benchmarking National Legislation; Advancing the Implementation of CEDAW in the Cook Islands; CEDAW Indicators for South Asia; and Do Our Laws Promote Gender Equality?* (For full citations, see Bibliography).

Assessing Myanmar's laws from a gender perspective is complicated by a number of factors. First, although the courts function under a common law system, it is difficult to access texts of the laws themselves (in either Myanmar or English) and reported cases.<sup>3</sup> Without easy access to previous decisions, it is difficult to know how the laws are being interpreted and to what degree *stare decisis* (the principle in which courts base their rulings on previous decisions) is still employed.

Secondly, while Myanmar has acceded to CEDAW, the obligations under CEDAW still need to be incorporated into domestic law.

According to s. 13(1) of the *Burma Laws Act*<sup>4</sup>, customary and religious codes have the force of law and can be relied upon by the courts in decisions concerning "succession, inheritance, marriage or caste". However, in some areas outside of these four categories, victims rely on customary practices outside of the court system to resolve disputes - for a variety of reasons. The fact that victims regularly use customary practices and not the legal system to address complaints is an issue of concern that should be addressed in a more thorough legal review, in collaboration with members of Myanmar's ethnic groups versed in their unwritten customary laws and practices. Thorough documentation of customary laws and practices was unavailable for the writing of this paper.

### **The Constitution and Guarantees of Equality**

The CEDAW Committee has stated repeatedly, in its Concluding Observations and in occasional papers by its members, that it is preferable to have guarantees of women's equality in a country's national constitution. A national constitution is the foundation of a country's laws and is not subject to amendment or repeal with the ease of other types of enactments. In cases where the constitution and other laws are in conflict, the constitution prevails.

In order to harmonize with CEDAW, in addition to providing a guarantee of equality regardless of gender or sex, constitutional provisions should include a prohibition on both direct and indirect discrimination. Formal guarantees of equality that treat all persons the same may not be sufficient to eliminate the differential treatment experienced by women. CEDAW requires a substantive understanding of equality that looks beyond what the laws say, to their actual impact in women's lives. Constitutional equality provisions should also bind both public institutions and private actors.

Sections 347 and 348 of the *Constitution of the Republic of the Union of Myanmar, 2008*, guarantee the legal equality of all citizens, and prohibit discrimination on the basis of, among other things, sex. Section 349 ensures equal opportunities in public employment, occupation, trade and business, and matters related to technology and science, and s. 350 provides for equal pay for equal work.

However, the *Constitution* does not define what constitutes discrimination against women or describe direct and indirect discrimination. This is problematic, because a number of laws draw distinctions between men and women, and s. 352 of the *Constitution* specifically refers to "positions that are suitable for men only", suggesting that women are restricted in their occupational choices because of gendered societal concepts.

The *Constitution* also does not provide any guarantees of substantive equality or contain any clauses describing temporary special measures or affirmation actions that may be taken, for example, to increase women's participation in traditionally male-dominated fields or in government, an issue that the CEDAW Committee raised in its Concluding Observations on Myanmar in 2008.<sup>5</sup>

The *Constitution* authorizes the *Pyidaungsu Hluttaw*, Myanmar's bicameral legislature, to enact laws relating to, amongst other things, the

<sup>3</sup> Most countries have printed and online "reporters" or publications, both government and commercial, that provide written records of the decisions issued by the various levels of court.

<sup>4</sup> *India Act XIII, 1898*.

<sup>5</sup> Concluding Observations of the Committee on the Elimination of Discrimination against Women: Myanmar, CEDAW/C/MMR/CO/3, 7 November 2008, p. 3.



welfare of women.<sup>6</sup> Section 351 holds that mothers, children and expectant women enjoy equal rights as prescribed by law. Although recognition of the special concerns associated with maternity can help to ensure substantive equality, as the CEDAW Committee noted in 2008, the emphasis on women as mothers may serve to reinforce stereotypical gender roles and neglect the concerns of women who for various reasons do not bear children. Additionally, fundamental human rights such as equality should be guaranteed to all persons, regardless of their national status. Since women in some areas of Myanmar lack access to documentation needed to prove their citizenship, they are at risk of being denied gender equality rights.

The Transitional Provisions in the *Constitution* provide that all laws and legislative instruments of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve to the Republic of the Union of Myanmar,<sup>7</sup> meaning that, until they are amended or repealed, existing laws (and other instruments like regulations and orders) remain in effect to the extent that they are not contrary to the *Constitution*.<sup>8</sup> Therefore, despite being invalid by virtue of their inconsistency with the *Constitution*, existing laws may nevertheless continue to be operative until they are challenged and ruled invalid by the Constitutional Tribunal, in accordance with s. 323 of the *Constitution*.

### **Violence against Women and Criminal Offences**

While there is no single article of CEDAW that addresses violence against women, it is considered an extreme form of discrimination, and its elimination is a principle that underlies all of the Convention's articles. The CEDAW Committee discussed violence against women in detail in General Recommendation No. 19. Of particular concern are domestic violence, rape and sexual assault, and the vulnerabilities to these forms of gender-based violence experienced by women in emergencies and

conflict situations. The United Nations Security Council has adopted four resolutions (1325, 1820, 1888 and 1889) on Women, Peace and Security. The resolutions link women's experiences of conflict to international peace and security, and provide a framework for improving the situation of women affected by conflict.

The primary legislation in Myanmar concerning crimes of violence and the punishments associated with them is the *Penal Code*, 1860, which defines "women" as female persons of any age (s. 10). The *Penal Code* dates from the time of British colonial occupation. Not surprisingly, it has few provisions that specifically address gender-based violence. Many of its descriptions of relevant offences use outdated language that does not focus on the key issue, that being the violation of women's personal integrity, and instead calls into question the behaviour of victims, or perceives them as socially diminished by violence.<sup>9</sup> The use of the *Penal Code* in criminal proceedings is governed by the *Code of Criminal Procedure*, 1898 and the Evidence Act, 1872.

Commentaries on CEDAW emphasize that the determining factor in any offences addressing sexual violence should be the woman's consent to the act in question. Agreement to any act obtained under threat or fear of injury or by fraud is not consent under the *Penal Code*, s. 90. Children under the age of 12 cannot be found to have given consent.

### Rape

Section 375 of the *Penal Code* prohibits rape, which it defines as sexual intercourse with a woman either without her consent, against her will, with consent obtained by fear or threat of injury or death, with consent obtained through deception, or if the woman is under the age of fourteen, provided she is not married to the man. The *Code* states that "penetration is sufficient to constitute the sexual intercourse

<sup>6</sup> Section 96, item 9(l) of the Union Legislative List (Schedule 1).

<sup>7</sup> Section 445.

<sup>8</sup> Sections 446 and 447.

<sup>9</sup> Additionally, the *Penal Code* still prescribes "transportation for life" as a punishment for some offences, in reference to a time when Britain kept penal colonies. For the purposes of this paper, those references have been ignored.



necessary to the offence of rape". Rape is punishable with a term of imprisonment of up to 10 years.

There is no specific definition for "attempted rape", but attempted acts are punishable under s. 511 of the *Penal Code* and attract up to half of the full sentence, meaning a conviction for attempted rape is punishable by up to five years' imprisonment.

Under s. 377, "carnal intercourse against the order of nature" is prohibited, regardless of the sex of the victim, with a maximum sentence of 10 years. "Carnal intercourse" refers to non-vaginal sex and includes anal sex, acts of homosexuality and bestiality.

Because "penetration" is not further defined, it is difficult to conclude with certainty what the laws addressing rape capture. Although s. 377 prohibits insertion of the penis into the anus, it is not clear if rape can include insertion of penis into the mouth, or the insertion of objects besides the penis into the vagina. The laws also do not appear to provide specific penalties for unwanted sexual touching that does not include penetration, although general provisions against use of force (s. 350) and assault (s. 354) may apply. Definitions of rape vary widely between jurisdictions. While many domestic laws focus narrowly on penetration and coercion as key elements, recent definitions in international law define an array of violent sexual acts as rape, using terms that range from very specific to very general.<sup>10</sup> The definition of rape in the *Penal Code* would be improved if it encompassed a variety of non-consenting acts of sexual violence, and not just the traditional definition of sexual intercourse.

<sup>10</sup> For alternative definitions of rape, see the World Health Organization ("physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using a penis, other body parts or an object": [Etienne Krug et al, World Report on Violence and Health (Geneva: WHO, 2002), p. 149]) and the International Criminal Tribunal for Rwanda ("a physical invasion of a sexual nature committed on a person under circumstances which are coercive": [International Criminal Tribunal for Rwanda, *Akayesu case*, Judgement ( § 1726).]).

Section 375 creates an exemption for marital rape, unless a "woman" is under the age of 13.<sup>11</sup> In most jurisdictions around the world, the defining feature of the crime of rape is sexual activity without consent, regardless of the identity and age of the survivor. According to the *Evidence Act*, if the woman states that she did not consent, the Court is to presume that she did not.<sup>12</sup> While it varies by country, the age at which a person is able to consent to sexual activity is usually late adolescence, and it is a crime for an adult to engage in sexual activity with a person who is any younger. Sexual intercourse with a child should always constitute a prohibited act.

Sections 493 to 498 of the *Penal Code* concern offences involving deception in relation to marriage, adultery and sexual intercourse. A man who induces a woman to engage in sex on the mistaken belief that she is married to him is liable for up to 10 years' imprisonment. Fraudulent marriage is punishable by a sentence of five to 10 years' imprisonment, depending on the conditions. Adultery by a man is punishable with a sentence of up to five years. The length of these sentences and their similarity to the sentences for rape suggest the emphasis in the *Penal Code* is on outlawing extramarital sex, rather than punishing sexual violence.

The *Code of Criminal Procedure* does not contain any specific provisions regarding prosecution and testimony in rape cases. There are very few -- if any -- legislative protections for taking of evidence from victims of rape. The *Code of Criminal Procedure* and the *Evidence Act* do not provide appropriate protection during witness examination. In cases of rape and sexual assault, government hospitals must obtain permission from the local police before they are permitted to examine and treat patients, in order that evidence is not destroyed. This is regrettable, as women need to be assured the right to medical treatment

<sup>11</sup> The provisions in the *Penal Code* are confusing, but seem to suggest that the punishment for marital rape when the wife is 12 or 13 years old is two years, and that when a wife is younger than 12, the act is considered rape and subject to 10 years' sentence.

<sup>12</sup> *The Indian Evidence Act*, 1872, s 114A.

regardless of whether or not they choose to report the crime.

The legislation also does not indicate whether uncorroborated evidence from the victim will be accepted by a court. According to the *Evidence Act*, if the woman states that she did not consent, the Court is to presume that she did not.<sup>13</sup> In at least one reported case, a Myanmar court stated it was "notoriously unsafe" to convict a man of rape on the uncorroborated evidence of a woman.<sup>14</sup> The lack of cogent legislative direction regarding the prosecution of rape means that decisions as to weight and admissibility of evidence will be left to judicial discretion.

In criminal cases, prosecution for rape may not continue if the victim withdraws from a prosecution or does not wish to testify. Paragraph 443 of the Courts Manual and sections 208 and 247 of the Criminal Procedure Code make it clear that if the complainant does not appear, the judge can only adjourn the case until the victim appears or acquit the accused. A woman may be compelled (including by the accused) to testify, something that is specifically prohibited in some other common law jurisdictions. Arrangements for *in camera* (private) testimony may be made so that the victim does not have to testify in an open court before the public. There is no legal protection for the victim from retaliation after the trial. Some common law jurisdictions have "rape shield laws", which prohibit the use of the victim's prior sexual conduct evidence in establishing consent and protect her identity and privacy. The *Evidence Act* states that past sexual conduct and character evidence may be introduced in cross-examination to impugn a witness' credibility, with the weight to be given the evidence at the judge's discretion. The court may also draw an adverse inference from a witness' refusal to answer questions.<sup>15</sup>

<sup>14</sup> *U Toe Sein v King-Emperor* 40 Cr LJ 525, *Maung Ba Tin v King-Emperor* 5 BLJ 112

<sup>14</sup> *U Toe Sein v King-Emperor* 40 Cr LJ 525, *Maung Ba Tin v King-Emperor* 5 BLJ 112

<sup>15</sup> *The Evidence Act* (1872), s 155 (4).

Finally, while the lengthy sentences of imprisonment available for rape fit the seriousness of the offence, and there are provisions for compensation to rape victims, in practice victims rarely seek compensation. Rape is also an injury, and under the common law, could be the subject of a private tort suit for damages. delete Some countries have also instituted public funds to compensate victims of rape and other crimes for their injuries.

#### Other Forms of Sexual Violence

Several sections of the *Penal Code* codify offences that could be applied in cases of sexual assault and harassment (unwanted sexual touching, attention or threats that compel someone to comply with a request for sexual relations). Section 354 criminalizes assault intended to "outrage [a woman's] modesty", which is punishable by a sentence of up to two years and possible fine. Section 509 provides for imprisonment and/or fine to anyone making sounds, exhibiting objects or behaviour, or acting in a way to insult a woman's modesty.

Since "modesty" is not defined by the legislation, it is not certain what offences these provisions capture. Cases in which s. 354 has been applied give an indication of the breadth of its scope. In one, a person who had touched the genitals a four-year-old child received a combined sentence of three years' imprisonment with labour under ss. 323 (causing hurt) and 354.<sup>16</sup> In another, a girl fell in front of a crowd after being hit by a boy at school, causing her shame. The boy was convicted<sup>17</sup> of outraging her modesty and causing hurt under ss. 323 and 354 of the *Penal Code*.<sup>18</sup> In a third case, a man was charged under s. 354 for taking naked pictures of a woman.<sup>19</sup>

<sup>16</sup> *Ko Thet Naing (a) Thet Kyi v Union of Myanmar and Daw Yu Ya Lin* (2005) Criminal General Application (Special) 214 (Yangon) 14 March 2006.

<sup>17</sup> It is not clear whether the boy was charged or convicted, nor how old the parties were.

<sup>18</sup> *Maung Tun Tun Oo v Union of Myanmar and Ma Yu Yu Maw* (2006) Criminal Revision Case 550 (B) (Yangon) 28 February 2007.

<sup>19</sup> *Maung Tin Han and 9 v Pyidaungsu* (1967) Special 30.

Clear, objective standards for behaviour are essential in order for people to understand what conduct is acceptable, and what is not, and to enable consistency in the application of the law. It is important that, the law, however framed, does not cause fault to be attributed to the victim. Laws implying that a woman must engage in “modest” behaviour invite judicial interpretation of her conduct and dignity based on prevailing social mores and may call into question the woman’s deportment, resulting in decisions that blame the victim. If the intent of these *Penal Code* provisions is to prevent unwanted touching or sexual harassment, whether physical, emotional, visual (through unwanted exposure to sexually explicit images) or verbal, they should identify these unlawful acts more precisely.

Anti-Violence Against Women laws could supply provisions to fill the gaps in the definitions of rape and other forms of sexual violence. They could provide appropriate legal protection to victims of rape relating to evidence and prosecution of cases that would reduce unnecessary distress, and help achieve outcomes that are fair and just. Issues of stigma, discrimination and violence against same-sex attracted and gender non-conforming women could also be addressed.

#### Domestic Violence

Domestic violence is among the most prevalent forms of violence in the world. Addressing domestic violence is complicated by many factors, among them victims’ legal and emotional ties to, and often their economic dependence on, those who are abusing them. However, the greatest impediment to ending domestic violence is the cultural acceptance of it as a family matter. Domestic violence laws are a critical step in moving violence against women from the private to the public sphere. They affirm unequivocally that domestic violence is unacceptable and should be punished. Ideally, a law on domestic violence should prohibit physical, sexual, emotional and economic violence, and extend protection to those in intimate relationships, irrespective of their marital status and living arrangements.

Traditionally, the *Dhammathats* provided that in cases of disagreement a husband could chastise his wife with a light cane or split bamboo.<sup>20</sup> Case law suggests that a wife may submit to ill-treatment and condone it, but if she comes to Court, she is entitled to protection.<sup>21</sup>

There is no legislation that specifically addresses the issue of domestic violence, which means that violence in the context of intimate relationships must be dealt with under the laws that address intentional infliction of injury<sup>22</sup> (ss. 319-338) and assault (ss. 349-358). Similarly for incest and stalking. While ss. 100 to 102 of the *Penal Code* provide the rights to self-defence, arising as soon as there is a reasonable apprehension of danger to the body, there does not appear to be case law dealing with women’s self-defence in the context of domestic violence, as exists in some other common law countries. Also, there are no mechanisms for restraining orders that would enable a woman to prevent a violent spouse, relative or boyfriend from having contact with her.

A law on domestic violence will make it easier to quantify the number of cases of domestic violence referred to the police each year or to understand the magnitude of the problem. Drafting Anti-Violence Against Women laws, including provisions that reflect women’s experiences of domestic violence, would be a useful first step. Such laws could include mandatory sensitivity and gender training for law enforcement officials, the judiciary and health personnel, as well as community and public education programs to increase understanding among men and women that violence includes emotional, verbal, sexual and physical abuse, and that it is not acceptable.

#### Imprisonment

Parliament may legislate with respect to prisons.<sup>23</sup> The primary legislation dealing with women as perpetrators of crimes is the *Prisons Act, 1894*. According to the *Prisons Act*, upon

<sup>20</sup> Ba Tun, *Principles of Modern Burmese Buddhist Law* (Calcutta: Eastern Law Hse [Priv.] Ltd., 1957), p. 97.

<sup>21</sup> *Ma Sat v Maung Nyi Bu* 4 UBR 68.

<sup>22</sup> The text of the *Penal Code* says “voluntarily causing hurt.”

<sup>23</sup> Section 96, Item 10 (g) of the Union Legislative List.

admission to prison, search and examination of female inmates (for prohibited items, and for health assessment) is to be carried out by the prison matron.<sup>24</sup> Female prisoners are to be kept separate from male prisoners to prevent communication and sexual intercourse.<sup>25</sup> Female prisoners are not to be handcuffed, shackled, or whipped.<sup>26</sup>

Chapter IX of the *Child Law* (1993) contains provisions for girls who have been arrested, including s. 37, which provides that if the accused is a girl, she should be guarded by a woman.

A new law should ensure that women continue to be kept separately from men; that they not be subjected to body searches by male guards; that they be protected from physical and sexual assaults while incarcerated; and that they be provided appropriate health care, including sexual and reproductive care.

#### Laws Concerning Sex Work & Trafficking

Article 6 of CEDAW calls on governments to eliminate trafficking in persons and exploitation of prostitution (or sex work).<sup>27</sup> The CEDAW Committee clarified its position on these issues in a background paper in 2003,<sup>28</sup> emphasizing States Parties' responsibility to punish persons who profit from the exploitation of women. The Committee has recommended that sex work be decriminalized, and that uncoerced sex work be treated differently from trafficking, which encompasses the forced movement of persons into a range of abusive work situations.

<sup>24</sup> *India Act* 9, 1894, section 24 (3).

<sup>25</sup> Section 27 (1).

<sup>26</sup> Section 46 (12).

<sup>27</sup> In this discussion, the terms "prostitution" and "sex work" are both used. "Prostitution" is used when referring to provisions in laws that employ that term. "Sex work" is used to refer to sexual services voluntarily provided by adults in exchange for money. Article 6 of CEDAW focuses on exploitation – profit obtained by others from women doing sex work in coerced or abusive situations. It does not prohibit sex work.

<sup>28</sup> *Background paper concerning article 6 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/2003/II/WP.2.

#### Sex Work

Soliciting for prostitution, forcing or enticing a woman into prostitution, and running or working in a brothel are illegal in Myanmar under the *Suppression of Prostitution Act, 1949*. There are also several other laws under which sex workers are frequently arrested.<sup>29</sup>

Section 3 of the *Suppression of Prostitution Act, 1949*, amended in 1998 to increase sentences<sup>30</sup>, criminalizes solicitation or luring of customers for the purposes of prostitution with a term of from one to five years' "rigorous imprisonment" plus possible fine.<sup>31</sup> If the sex worker herself is convicted, the provision provides that she shall serve her sentence in a detention centre. Section 6 provides that anyone procuring a woman to work as a prostitute in a brothel may be subject to the same sentence. Section 12(1) provides that anyone who detains a woman for the purposes of illicit sexual intercourse in a brothel may be sentenced to up to three years' rigorous imprisonment. The 1998 amendments to the *Act* expanded the definition of "brothel" to include other venues that are often used for sexual services, such as massage parlours, beauty salons and karaoke lounges.<sup>32</sup> In one case, the court ruled that the proper penalty for the offence of managing a brothel under s 11(a) of the *Suppression of Brothels Act* was imprisonment: a fine was inadequate.<sup>33</sup>

Prostitution is proven if it can be shown that a woman offers her body for "lewdness"<sup>34</sup> in

<sup>29</sup> Under the *Rangoon Police Act*, a person who is "found between sunset and sunrise, within the precincts of any dwelling-house or other building whatsoever ... without being able satisfactorily to account for his presence therein ... may be taken into custody by any police officer without a warrant, and shall be liable for imprisonment for up to three months."<sup>29</sup> This law is more colloquially known as *Hmaung Yeip Kho Hmu*: "hiding in the dark shadows," and is thought to be applied very broadly, including to sex workers.

<sup>30</sup> *The Law Amending the Suppression of Prostitution Act, 1949* (The State Peace and Development Council Law No. 7/98).

<sup>31</sup> Section 3 (1).

<sup>32</sup> *The Law Amending the Suppression of Prostitution Act*, s 2 (a). "Brothel" means any house, building, room, any kind of vehicle/ vessel/ aircraft or place habitually used for the purpose of prostitution or used with reference to any kind of business for the purpose of prostitution.

<sup>33</sup> *M Ulla v The King* 1938 AIR Ran 107.

<sup>34</sup> This term is also not defined.

exchange for payment (although jurisprudence says a single act is not sufficient).<sup>35</sup> It is not known what evidence is usually received in court as proof, beside *viva voce* testimony of police officers.

Until condoms were legalized in Myanmar, possession of condoms by a woman could be taken as evidence that she was engaged in prostitution. According to Order 1048 (1/2000), condoms are not to be used as evidence to prosecute people under the Act.<sup>36</sup> This is consistent with the Myanmar National Strategic Plan on HIV/AIDS 2011-2015. However, sex workers still report being arrested for possessing condoms, and many massage parlours and KTV (karaoke) lounges that operate as brothels do not permit condoms to be kept on their premises so as not to attract unwanted police attention.

There are no specific provisions in the law to protect sex workers when they are arrested, however the Courts Manual, Paragraph 697 states that Courts may have discretion to release the accused on probation of good conduct. A number of sex workers report that they are often asked to provide sexual favours free of charge to police, and that declining to do so may result in being charged. Sex workers who are raped or assaulted face barriers to reporting the matters to police, and may avoid seeking medical attention for fear of social censure and arrest.

### Children

Under s. 65(a) of the *Child Law*, it is an offence to employ a child to perform work which is harmful to the child's moral character. It is also an offence for a guardian to permit the prostitution of a girl who is under 16, and to permit a child to live with or consort with a person earning a living by prostitution.<sup>37</sup>

Since the age of consent for consensual sex in Myanmar is 14 for girls,<sup>38</sup> sex with any girl

younger than that age is rape. In many countries, adolescents can only consent to sex with another child of similar age; sex with significantly older persons is both rape and child abuse.

### Trafficking

Trafficking and enslavement of persons are prohibited under s. 358 of the *Constitution*. Trafficking is also prohibited by the *Penal Code*, the *Anti-Trafficking in Persons Law*, 2005, and s. 358 of the *Constitution*.<sup>39</sup>

The *Penal Code* provisions address kidnapping for illicit intercourse, although without direct reference to payment or profit. The *Penal Code* prescribes a penalty of up to 10 years' imprisonment plus fine for any person who forcibly kidnaps or abducts a woman (s. 366) or a minor girl under the age of 18 (s. 366A), or imports a woman under the age of 21 into Myanmar (s. 366B), knowing that she may be forced to engage in illicit intercourse. Section 367 provides for a penalty of up to 10 years' imprisonment plus fine for anyone who kidnaps or abducts a person, knowing that they may be subjected to grievous hurt or slavery, or to unnatural lust.<sup>40</sup> It is not unlawful for a man to persuade a woman to go with him with the intention of having sex;<sup>41</sup> however, such an activity may amount to abduction if consent is obtained by coercion.<sup>42</sup> Sections 372 and 373 make it unlawful to sell, let, hire, buy, or otherwise trade a person under the age of 18 with the intention of using the person, or in the knowledge that the person will be likely to be

<sup>39</sup> The *Constitution* is normally paramount in interpretation of overlapping laws. When ordinary acts overlap or conflict, precedence is normally given to the law that was enacted most recently or is most specific. The *Constitution* and the *Anti-Trafficking in Persons Law* correspond on the issue of trafficking, with the *Anti-Trafficking in Persons Law* providing the most complete treatment of offences and penalties. Under the rules of statutory interpretation, the *Anti-Trafficking in Persons Law* would take precedence over the *Penal Code* as it is both more specific and more recently enacted. *Penal Code* provisions are included here for completeness.

<sup>40</sup> "Unnatural lust" is not defined.

<sup>41</sup> *Maung Tin Aung + 3 and Pyidaungsu*, 1966, Head Quarters 1006.

<sup>42</sup> *Maung Aung Nyein and Pyidaungsu*.

<sup>35</sup> *The King v De Munck* 1918 KB1 635 followed, *Sultan v The King* 1947 BLR 337.

<sup>36</sup> Issued by Police Brigadier Zaw Win.

<sup>37</sup> *Child Law*, 1993, s. 66.

<sup>38</sup> See the *Penal Code*, s. 375, which makes sex with a female person under the age of 14 rape.



used, for prostitution, illicit intercourse, or for any unlawful or immoral purpose.<sup>43</sup>

The *Anti Trafficking in Persons Law*, 2005, defines trafficking in persons as: "... recruitment, transportation, transfer, sale, purchase, lending, hiring, harbouring or receipt of persons" with or without their consent, through the use of threat or coercion, abduction, fraud, deception, abuse of power or position of authority, or exchange of money with another having control over the person.<sup>44</sup>

Section 3 defines "exploitation" to include "receipt or agreement of money or benefit for the prostitution of one person by another, other forms of sexual exploitation, forced labour, forced service, slavery, servitude, debt bondage or the removal and sale of organs from the body." It also defines a "child" as a person under the age of 16, and a "youth" as a person who is at least 16, but not yet 18.<sup>45</sup>

The law applies to persons who commit offences under the *Law* in Myanmar, as well as those residing permanently in Myanmar who commit the offences outside the country. In keeping with the notion that anti-trafficking legislation should target the traffickers, trafficked persons themselves are not to be prosecuted under the Act.

The *Anti-Trafficking in Persons Law* provides for sentences of 10 years' to life imprisonment for the trafficking of women, children and youth.<sup>46</sup> Trafficking of other persons carries a term of imprisonment from five to 10 years.<sup>47</sup> It is also an offence to adopt or marry (fraudulently) a person for the purpose of trafficking, and to use or arrange for a trafficked victim for the purpose of pornography.<sup>48</sup> Public officials who demand or accept money or other property in

connection with their duties under the *Law* are liable to imprisonment for a term of three to seven years.<sup>49</sup> Trafficking through organized crime carries a sentence of 20 years to life.<sup>50</sup> The *Law* also allows for seizure of property presumed to have been acquired through the proceeds of trafficking to pay damages to trafficked persons.

The Central Body for Suppression of Trafficking in Persons was established under s. 5 of the *Anti- Trafficking in Persons Law*. The Central Body is responsible for, amongst other things, submitting suggestions to the government for developing anti-trafficking policies and programs, and making arrangements for the relief, resettlement, rehabilitation and reintegration of trafficked victims. Chapter VI of the *Law* contains provisions for the special protection of trafficked victims who are women, children and youth by the Central Body. This includes making arrangements for welfare, legal representation, personal security, medical examination and treatment, and vocational education and training. The Central Body was reorganised in May 2011.<sup>51</sup>

Courts must hold trials for victims of trafficking who are women, children and youth *in camera* to preserve their dignity, physical and mental security.<sup>52</sup> Publication of news about human trafficking at any stage of investigation, prosecution and adjudication requires permission from the Central Body.<sup>53</sup>

The *Anti-Trafficking Law* meets most of the criteria prescribed by the CEDAW Committee, the *UN Trafficking Protocol*,<sup>54</sup> and advocacy groups for safeguarding trafficked women's rights. It includes coercion as a key element in defining trafficking and contemplates varied forms of exploitation beyond coercive sex work.

<sup>43</sup> Sections 372, 373.

<sup>44</sup> Section 3.

<sup>45</sup> This definition and the definition of trafficking mirror the language in the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000.

<sup>46</sup> Section 24.

<sup>47</sup> Section 25.

<sup>48</sup> Sections 26 and 27.

<sup>49</sup> Section 30.

<sup>50</sup> Section 33.

<sup>51</sup> Notification 18/2011 (27 May 2011). It is not certain at the time of writing what the reorganization entailed.

<sup>52</sup> *Anti Trafficking in Persons Law*, 2005, s. 11 (a).

<sup>53</sup> Section 11 (b).

<sup>54</sup> *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000.

It requires the identities of trafficked persons be protected to preserve their privacy and provides for services to trafficked persons.

At the same time, two issues remain problematic with the legislation. The first is that the law states that services will be provided to trafficked persons using state and *donated* funds.<sup>55</sup> Reliance on donated funds, rather than a dedicated budget, may compromise the full range of services available to trafficked persons. Secondly, the *Law* requires appropriate training on gender and issues of trafficking for those persons in positions of authority entrusted with protection trafficked persons.<sup>56</sup> It does not explicitly require training of police, border police, or members of the judiciary. Given that these are the first contacts trafficked persons are likely to have following arrests of traffickers, and the possibility that sex workers (who comprise a significant portion of trafficked persons in the region) could be mistreated by police, it is important that these personnel are prioritized for training.

### Health Laws

CEDAW provides that a woman's health should be protected throughout her life cycle. This includes, but is not limited to, sexual and reproductive health. Prevention of violence and provision of appropriate and accessible health services are critical to ensuring that woman have personal autonomy and the opportunity to make choices regarding their health and their bodies. Because women's responsibilities in bearing and raising children impact their access to education, employment and other activities related to their personal development, as well as their physical and mental health, laws should empower women to regulate the number and spacing of children and to terminate unwanted pregnancies.<sup>57</sup>

The *Constitution* empowers Parliament to legislate with respect to maternal welfare.<sup>58</sup> The Constitution states that "Nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person".<sup>59</sup>

Under the *Penal Code*, s. 312A, intentionally aborting a pregnancy<sup>60</sup> is illegal, except for the purpose of saving the life of the woman. Any person performing a first-trimester abortion, including any woman who induces her own abortion, may face up to three years' imprisonment and/or be required to pay a fine; this sentence can extend to seven years if the woman is "quick with child" – a term used to describe when the foetus can be felt moving, usually in the second trimester of pregnancy at approximately 16 weeks.

Criminalizing abortion increases the likelihood that women will rely on unqualified or untrained persons, or attempt to perform abortions by themselves to terminate unwanted pregnancies, resulting in serious complications such as infection and injury, and not infrequently, death. Legalizing abortions by medical practitioners could significantly decrease the rate of maternal mortality in Myanmar and protect women's health.

Sections 312B to 312D also criminalize any sterilization procedure that has not been certified by a medical board as necessary for the patient's physical or mental health, with a punishment of up to three years plus fine for both the practitioner conducting the sterilization and the patient. Sentences of ten years and life are available for sterilizations without consent or causing death. That sterilization is restricted for both women and men does not make these provisions more equitable in effect. Since only women can become pregnant, they are the ones who are substantively affected when they and their spouses are not able to choose sterilization in

<sup>55</sup> Section 22.

<sup>56</sup> Section 8.

<sup>57</sup> See CEDAW General Recommendation No. 21, accessed at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

<sup>58</sup> Section 96, item 9(I) of the Union Legislative List (Schedule 1).

<sup>59</sup> Section 353.

<sup>60</sup> The term used in the provision is "voluntarily causing miscarriage".



order to prevent pregnancy. Additionally, hospital regulations require that a woman obtain the signatures of her husband and doctor on any application for sterilization. While it is preferable that decisions regarding whether or not to have children are taken in consultation with both partners, a woman should nevertheless be entitled to make this decision about her own body, and this decision should not be limited by either spouses or governments. Removing this provision from the *Penal Code* and revising hospital regulations to remove the need for a spousal signature would result in better health outcomes for women and greater reproductive choice.

Section 21 of the *Law relating to the Nurse and Midwife*<sup>61</sup> makes it illegal for anyone to practise midwifery without a licence, on penalty of up to one year's imprisonment plus fine. Given the limited reach of medical services in some rural areas of Myanmar and the heavy reliance of women in these areas on traditional birth attendants, this provision may be unduly harsh, even if its aim is to ensure that women receive the best quality services available. It would be more effective to extend the education and certification of midwives and traditional birth attendants, to raise the standard of services available to women, than to penalize those providing services within their budget or geographic reach.

### Family Law

Recognizing the potentially harmful influence of gender stereotyping arising from religious and cultural views of the roles of women in families, the CEDAW Committee has emphasized that women should share with men the same rights to enter into marriage and freely choose their spouses, as well as the same rights and responsibilities during marriage and on its dissolution. In order to prevent child marriages, legislation should specify a minimum age for marriage and make the official registration of marriages compulsory. The Committee stated in General Recommendation 21 that the

minimum age for marriage for both men and women should be 18.<sup>62</sup>

The Committee has also stated explicitly that legal provisions on fault-based divorce should be abolished for a variety of reasons, including the fact that they make it more difficult for women to extricate themselves from violent relationships.<sup>63</sup> The Committee has stressed that both parents have a responsibility to support children, and that custody arrangements should always take into account the best interests of the child.

As noted above, there are multiple sources for the laws relating to marriage, divorce, inheritance<sup>64</sup> and child custody in Myanmar, generating conflicting standards. The laws that apply depend on the religion of the parties to the dispute.

Prior to British occupation, Myanmar courts ruled using the *Dhammathats* (derived from the Hindi term *Dharmashatra*, meaning "treatise on laws"), a consolidation of customary rules, writings, and decisions of previous judges collectively known as customary law. Because British courts during the colonial period were expected to apply customary law in situations involving Buddhists, the *Dhammathats* were translated into English during the latter part of the 19<sup>th</sup> century. The *Dhammathats* continue to be applied in family law decisions involving Buddhists, although the Myanmar courts have recognised that customary law is constantly evolving, and that some elements of the *Dhammathats* may not be suitable for contemporary Myanmar society.<sup>65</sup>

<sup>62</sup> While this discussion focuses on heterosexual relationships, equality principles also should apply to, and invite consideration of, same-sex relationships. Representatives of LGBT (lesbian, gay, bisexual and transgendered) communities should be involved as stakeholders in discussion of revisions to Myanmar family laws.

<sup>63</sup> Concluding Comments of CEDAW Committee: Luxembourg (2008) 40th Session at para. 34 (UN Doc CEDAW/C/LUX/CO/5).

<sup>64</sup> For want of documentation, inheritance will not be addressed here.

<sup>65</sup> *Daw Khin Mya Mar (a) Mar Mar vs. U Nyunt Hlaing* (1972) First Civil Appeal of Chief Court, No. 38. See also *Daw Kyi Kyi v Mrs Mary Wain* (1971) 11 BLR (SC) 52.

<sup>61</sup> The State Law and Order Restoration Council Law No. 19/90.

The CEDAW Committee noted, in paragraphs 46 and 47 of its 2008 Concluding Observations on Myanmar that discriminatory customary practices persist, especially in ethnic communities, with regard to marriage and its dissolution, as well as family relations, including inheritance. Ethnic groups including the Arakan, Chin, Kachin, Karen, Kayah, Mon and Shan, have engaged in their own customary practices in both family and community matters, some of which are not codified.<sup>66</sup> Since colonial times, Christians have been governed primarily by British common law, along with the *Christian Marriage Act*, 1872, requiring registration of marriages, and the *Burma Divorce Act*, 1869,<sup>67</sup> which authorizes the court to pronounce on divorce, nullification of marriage, and judicial separation. Marriage between Hindus (together with Sikhs) and Muslims is governed by other legislation, case and customary law. The discussion below focuses primarily on Buddhists, who make up the majority of the population. Nonetheless, it is important that all ethnic groups be considered and consulted in programs for law reform.

#### Conditions for Marriage

All laws relating to marriage in Myanmar require the consent of both the parties; most require explicitly that parties be of sound mind. Buddhist customary law allows a woman to marry without her father's consent when she is 20 years of age or older, provided she is single. If a woman is younger than 20 but older than 15, she must obtain her father's consent, unless she is a divorcee or a widow.<sup>68</sup> Courts have interpreted the requirement of the father's consent to mean parents' or guardians' consent generally.<sup>69</sup> However, in practice, a girl who has attained the age of 18 years can marry without her parents' consent before a judge under the *Contract Act*. Presumably, girls younger than 15 cannot marry; however, the provisions on marital rape in the *Penal Code* would suggest otherwise. Men can marry without parental

consent once they reach physical maturity (puberty).

There is a body of case law dealing with promises to marry. It has been held that a woman can sue for damages for breach of promise to marry, but not for seduction.<sup>70</sup> If a boy under the age of 18 makes such a promise without the consent of his parents, the "contract" is normally voidable. However, if he has intercourse with the woman, his parents may not withhold consent, and he can be sued for breaching his promise.<sup>71</sup> If a boy publicly promises to marry a girl and engages in sexual conduct with her, he is bound by his promise, and he (and his parents) can be sued for damages.<sup>72</sup> A Myanmar woman can claim damages despite the absence of a promise to marry if she is induced by a Buddhist man to have sexual intercourse and she becomes pregnant.<sup>73</sup>

Bigamy is legal under Buddhist customary law, and the *Dhammathats* mention infertility (or the failure of a wife to bear sons) as a reason for a man to divorce or take another wife. If he does so without the consent of his first wife, the first wife can refuse to stay together with the second wife, and does not lose her rights as a first wife.<sup>74</sup> However, in one case, the court held that the first and second wife have equal legal status, and that the *Buddhist Women's Special Marriage and Succession Act*, 1954 was intended to protect the rights of women who had been treated as lesser wives or as concubines.<sup>75</sup> Polygamy is also legal under Muslim customary law and is practised in some Muslim communities in Myanmar.

While recognition of a variety of means of consecrating marriages may be beneficial in a pluralistic society like Myanmar, setting a

<sup>70</sup> *Ma You v Maung Po Lu* 2 UBR 499.

<sup>71</sup> *Maung Tun Kyin v Ma Mai Tin* (1910) 10 LBR 28.

<sup>72</sup> *Maung Ye Nyein Aung and Three v Ma Khin San Nwe (Minor and her guardian Mother Daw San Myint)* (2010) Special Civil Appeal No. 11 MLR 69.

<sup>73</sup> *Maung Myo Chit v Ma Pu* (1987) BLR 108, overruling *Ma Yan v Maung Phoe Lu* 2 UBR (1897-1901) 499.

<sup>74</sup> *Ma Kar Oo v Phoe Soe* 4 LBR 340. It is not clear whether the first wife has the right to prevent the second from moving into the same residence.

<sup>75</sup> *Daw Kyi Kyi v Mrs Mary Wain* (1971) 11 BLR (SC) 52.

<sup>66</sup> Since these customary laws are not available, they have not been considered here.

<sup>67</sup> While the text of this Act was not available, it is substantially the same as the *Indian Divorce Act*, 1869.

<sup>68</sup> Manugye Book VI, ch 28.

<sup>69</sup> *Ma Khin San Win v Maung Tin Myint* 1977 BLR p 12.

common minimum age (preferably 18) and standard for consent by both parties, eliminating parental consent, and requiring registration of all marriages would further women's equality and autonomy in marriage. The CEDAW Committee has expressed concern about the persistence of bigamy and polygamy in Myanmar law and recommended revising the laws to eliminate these practices in its 2008 Concluding Observations.

In 1998, the Chief Justice of the Supreme Court issued an order (Reference No. 3604/Su 1 (*gange*)86/98 prohibiting registration of marriages of Myanmar women to foreigners, in order to prevent women from being trafficked. This restricts the rights of women to freely choose their life partners.

Buddhist customary law recognizes the marriage of a couple publicly cohabitating without the requirement of other formalities, and without proof of physical consummation of the marriage.<sup>76</sup> The *Buddhist Women's Special Marriage and Succession Act*, 1954, s 20 (1), incorporated this presumption explicitly in its provisions dealing with non-Buddhist men and Buddhist women, and the principle has been applied in several cases.<sup>77</sup> This suggests that relationships involving Buddhist women that might be referred to as "common law" in other jurisdictions - that is two unmarried persons living together as though married, will attract the same legal consideration afforded marriages that are registered or otherwise formalized, thereby enhancing women's property rights. Going one step further and codifying the recognition of all common law relationships would enable all women in Myanmar to rely on this legal protection when such relationships dissolve.

#### Divorce

Adultery and cruelty are often grounds for divorce. A spouse can also claim desertion if the

other spouse abandons the marriage and does not return for three years.

According to Buddhist customary law, there are three grounds upon which a Buddhist man can initiate divorce: through mutual consent of the parties;<sup>78</sup> by leaving the marriage to enter a Buddhist monastery; or by claiming "matrimonial fault" by his wife.<sup>79</sup>

Buddhist women can file for divorce on the grounds of cruelty. This requires ill treatment in the form of physical violence or the infliction of mental pain.<sup>80</sup> Physical assault by the husband is considered "matrimonial fault." There is authority supporting the notion that divorce may be granted on proof of a single act of cruelty on the part of the husband.<sup>81</sup> However, subsequent conflicting authority suggests that cruelty means bodily torture that endangers health and places the wife in danger of being hurt or killed.<sup>82</sup> A Buddhist woman also has the right to divorce her (Buddhist) husband if he marries another woman without her consent.<sup>83</sup>

Some sources suggest that a Buddhist woman is entitled to unilaterally divorce her husband on the grounds of ill treatment, even if it does not amount to legal cruelty.<sup>84</sup> However, this may require her to pay for the costs of the divorce suit, and forego all rights to the joint properties of the marriage. More recent authority suggests that "mere caprice without proof of some matrimonial fault" is not sufficient, even if the party wanting to divorce is prepared to surrender his or her share of the joint property and to pay compensation".<sup>85</sup> This seems to

<sup>78</sup> *Daw A Ma v Daw Khin Tint* (1964) BLR 314; *Daw Hla Kyi v Daw Hel Lin* (2003) MLR 127.

<sup>79</sup> The term "matrimonial fault" is not defined in the *Dhammathats* but has been subject to some judicial interpretation: see below.

<sup>80</sup> *Mrs Pritima Ghosh v Bima L Ghosh* (1962) Burma Code 526.

<sup>81</sup> *Ma Gyan v Su Wah 11* (1897) Lower Burma (1897-01) 28; *Ma Sat v Maung Nyi Pu 4* UBR 68 (1921-1922).

<sup>82</sup> *Ms Than Tun and U Than Tun* (1960) MaSaTa 256.

<sup>83</sup> *Maung Set Maung v Ma Kyin Twe* (1963) BLR p 297. Property rights in such cases are unclear.

<sup>84</sup> *Ma Their Mya v Maung Tun Hla* 11 LBR 385.

<sup>85</sup> *Maung Kywe v Ma Kyin* (1930) 8 Ran 411. Also see *Daw Ahma v Daw Khin Tine* (1964) BLR 314.

<sup>76</sup> *Daw Khin Mya Mar (a) Mar Mar vs. U Nyunt Hlaing* (1972) First Civil Appeal of Chief Court, No. 38.

<sup>77</sup> *Maung Thein Maung v Ma Saw 6* Ran 340; *Maung Sein Nyunt v Ma Aye Kyi* (1962) BLR 404; *Ma Tin Thein vs. Mg Win Khaing* (1965) BLR 199.

indicate that it is difficult for a woman to initiate divorce without her husband's agreement.

While no-fault divorce by mutual consent does exist under Buddhist customary law, it is socially discouraged. Under customary law, a woman cannot leave home and refuse to return to her husband if he demands so.<sup>86</sup> When a couple separates by mutual consent, the wife is not entitled to any maintenance or spousal support payments.

Christian divorces are regulated by the *Burma Divorce Act, 1869*. The grounds for divorce s. 10 in the *Act* are, for the man, adultery, and for the woman, adultery (coupled with various conditions, including with incest, bigamy, remarriage, cruelty or desertion for a period of two or more years), rape, sodomy and bestiality. A woman may also divorce her husband if he changes his religion or marries another woman. When the grounds for the application are adultery accompanied by cruelty, the court will effect a judicial separation, whereby the parties live separately but remain formally married. The *Act* does not give a woman the option of filing for divorce on the grounds of cruelty alone.

According to Mohammedan (Islamic) customary law, a Muslim man can divorce his wife on his own accord merely by saying "Talaq" ("I divorce you") three times to his wife.<sup>87</sup> A Muslim woman has no such right.

A Hindu woman cannot divorce her husband.

The many qualifications constraining a woman's ability to divorce increase the likelihood that they will remain in unhappy and, in some cases, abusive situations. It is not known whether courts or religious tribunals actively encourage couples attempting to divorce to reconcile. Forced or coerced reconciliations can prevent individuals from making important and often difficult life choices.

<sup>86</sup> *U Ohm Thoung and Daw Aye Chit* (1976) MLR 86.

<sup>87</sup> One lawyer noted that this may mean that divorce can be effected by telephone, email or SMS message.

#### Property Division

Women generally enjoy the same rights generally as men under Myanmar civil law to hold and transfer property. Buddhists share jointly a portion of the property brought into the marital union.<sup>88</sup> Some authors and judicial authorities have described this as "tenancy in common," which can lead to some misunderstandings in the context of partition and succession. Each party maintains a personal share in two thirds of the property acquired before marriage, and an equal share of property acquired during marriage, although this can be varied depending on circumstance. Accordingly, there is no automatic presumption of equal division of property upon divorce. As noted previously, under Buddhist customary law, if a husband divorces his wife because of adultery, the wife forfeits her claim to any share in their joint property. Initiating a divorce may be an impossibility for many women who fear leaving a marriage with little economic support.

The *Special Women's Marriage Act, 1872* was promulgated to protect women's property rights when women married men of different religions practicing different marital property schemes.<sup>89</sup> Under s. 25(1) of the *Act*, if a Buddhist woman marries a non-Buddhist man, and the man divorces without cause, deserts, or causes distress through cruelty, he must surrender his share of the property owned by both, and pay indemnity to the woman.

#### Maintenance and Child Custody

Parliament may legislate with respect to maternal and child welfare, as well as social security.<sup>90</sup> At present, there does not appear to be legislation guaranteeing a right to maintenance or *requiring* court scrutiny of arrangements for maintenance in the form of spousal or child support at the dissolution of marriage, although a court *may* intervene on application. Under Buddhist customary law,

<sup>88</sup> *Ma Ohn Kyi vs. Ma Hnin Nwe*, 1953, B.L.R. Hluttaw p. 392.

<sup>89</sup> The first *Buddhist Women's Special Marriage and Succession Act* also came into force around the same time that British women were first granted separate property rights from their husbands.

<sup>90</sup> *Constitution*, s 96, items 9 (i) and 9 (q) of the Union Legislative List.

spousal maintenance was settled through negotiation between the parties.

In terms of child custody, the *Dhammathats* traditionally gave custody of male children to the father and female children to the mother. Under s. 25(1) of the *Buddhist Women's Special Marriage and Succession Act*, a Buddhist woman whose non-Buddhist husband has divorced or deserted her, or caused distress through cruelty, shall also be granted custody of the couple's children. The man must provide for maintenance of minor children. In practice, women often have *de facto* custody of children in divorce.

Section 488 of the *Code of Criminal Procedure* affirms the moral obligation of fathers generally to pay child support. A judge may order a man who has sufficient means to pay a monthly allowance for the maintenance of his wife and children.<sup>91</sup> The sum of money is usually negligible,<sup>92</sup> and the woman must first prove neglect or refusal to pay maintenance and may not be entitled to receive such an allowance if she refuses to live with her husband "without any sufficient reason". If maintenance is ordered, it is not clear what special enforcement mechanisms exist, and whether, for example, a former wife may apply for orders garnishing wages or property of her ex-husband. Strengthening provisions for maintenance and child support would provide legislative recognition that both parents bear responsibilities for the welfare of their children.

In conclusion, in addition to Anti-Violence Against Women laws, the creation of a harmonized family law, drafted with the input of women's groups and other stakeholders representing the country's different religious and ethnic groups, and reflecting the values and context of contemporary Myanmar society, would greatly streamline adjudication and settlement of family decisions and bolster women's personal and economic rights, within the family and beyond.

<sup>91</sup> *The Code of Criminal Procedure*, s. 488.

<sup>92</sup> Reported to be only 100 kyat.

### Laws on Nationality

Proof of citizenship is fundamental, as it is the basis for enjoyment of the rights to equality, various civil liberties such as freedom of expression, participation in government representation, and choice of residence. The Constitution, s. 347, guarantees all persons equal rights and protection before the law. Criminal sanctions are applied without reference to the nationality of victims, and labour protections in the *Constitution* are guaranteed to all women. However, many other constitutional provisions apply only to citizens.

Neither the *Constitution* nor the 1982 *Citizenship Law* contains provisions that discriminate against women with regard to their rights to hold citizenship or transmit it to their children in comparison with men. Additionally, the *Child Law*<sup>93</sup> guarantees every child citizenship in accordance with the provisions of the existing law.

Nonetheless, women in rural areas often lack the means to prove their citizenship with appropriate documentation or to acquire *hmat pon tin* (identity cards), because of the lack of civil administrative services in their areas, or because their families do not have the money to pay processing fees. This has been found to have a significant negative impact on women who migrate from rural to urban areas to work, and on sex workers, who may avoid contact with authorities.<sup>94</sup> Women who do not have identity documents cannot register their children's births, which may affect their children's access to the rights and services accorded citizens, including the right to attend school. Additionally, women who have born children outside of Myanmar may have difficulty conveying citizenship to their children.

The Muslim population of northern Rakhine State without citizenship, which numbers more

<sup>93</sup> *Child Law*, 1993, s. 10.

<sup>94</sup> The *Constitution*, s. 347, guarantees all "persons" equal rights and protection before the law. Criminal sanctions are applied without reference to the nationality of victims, and labour protections in the *Constitution* are guaranteed to all "women". However, many other constitutional provisions apply only to citizens.



than 797,000 persons, and constitutes the largest ethnic group in northern Rakhine State [NRS], faces a number of restrictions, many of which affect women. These restrictions, some of which are through the Regional Degree 1994, include: requirements for marriage permissions; limits on the number of children allowed; restrictions on access to higher education; prohibition of the registration of 'unauthorized' children; amongst others.

There is a requirement in NRS to obtain marriage authorization from the local authorities, which is normally a complicated, lengthy and expensive procedure. Failure to obtain authorization can result in susceptibility to extortion, arrest and even imprisonment (in some cases, imprisonment of up to five and half years where couples are charged with other offences at the same time). In recent years, there has also been a prohibition against having more than two children (imposed only on Muslims in NRS). Although the prohibition has not been strictly enforced by authorities, it results in a lack of registration for third and subsequent births; registration for these children has become more expensive. Where birth registration is late or where a child is born outside of an officially authorized marriage, birth registration becomes difficult, expensive and in many cases even impossible.

The traditional religious and socio-cultural practices in NRS further disadvantage women and girls. Many girls are prevented from accessing basic services such as health care, attending school after puberty or participating in skills training and employment or economic activities outside the confines of their homes. Norms are reinforced and perpetuated by community and religious leaders, as well as by the young men in the family, who assume a dominant role at adolescence.

#### **Labour Laws**

As noted previously, the *Constitution* protects the rights of all citizens to choose their occupations (s. 349) and provides that women should receive equal pay for work of similar value (s. 350). It is not known if other labour laws ensure the range of women's rights to

employment or prohibit discrimination on the basis of sex in terms of advertisement of job opportunities, hiring and dismissal of workers.

Given that many fields in Myanmar are dominated by one sex, the legislature may wish to consider legislating for temporary special measure to facilitate women's entry into male-dominated work. Labour laws could also prohibit dismissal on account of marital status, pregnancy and maternity, and require employers to provide paid parental leave for a reasonable period after the birth of a child. Anti-discrimination laws protecting the conditions of work should include penalties for sexual harassment in the workplace, including physical, mental, and verbal forms of harassment, and exposure to sexually explicit visual materials. They should also provide for the establishment of appropriate tribunals through which women can seek remedies.

Additionally, a large number of women work in the informal sector, and as such, lack access to social protection and benefits as well as legal mechanisms for redress. Providing a regulatory framework for the informal sector would help to ensure that women's rights there are protected.

In northern Rakhine State there are particularly few job opportunities for women, which is in part due to the role of women in society and cultural and religious norms. The majority of women are illiterate and confined to doing household chores. Female headed households live from the charity of relatives and begging, unless they are fortunate enough to be employed as household help for other Muslim or Rakhine villagers.

#### **Laws Concerning Women's Representation in Government**

To facilitate the creation of more gender-sensitive laws and policies, women must be part of the process. The CEDAW Committee has endorsed measures adopted by a number of states to ensure equal participation by women in senior cabinet and administrative positions, including preferential appointment of qualified women candidates; rules that neither sex should constitute less than 40% of the members

of any public body; and quotas for women in cabinet and the legislature.

Although the Constitution guarantees women's rights to run for public office and to vote, there is a marked disparity between the number of women and men in government. Few women in Myanmar hold positions as senior civil servants or at the top levels of government ministries. Even fewer have been elected to the *Pyidaungsu Hluttaw*. The legislature should consider adopting affirmative action plans and enshrining these plans in appropriate legislation, until greater parity can be achieved. Commonly in international women's right forums, governments are encouraged to strive for targets of 30% female representation in legislative bodies and publicly appointed positions.



**Conclusion**

Legislative reform is needed to bring the body of Myanmar's laws into greater compliance with CEDAW. In conducting a proper assessment, none of the laws should be looked at in isolation. Particular attention should be paid to laws that limit women's autonomy by restricting their power to make decisions with respect to their health and in the family. Laws that aim to eradicate violence should be evaluated to ensure that they respect women's physical and mental integrity and that they promote access to justice and appropriate redress. Family laws should be reviewed with a view to establishing a baseline set of universal standards for marriage, divorce, property division, maintenance and inheritance rights, while still allowing for expression of ethnic and cultural diversity.

Protection from violence, in all aspects of women's lives, is a theme that runs throughout the preceding discussion. Attempting to revise the entire body of existing legislation to provide effective protections in the various aspects of women's lives could prove a laborious task. Additionally, amending the *Constitution* to provide greater equality protections is something not easily and lightly undertaken.

The creation of new Against Women laws would be a comprehensive way of revising legislation and addressing violence in a myriad of contexts. New laws could effectively fill the gaps in existing legislation, particularly with respect to sexual violence, and clarify issues of conflict between laws by superseding inadequate, inappropriate or discriminatory measures. It could provide specific, appropriate provisions addressing domestic violence, workplace harassment, and victim support, where no legislation currently exists. New laws could also strengthen existing provisions in the *Constitution* and provide a definition of discrimination that harmonizes with CEDAW, while creating institutions to enforce penalties for discrimination. Drafting Anti-Violence Against Women laws could present an opportunity to mandate training for law enforcement officers and the judiciary in gender and women's human rights issues. Specific

measures could be included to contribute to the development of mechanisms for monitoring enforcement of the laws. While legal renewal is only one step in the process of implementing CEDAW norms, it would provide a strong foundation for the realization of women's substantive equality in Myanmar.

There is no single formula for legal reform. Appropriate next steps may depend very much on the circumstances that exist in the particular jurisdiction. That said, any process of amendment should be undertaken with the direct input of women and women's organizations, other stakeholder groups in the community, as well as legal experts and government officials, and should recognize that culture is not static but capable of adapting to new understandings of women's status and rights.

Myanmar Laws And CEDAW

The Case for Anti-Violence Against Women Laws

**Table 1: Summary Assessment of the Gender Equality of Myanmar's Laws**

| Relevant Legislation                      | CEDAW Article(s)                | Indicator  | Compliance  | Recommendations for Amending or Drafting New Legislation   |
|---|---------------------------------|--|---|--|
| Constitution                              | 1, 2                            | The Constitution should provide a guarantee of equality that extends fundamental human rights and freedoms to men and women equally in the political, economic, social, cultural, and civil or any other field.<br>It should also provide a definition of substantive equality and prohibit both direct and indirect discrimination. | Partial – provisions referring to work that is suitable to men and to women as mothers are problematic. Equality rights are guaranteed only to citizens, even though they are fundamental human rights. | Modify provisions that refer to stereotypical gender roles.<br>Provide a definition of substantive equality (equality in results, rather than formal equality that provides identical treatment).<br>Prohibit both direct discrimination and discrimination in effects.<br>Extend equality rights to all persons in Myanmar. |
| Constitution, labour laws                 | 4                               | The Constitution and other legislation should, where appropriate, provide temporary special measures for the accelerated advancement of women's equality.  | No  | Enact temporary special measures, including in the fields of labour and women's representation in government, decision making and leadership.  |
| Penal Code                                | 1, 2, General Recommendation 19 | Rape should be defined to include sexual various acts undertaken without consent.  | Partial   | Expand the definition of rape to include all acts of a sexual nature undertaken without consent that threaten the physical and mental integrity of the victim.<br>Review the age for statutory rape (the minimum age of consent)   |
| Penal Code                                | 1, 2, General Recommendation 19 | Marital rape should be prohibited.   | No  | Remove the exemption for marital rape.   |
| Code of Criminal Procedure                | 1, 2, General Recommendation 19 | Protections should be provided to victims of rape and other forms of violence, during examination for evidence and throughout prosecution, including trial.  | No  | Enact specific provisions, including rape shield laws and specific provisions relating to evidence, to protect victims' privacy and prevent further trauma while giving evidence or participating in prosecutions for rape or domestic violence.   |
| Penal Code and Code of Criminal Procedure | 1, 2, General Recommendation 19 | In addition to being a criminal offence, rape should attract civil penalties in the form of damages  | No  | Establish funds to provide victims of rape with compensation for injuries, and/or provide for the possibility of civil suits against perpetrators for  |

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| Relevant Legislation        | CEDAW Article(s)                    | Indicator   | Compliance  | Recommendations for Amending or Drafting New Legislation   |
|-----------------------------|-------------------------------------|---|-------------|--|
|                             |                                     |   |             | damages.   |
| Penal Code                  | 1, 2, General Recommendation 19     | Sexual assault and harassment should be defined in criminal provisions  | No          | Enact specific provisions to deal with unwanted sexual touching, attention or threats that compel someone to comply with a request for sexual relations. Replacing language that refers to modesty with language referencing consent.  |
| Penal Code                  | 1, 2, General Recommendation 19     | Incest should be prohibited and assurances made that any laws do not penalize victims.  | No          | Criminalize incest, but ensure that provisions differentiate between perpetrators and victims, so that victims are not charged.  |
| Penal Code                  | 1, 2, General Recommendation 19     | Domestic violence is an extreme form of discrimination against women. Criminal penalties work to state publicly that domestic violence is unacceptable and to deter violence. Any laws should recognize the vulnerabilities that women victims face and their needs for appropriate support, including counselling, housing and legal services. | No          | Enact specific laws or Penal Code provisions on domestic violence, including the following:<br>The definition of domestic violence should include acts between people in intimate relationships or who are not married or cohabitating.<br>Stalking should be among the prohibited offenses. Provisions should allow women to seek restraining orders prohibiting contact by those who are potentially violence.<br>There should be a policy of mandatory enforcement, regardless of whether victim withdraws consent to proceed with prosecution.<br>Services should be provided to victims, including shelters, counselling, and legal services. |
| Prison Manual               | 1, 2, 12, General Recommendation 19 | The rights of women prisoners not to be subjected to violence while incarcerated should be recognized in penal laws.  | Not certain | Women should be kept separately from men and should not be subjected to body searches by male guards. Women should be protected from physical and sexual assaults while incarcerated. Women should be provided appropriate health care, including sexual and reproductive care.  |
| Penal Code                  | 6                                   | Sex work laws should target those exploiting women and not women sex workers. Sex workers' rights should enjoy protections from violence as other women.  | No          | Amend laws on prostitution to decriminalize soliciting and protect rights of sex workers, including during arrest and detention.   |
| Anti-Trafficking in Persons | 6                                   | Laws should recognize coercion as a key   | Yes         | The Anti-Trafficking in Persons Law meets the main   |

Myanmar Laws And CEDAW

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| Relevant Legislation   | CEDAW Article(s) | Indicator   | Compliance | Recommendations for Amending or Drafting New Legislation  |
|--|------------------|---|------------|---|
| Law  |                  | element in defining trafficking. Trafficking should encompass a range of coerced activities. Law should target traffickers and provide protections and services to victims.   |            | criteria for a defining, prosecuting and penalizing trafficking as laid out by international organizations devoted to trafficking issues and the United Nations.  |
| Penal Code   | 12               | Abortion should not be criminalized, in order that women enjoy reproductive health and autonomy.  | No         | Decriminalize and regulate abortion to reduce maternal mortality.   |
| Hospital regulations   | 12               | Sterilization should not be restricted by provisions requiring consent of those other than the person seeking sterilization, such as spousal or parental consent.   | No         | Remove restrictions on medically administered sterilizations.   |
| Various, including the Dhammathats, ethnic customary laws, Buddhist Women's Special Marriage and Succession Act, Hindu and Islamic religious laws, Burma Divorce Act | 16               | Marriage should be monogamous. Free consent of the parties is required. The minimum age for both sexes to marry should be 18. All marriages should be registered.<br>Allowing men to take more than one wife at a time is discriminatory towards women. | No         | Establish a standard minimum age of 18 for marriage in legislation.<br>Requirements the parties' consent only (not that of parents or relatives).<br>Require that all marriages be registered.<br>Amend the laws to prohibit bigamy and polygamy. |
| Various, including the Dhammathats, ethnic customary laws, Buddhist Women's Special Marriage and Succession Act, Hindu and Islamic religious laws, Burma Divorce Act | 16               | Divorce should not require women to prove cruelty, adultery or desertion, as this may prevent them from ending difficult marriages.   | No         | Enact a law providing for no-fault divorce.   |
| Various, including Dhammathats, ethnic customary laws, Buddhist Women's Special Marriage and Succession Act, Hindu and Islamic religious laws, Burma Divorce Act     | 16               | Division of common property upon dissolution of marriage or marriage-like relationships should be equal, unless either party can show that this would result in unfairness.   | Partial    | Ensure that laws provide a presumption that marital property will be divided equally, with any variation taking into account unpaid contributions and future needs of the spouses.  |
| Various, including Dhammathats, ethnic   | 16               | Spousal maintenance at the dissolution of marriage or marriage-like relationships   | Partial    | Ensure that laws on spousal maintenance are enforced. Maintenance payments should take into account   |

Myanmar Laws And CEDAW

The Case for Anti-Violence Against Women Laws

| Relevant Legislation  | CEDAW Article(s) | Indicator  | Compliance   | Recommendations for Amending or Drafting New Legislation   |
|---|------------------|--|--|--|
| customary laws, Buddhist Women's Special Marriage and Succession Act, Hindu and Islamic religious laws, Burma Divorce Act |                  | should account for the roles and contributions of the parties during the relationship, the length of the relationships, and the parties' needs.  |  | whether one party's contributions to housekeeping and childrearing required foregoing other activities. It should also take into account the parties' needs.   |
| Code of Criminal Procedure  | 16               | Child support is the responsibility of both parents.<br>The payment of child support should not be used as a justification to reduce maintenance in terms of spousal support.  | Partial  | Make child support mandatory based on need. Institute state monitoring of child support agreements and payments. Provide methods of enforcement for payment such as garnishment of wages.  |
| Constitution, Citizenship Law   | 9, 14            | Women should have equal rights to keep and acquire nationality and to pass their nationality to their children.  | Yes, but enforcement may be an issue   | Ensure rights of all Myanmar citizens to pass nationality to children. Consider simplifying regulatory procedures to facilitate extending citizenship to those who lack documentation, including those in and from rural areas.  |
| Not known   | 4, 11            | Laws concerning labour and employment should guarantee women's rights to equal pay for work of equal value. They should also protect women in the workplace without unduly restricting women's access to a broad range of occupational opportunities. Special provisions should exist to recognize pregnancy and maternity. Harassment, including sexual harassment, is a form of discrimination against women as well as a form of violence and must be prohibited. | Not certain  | Enact temporary special measure to facilitate women's entry into male-dominated work. Ensure laws prohibit dismissal on account of marital status, pregnancy and maternity. Require employers to provide paid parental leave for a reasonable period after the birth of a child. Enact laws and regulations penalizing sexual harassment in the workplace, including physical, mental, and verbal forms of harassment, and exposure to sexually explicit visual materials. Provide for the establishment of appropriate tribunals providing redress. Create a regulatory framework for the informal labour sector, to ensure that women have access to benefits. |
| Constitution  | 1, 4, 7          | Laws should guarantee women's rights to vote in elections and play an active role in all forms of public decision making and leadership, including as representatives to law-making bodies and in the civil  | Partial – women's rights to vote and stand for office are guaranteed if they are citizens. | Establish quotas of 30% for representation in legislature, ministerial and civil service positions.  |

Myanmar Laws And CEDAW

The Case for Anti-Violence Against Women Laws

| Relevant Legislation | CEDAW Article(s) | Indicator   | Compliance                               | Recommendations for Amending or Drafting New Legislation |
|----------------------|------------------|---|--|--|
|                      |                  | administration.<br>Given the dearth of women in law making positions, governments should consider employing temporary special measures to increase their participation. | Women have rights to work in government. |  |

## Case Studies from Cambodia, Thailand and Vietnam

The following section describes laws concerning women in three Southeast Asian countries – Cambodia, Thailand, and Vietnam<sup>95</sup> – and their compliance with the goals of the CEDAW. The process of law reform may find these experiences useful, particularly as many of the issues with regard to gender equality are also faced by women in Myanmar. A study of findings from five Asian countries entitled *Benchmarking National Legislation for Gender Equality* echoes the criticisms found in other evaluations of progress to reform legislation and policies, stating that

...women continue to face significant discrimination within their legal systems. ...[T]he legal challenges are three-fold: absence of laws; the existence of discriminatory laws and gaps between *de jure* and *de facto* aspects of laws; and conflicts between constitutional guarantees on equality vis-à-vis customary laws and practices.<sup>96</sup>

It may be more realistic to view examples from other countries as “learning experiences.” Reference has been made throughout this section to the most recent Concluding Observations by the CEDAW Committee on the periodic reports of each country.<sup>97</sup>

It should be noted that, among ASEAN countries, there has been little jurisprudence citing the CEDAW. Only in the Philippines has the Supreme Court cited the CEDAW in its

decisions (in the context of political representation and discrimination in hiring).<sup>98</sup>

### Cambodia

Cambodia ratified CEDAW in 1992, but has not ratified the Optional Protocol. Regional and local NGOs report that despite some progress in law reform to promote gender equality, application and enforcement of the laws continues to be complicated by the dearth of women in the judiciary and government and the prevalence of gender stereotypes.<sup>99</sup> Rural women’s access to the law is also a problem, because of the distance and expense of attending provincial courts. Legal literacy about women’s human rights is low, among the judiciary, law enforcement authorities, government officials and the public. Therefore, it is not clear whether the laws are being followed on a national basis. As is the case in Myanmar, texts of the laws (in any language) are difficult to access, and the translations of the laws into English do not always appear to be accurate or complete.

#### Constitution & Equality Laws

The *Constitution of the Kingdom of Cambodia*, 1993, contains recognitions of women’s equality and prohibits discrimination, but, as the CEDAW Committee noted with concern, it does not define discrimination or contain descriptions of substantive equality or indirect discrimination. It also does not specify penalties for discrimination or mandate temporary special measures to accelerate *de facto* enjoyment of equality.

Article 31(1) recognizes the human rights guaranteed under the Universal Declaration of Human Rights, as well as covenants and conventions related to human rights, women’s rights and children’s rights. While it is not entirely clear, it appears that the *Constitution*

<sup>95</sup> It should be noted that few of the laws for any of these countries are available in English, thus, most of this information comes from commentaries and may not reflect recent changes.

<sup>96</sup> Hasna Cheema, *Benchmarking National Legislation for Gender Equality* (Bangkok: Human Development Report Unit, United Nations Development Program, 2010), p. 2

<sup>97</sup> Cambodia and Thailand presented reports in 2006; Vietnam, in 2007.

<sup>98</sup> Shanthy Dairiam, *The Status of CEDAW Implementation in the ASEAN Countries and Selected Muslim Countries*, Presented at the Roundtable Discussion on Rights and Obligations Under CEDAW

17 March 2003, Kuala Lumpur, Malaysia, p. 6.

<sup>99</sup> Cambodian Committee of Women, *Violence Against Women: How Cambodian Laws Discriminate Against Women* (Phnom Penh: LICADHO (Cambodian League for the Promotion and Defense of Human Rights), 2007.



incorporates these instruments into domestic legislation by reference.<sup>100</sup>

Article 45 abolishes all forms of discrimination against women, prohibits exploitation of women in marriage and family matters, and enshrines the principle of monogamous marriage by mutual consent of the parties. Article 46 prohibits trafficking in persons, exploitation of prostitution and “obscenity... affect[ing] the reputation of women.”

The Constitution also affirms women’s rights to vote, run for public office, work in the employment of their choice, and receive equal pay for work of equal value.

### Rape

Until the introduction of a new *Penal Code* in 2010, the offence of rape was governed by transitional provisions put in place in the early 1990s under UNTAC.<sup>101</sup> These provisions described rape as “any sexual act involving penetration against a non-consenting person”. A rape conviction carried a penalty of 10 and up to 15 years, when accompanied by fraud, violence, or threats, or committed by a person in a position of authority. The new *Penal Code* improves upon the definition of rape somewhat by providing, “All acts of sexual penetration, of any kind whatsoever, or an act of penetrating any object into sexual organs of a person of either the same sex or different sexes by violence, coercion, threat or surprise constitute a rape.” (Art 239) It also sets the age of consent at 15 years.<sup>102</sup> The penalties under the new law are believed to be similar to those of the UNTAC law. Women’s rights activists have criticized the new law as inadequately capturing the idea of free consent. They are concerned that the law will serve to reinforce societal attitudes that tend to blame or shame women who are raped and that it will focus judicial attention on

<sup>100</sup> However, this may be the case, as various UN human rights conventions and international instruments are listed in one electronic database of the country’s laws. See the Asian Legal Information Institute at <http://www.asianlii.org>.

<sup>101</sup> *Provisions relating to the Judiciary and Criminal Law and Procedure Act Applicable in Cambodia during the Transitional Period (UNTAC)*, 1992.

<sup>102</sup> Amnesty International, *Breaking the Silence: Sexual Violence in Cambodia* (London: Amnesty International Publications, 2010), p. 43.

whether the victim actively resisted, rather than whether she consented.<sup>103</sup> The new law also does not criminalize marital rape, something the CEDAW Committee has recommended. Marital rape, under at least some conditions, is prohibited under the *Law on the Prevention of Domestic Violence and the Protection of Victims*, however, that law does not provide for explicit penalties.

### Domestic Violence

In 2005, NGOs and the Women’s Affairs Ministry worked together to draft a new domestic violence law that would reflect women’s experiences. The new law was passed, but not ratified by government. Support was obtained through international efforts to lobby the Cambodian government to ratify the law. Instead, the government redrafted the law, passing a new version of the *Law on the Prevention of Domestic Violence and Protection of Victims*, which is significantly different from the original. In its current form, the law does not clearly define domestic violence or identify the authorities responsible for protecting victims of domestic violence. It also does not prescribe penalties, which are drawn from provisions in the criminal laws. Not only is the new law not seen to meet women’s needs, few women are attempting to use it, since often women want the violence in their families to stop, but do not want their husbands to serve to jail terms.<sup>104</sup> That said, the new law has resulted in community programs to address domestic violence, including workshops for men, and counselling sessions for perpetrators.

The CEDAW Committee noted with concern that barriers to enforcement of the law include inadequate provisions relating to former spouses, lack of access to justice, a culture of impunity for abusers, and the high cost of medical certificates required for prosecutions. To facilitate enforcement, it recommended public awareness raising that domestic violence is unacceptable, and training for judges and lawyers, law enforcement personnel, social

<sup>103</sup> *Ibid.*

<sup>104</sup> Southeast Asia Meeting on the Application of CEDAW Framework to Address Impunity in the Context of Violence against Women (Report), 15- 18 August 2008, p. 26

workers and health care providers. It also recommended increasing the number of women in the judiciary and law enforcement agencies.

#### Trafficking

Cambodia's *Law on the Suppression of Human Trafficking and Sexual Exploitation* came into force in February 2008. The law criminalizes solicitation, but not un-coerced sex work. Nonetheless, its promulgation reportedly led to massive arrests of women doing sex work, with serious infringements of their rights during incarceration.<sup>105</sup> The law empowers law enforcement officials to prosecute and convict trafficking perpetrators, with penalties of up to 20 years imprisonment and fines of up to USD 2,500. In the year following its introduction, there was a decline in the number of convictions of traffickers, as well as reported failure to prosecute and convict officials involved in trafficking.<sup>106</sup> Although the law provides that law enforcement officials should refer trafficked persons to social affairs programs for assistance, it does not contain specific provisions for protection of trafficked persons. Trafficked persons have been detained and in some cases abused while in custody.<sup>107</sup>

The Committee expressed concern about the lack of enforcement of legislation, the impunity of traffickers and the absence of accurate data on trafficking, as well as the stigmatization of victims of trafficking and the insufficient measures for their rehabilitation and reintegration into the community. It urged

<sup>105</sup> Chenda Kheo, *Hard Life for a Legal Work: The 2008 Anti-Trafficking Law and Sex Work*, 2 April 2009, accessed at: <http://www.cambosastra.org/wp-content/uploads/2009/11/Hard-life-for-a-legal-work-02-April-2009.pdf>. It should be noted there has also been criticism from activists that Cambodia "caved in" to pressure by the United States in promulgating the law, and that it is putting women in greater danger by forcing sex work underground. See, for example, Dr. Laura Agastin, US Anti-trafficking Laws Cause Police Violence: Cambodia, accessed at <http://www.lauraagustin.com/us-anti-sex-trafficking-law-causes-police-violence-in-cambodia>.

<sup>106</sup> United States Agency for International Development, *USAID Anti-Trafficking In Persons Programs In Asia: A Synthesis*, November 2009, p. 39, accessed at: [http://icthumanity.com/wp-content/uploads/2010/08/Asia\\_Synthesis\\_TIP\\_FINAL\\_1002\\_16.pdf](http://icthumanity.com/wp-content/uploads/2010/08/Asia_Synthesis_TIP_FINAL_1002_16.pdf).

<sup>107</sup> Chenda Kheo, p. 8.

Cambodia to ensure that traffickers were prosecuted and punished to the full extent of the law, while requesting that victims of trafficking not be prosecuted for illegal migration.

#### Family Law

The *Marriage and Family Law*, 1989 is a comprehensive piece of legislation, giving women and men equal rights to freely choose a spouse, and enter into and dissolve their marriage.<sup>108</sup> The minimum age for men is 20 and for women, 18, however, underage marriages are permitted if the woman becomes pregnant. All marriages must be registered. Although the law explicitly states that rights in marriage and divorce are equal, considerable social stigma still prevents women from seeking divorce, and the statutory procedures that must be undertaken in divorce are lengthy and complicated. Additionally, the law contains a provision requiring the courts to attempt to "reconcile" the couple, which is extremely problematic for women in abusive relationships and leaves the granting of a divorce subject to the cultural biases of judges and other authorities.<sup>109</sup>

The CEDAW Committee expressed concern that the *Marriage and Family Law* was not effectively enforced and that traditional and cultural factors prevented women from enjoying rights to freely enter into marriage. It also recommended setting a single minimum age of 18, without exceptions, for parties entering into marriage.

#### Health

The *Law on Abortion* authorizes abortions up to the 12<sup>th</sup> week of pregnancy by trained medical personnel (doctors or midwives) in hospitals and clinics. However, the law appears to task doctors with dissuading women from having abortions, only allowing them to perform them after considerable consultation.<sup>110</sup> After the 12<sup>th</sup> week of pregnancy, abortions can only be

<sup>108</sup> Note that Article 22 of the Law provides different minimum ages for marriage (20 for men, and 18 for women), however, they meet the minimum age standard suggested by CEDAW Committee.

<sup>109</sup> Shanthi Dairiam, p. 8.

<sup>110</sup> *Law on Abortion*, Article 7.

performed if there is suspicion of a serious fetal deformity or disease, or if the pregnancy resulted from a rape. Abortion after 12 weeks requires a confidential application with the patient's written consent plus the recommendation of two to three doctors. Doctors or midwives who contravene the law are subject to a punishment of between one month and one year's imprisonment, with longer sentences for procedures causing complications or death of the mother.

#### Laws Concerning Women's Representation in Government

In terms of political participation and public life, the *Cambodia Law on Commune Election* has a general provision on the rights of women and men to be elected. However, there are no specific provisions enabling greater women's participation in community and leadership positions.<sup>111</sup>

## Thailand

Thailand ratified the CEDAW in 1985, with reservations. Although some of these have been withdrawn, Thailand continues to reserve on Article 16, which relates to women's role in the family. Thailand ratified the Optional Protocol in 2000. The 2006 coup provided an opportunity to introduce amendments to existing laws as well as new laws. Much of the progress on women's human rights has been attributed to the direct involvement of NGOs and academics in legislative drafting and government programs.<sup>112</sup>

The CEDAW does not have the force of law in Thailand, meaning that CEDAW principles must be enacted in domestic legislation. However, the Convention has had a powerful influence on government action, serving as the standard against which laws and practices should be judged.<sup>113</sup>

<sup>111</sup> Cambodian Committee of Women, *Violence Against Women: How Cambodian Laws Discriminate Against Women* (Phnom Penh: LICADHO (Cambodian League for the Promotion and Defense of Human Rights), 2007).

<sup>112</sup> Leigh Pascal, *Time for Action: Implementing CEDAW in Southeast Asia* (United Nations Development Fund for Women, 2009, p. 52).

<sup>113</sup> Shanthi Dairiam, p. 11.

#### Constitution & Equality Laws

Fundamental women's rights were included in the *Constitution of the Kingdom of Thailand, 2007*. Drafting was undertaken through a collaborative process between the government's Constitutional Drafting Committee and women's rights NGOs. The new Constitution contains specific provisions on violence against women<sup>114</sup> as a form of discrimination, requiring not only that women be protected against violence, but also that rehabilitation and legal aid services be provided to them through organizations supported by the state. However, as noted by the CEDAW Committee, the *Constitution* does not explicitly define discrimination against women. The Thai *Constitution* provides for an Ombudsman to address human rights complaints under the *Constitution*,<sup>115</sup> as the CEDAW Committee recognized with approval in its Concluding Observations.

Thailand is the only country in Southeast Asia that has constitutional provisions to mandate temporary special measures or affirmative action to enhance women's equality,<sup>116</sup> something which the Committee commended. The *Constitution* requires that political parties must have an equal number of women and men on party lists of candidates. Also, the Thai parliament's standing Committee on Social Issues must include at least one third of female members among NGO representatives.<sup>117</sup> The National Commission on Women's Affairs has established gender focal points in all government ministries. Despite these steps, women continue to be under-represented in the judiciary and in politics and government institutions generally.

<sup>114</sup> *Constitution of the Kingdom of Thailand, 2007*, Article 40.

<sup>115</sup> *Constitution of the Kingdom of Thailand, 2007*, Article 242.

<sup>116</sup> Shanthi Dairiam, p. 11.

<sup>117</sup> List of Gender Equality Laws, provided by Ms. Manav Sadcheva, Program Specialist, United Nations Development Fund for Women (UNIFEM), and UNIFEM Bangkok Team [Shoko Ishikawa, Ccpanninn Llaptaweasath, Ryratana Rangsitpol, Amarsanaa Darisuren, Patharaporn Theeratham], accessed at <http://www.iknowpolitics.org/node/5880>.

In 2008, the *Promotion of Opportunity and Gender Equality Act* was drafted.<sup>118</sup> At the time of writing, it is not known whether this legislation passed. The Committee urged Thailand to incorporate in the draft a full definition of discrimination including both direct and indirect discrimination, and to incorporate further temporary special measures aimed at accelerating women's participation in decision making and economic opportunities. Work continues to be done to amend laws on rape, sexual harassment, marital and domestic violence and trafficking, which are significant issues for women in Thailand.

#### Rape

The definition of rape in Thailand's *Penal Code* was amended in 2007 to include marital rape, in accordance with CEDAW Committee recommendations. The new definition of rape was also expanded to include anal sex and the insertion of objects into the victim's vagina and anus, and includes boys, transgendered women and men as victims. However, the amended law has faced opposition, including from the Thai Ministry of Social Development and Human Security, which claims it is difficult to enforce and which proposed repealing the amendment in 2009.<sup>119</sup>

#### Domestic Violence

In 2007, the government introduced the *Law on Protection of Victims of Domestic Violence Act*, which defines domestic violence as any act harming a family member's physical or mental health. It is not known if intimate partners who do not cohabit are charged under the Act. Regrettably, the maximum penalty available is a six month jail term, less than the *Penal Code* provisions of up to two years for

other forms of violence,<sup>120</sup> signalling that Parliament considers domestic violence to be of lesser gravity than other offences. Government centres have been set up to coordinate comprehensive services resources for victims of domestic violence. The CEDAW Committee has criticized the Act in draft form for inadequately punishing perpetrators and focusing on family reconciliation rather than women's rights to live free of violence.

#### Trafficking

While Thailand has made progress on trafficking of women, in concert with regional governments and NGOs, eradication of trafficking continues to present a serious challenge. In 2007, the Thai government promulgated the *Anti-trafficking in Persons Act* to prevent trafficking in women and children. NGOs report that greater education is needed amongst officials applying and enforcing the law. Cases of trafficked women have been dismissed by the criminal justice system because of prejudice against women sex workers. Charges are dropped or stayed by public prosecutors who do not have adequate understanding that human trafficking is a crime. Fear of reprisals and inadequate victim protection also prevent women from reporting trafficking.

#### Health Law

Under ss. 301-305 of the *Penal Code*, 1996, abortion is illegal, except when required for the mother's health, or when the pregnancy resulted from rape or incest. Penalties range from up to three to five years' imprisonment and substantial fines. The law is not rigorously enforced and illegal abortions are widely performed.<sup>121</sup>

<sup>118</sup> The draft text was not available at the time of writing, but reportedly contained general equality and gender discrimination provisions, as well as provisions for mechanisms to investigate address discrimination and fines. It did not include specific provisions dealing with violence or employment. See commentary at Mayer-Brown Client Alert, accessed at: <http://www.iwraw-ap.org/laws/doc/thailand%20gender%20equality%20draft%20summary.htm>.

<sup>119</sup> "Altering Rape Law is Wrong," *Bangkok Post*, October 30, 2010, accessed at: <http://www.bangkokpost.com/opinion/opinion/26532/altering-rape-law-is-wrong>.

<sup>120</sup> At the time of writing, it is not clear whether this legislation is in force.

<sup>121</sup> United Nations Population Fund, Thailand: Abortion Policy, accessed at <http://www.un.org/esa/population/publications/abortion/doc/thailand.doc>

### Family Law

Although changes continue to be made, currently women do not enjoy the same rights as men in marriage, divorce and betrothal, and in matters of property and inheritance. Under the *Civil and Commercial Code*, the legal age for marriage is 17 for both women and men. Both parties must freely consent, and registration of marriages is required.<sup>122</sup> However, there are persistent complaints that women are “sold” into marriage through contracts between husbands and parents.<sup>123</sup> At its last periodic report, the CEDAW Committee commended Thailand for its amendments to the *Person’s Name Act* in 2005, granting married women the right to choose to retain their maiden surnames on marriage.<sup>124</sup> Divorce is an administrative procedure, but requires satisfaction of certain grounds. Men are able to divorce their wives on a single instance of adultery but cannot be divorced for adultery unless they support another woman outside of marriage.<sup>125</sup> The CEDAW Committee expressed concern over this provision. An amendment to the *Civil and Criminal Code*, Book V, was drafted in 2005 to change this; it is not known whether the amendment passed.

### Nationality

Legal protections for Muslim, non-Thai ethnic and migrant workers women continue to be weak. Many Muslim and migrant women lack the legal documentation needed to ensure they can access benefits. For example, women who lost their husbands in the tsunami, and in communal violence in the South, have had difficulty receiving compensation or accessing health care, social security, and survivors’

pensions.<sup>126</sup> The CEDAW Committee has expressed concerns regarding the complexity of procedures for extending citizenship to hill tribe persons and displaced persons, and corrupt practices by officials.

### **Vietnam**<sup>127</sup>

Vietnam ratified CEDAW in 1982, and the Optional Protocol in 2010. It is one of the few countries that has attempted to review its laws for CEDAW compliance. In one recent study, its legal system was ranked the most compliant with CEDAW indicators of the five Asian countries studied.<sup>128</sup> While commending Vietnam for this effort, the Committee expressed regret that more information was not available about the impacts of the laws. It recommended that Vietnam focus on implementation by monitoring changes over specific time periods and allocating resources for enforcement.

The Vietnam government recognizes CEDAW and other treaties as binding within domestic law; however, the legal framework does not specify how to enforce treaty law when it conflicts with domestic enactments. Vietnam has adopted a procedure to monitor legislation to ensure its conformity with international treaties, requiring all government agencies to report annually on adherence.<sup>129</sup>

### The Constitution & Other Equality Laws

The *Constitution* contains guarantees of equality (Article 52) and non-discrimination on the basis of sex and gender (Articles 63) that comply with the CEDAW, but provides no provisions guaranteeing substantive equality. The *Constitution* requires the state to set up competent tribunals to provide legal protection

<sup>122</sup> Civil and Commercial Code, Articles 1435 to 1457.

<sup>123</sup> Somswasdi, Virada, "The Women's Movement and Legal Reform in Thailand" (2003). *Cornell Law School Berger International Speaker Papers*. Paper 1, p. 5.

<sup>124</sup> Statement of His Excellency Mr. Norochit Sinhaseni, Ambassador and Permanent Representative of Thailand to the United Nations, to the 54<sup>th</sup> Session of the Commission on the Status of Women, New York, 5 March 2010, accessed at: [http://www.un.org/womenwatch/daw/beijing15/general\\_discussion/THAILAND.pdf](http://www.un.org/womenwatch/daw/beijing15/general_discussion/THAILAND.pdf).

<sup>125</sup> Responses to the list of issues and questions for consideration of the combined fourth and fifth periodic report: Thailand, CEDAW/C/THA/Q/4-5/Add.1, 7 December 2005, p. 5.

<sup>126</sup> Concluding Comments of the Committee on the Elimination of Discrimination against Women: Thailand, CEDAW/C/THA/CO/5, 3 February 2006, p. 6-7.

<sup>127</sup> Much of the information in this section comes from Rhea Abada Chiongson, *CEDAW and the Law: A Gender and Rights-based Review of Vietnamese Legal Documents through the Lens of CEDAW*, Unifem, 2009, accessed at: [http://cedaw-seasia.org/vietnam\\_resources.html](http://cedaw-seasia.org/vietnam_resources.html).

<sup>128</sup> *Benchmarking National Legislation for Gender Equality*, p. i.

<sup>129</sup> Shanthi Dairiam, p. page 5-6



to women and mechanisms for rights enforcement.

A number of other laws also incorporate equality guarantees.<sup>130</sup> Vietnam promulgated the *Law on Gender Equality* in 2006. Articles 5(3) and 5(5) provide a definition of both gender equality and gender discrimination. Articles 10, 40 and 41 prohibit discrimination in all its forms, and gender-based violence. Article 37 gives complainants the right to seek redress in cases of discrimination, but does not stipulate specific mechanisms for redress or penalties for discriminatory acts. To deal with this omission, a Directive on Gender Equality, Paragraph II(b) instructs that the government should draft a decree detailing administrative fines for gender equality violations. The CEDAW Committee welcomed the new law, but also urged Vietnam to widely disseminate information about it, including in ethnic minority languages, and to harmonize existing legislation with the *Gender Equality Law*. It also expressed concern that there was inadequate understanding by the government of temporary special measures as opposed to social policies to implement CEDAW.

Article 8 of the *Law on Gender Equality* requires the government collect disaggregated statistics to support analysis of gender equality measures, and this has assisted the state to carry out a large number of studies.

#### Rape & Incest

The *Penal Code*, 1999 provides penalties for sexual offences, including Article 111 on rape, which imposes a sentence of imprisonment between two and seven years; Article 112 on the rape of children aged between 13 and 16 years, which imposes a sentence between seven and 15 years; and Article 150 on incest, which imposes penalties of imprisonment between six months and five years, for “those who have sexual intercourse with other persons of direct blood lines,” including half-brothers or sisters. However, non-penile penetration is not criminalized, and there is no specific *Penal Code*

provision on marital rape. Additionally, measures to criminalize sexual violence are generally problematic in that they require the victim to initiate investigations and put the onus on the victim to show self-defence.

#### Domestic Violence

Article 2 of the *Law on Domestic Violence Prevention and Control*, 2007, prohibits acts of domestic violence. The *Penal Code*, 1999, Article 151 stipulates that any person who “ill treats or persecutes their grand parent, parent, husband, wife, children, nephew, or niece shall be subject to warning, non-custodial reform for up to two years or prison term of between three months and two years.”

Stalking is included under Article 338 of the *Penal Code*, which states that “those who commit acts of harassing people shall be sentenced to non-custodial reform for up to three years or between three months and three years of imprisonment.” The court also can issue restraining orders prohibiting contact.

While the CEDAW Committee welcomed the *Law on Domestic Violence*, it expressed concern about the lack of information on the prevalence of violence, punishment of perpetrators, and provision of services to victims. It urged Vietnam to increase public awareness raising and targeted training of the judiciary, law enforcement officials, health care providers, social workers and community leaders, and to establish crisis centres for victims.

#### Criminal Procedures

The *Criminal Procedure Code* has general procedures in place to protect victims of crime and witnesses from intimidation, harassment or threats, but these could be made more specific to situations of gender-based violence. There are also general provisions to protect identities of complainants and victims of gender-based violence. Any investigative bodily search must be conducted by persons of the same sex (Articles 142 and 152 of the CC), however, there are no guarantees of privacy during searches.

With respect to incarceration, women who are pregnant or nursing are entitled to postponement or temporary suspension of

<sup>130</sup> These include Article 5 of the *Civil Code*, Article 8 of *Civil Procedure Code*, Article 5 of the *Criminal Procedure Code*, Article 5 of the *Labour Code*, Article 2 of the *Marriage and Family Law*, and Article 3 of the *Penal Code*.

imprisonment until their children reach the age of 36 months, at the end of which time, courts may decide to exempt them from further service based on behaviour (Articles 61 and 62 of the *Penal Code*).

#### Trafficking & Sex Work

The *Penal Code* criminalizes soliciting for the purposes of prostitution and procuring services of a girl younger than 18 years of age, as well as trafficking of women. The *Ordinance on the Prevention and Suppression of Prostitution*, 2003, stipulates that punitive measures should be directed against customers, procurers and organizers of prostitution, to prevent the exploitation of sex workers. However, in practice these measures also result in arrests of sex workers.

The Committee expressed concern about low rates of prosecutions for traffickers and others exploiting women, and noted that Vietnamese women returning home have difficulty enjoying citizenship and transmitting citizenship to children born abroad.

#### Health Law

The Law on Health, Article 44, provides for abortion on demand, although sex-selective abortion is illegal (*Penal Code*, Article 243).<sup>131</sup>

#### Family Law

An amended *Law on Marriage and Family* took effect in 2001, giving wives the same rights, interests, and obligations as husbands in acquiring, using and settling common property (Article 27). Article 9(1) provides that the minimum age for marriage for women is 18, and for men is 20. Marriages must be registered at registration offices. Forced and child marriages and bigamy are prohibited under the *Penal Code*. Property held by both the husband and the wife must be registered in both names and divided in equal shares at divorce. In consideration of spousal maintenance on divorce, the *Law on Marriage and Family* also recognizes domestic work as income-generating labour, authorizing courts to compensate wives

for unpaid contributions to the family.<sup>132</sup> Nonetheless, the law does not authorize no-fault divorce and requires the court to seek reconciliation before granting divorces.

#### Laws Concerning Women's Representation in Government

The *Law on Election to National Assembly*, 1997, *Law on Election to People's Councils* and *Law on Gender Equality* require that 20% of all elected positions be filled by women. The Committee acknowledged that Vietnam had among the highest proportions of women in Parliament in Asia, and commended the quota systems in place in other bodies, but expressed concern over the under-representation of women in appointed public decision making positions.

#### Labour

Article 5 of the *Labour Code*, 1994 (amended in 2002), and Article 13 of the *Law on Gender Equality* provide particular guarantees of equal employment opportunities for women. The *Labour Code*, Article 111, also provides for temporary special measures, endorsing preferential hiring of women who satisfy all recruitment criteria over men. However, a number of the laws concerning labour and employment are protective and serve to prevent women from choosing their occupation on the ground that certain types of work are dangerous, particularly to pregnant women or nursing mothers. It has been recommended that these provisions be reviewed and amended to require accommodation of women's needs while working in these fields.

The *Labour Code* prohibits dismissal on the basis of marriage and pregnancy, and provides women workers full maternity rights, including prenatal and post-natal leave for four to six months and a 60-minute break every day for one year to breast-feed.

The Committee encouraged Vietnam to better enforce its *Labour Code* and to regulate for benefits and services to workers in the informal economy.

<sup>131</sup> Concerns have been expressed, though, that the State has been overzealous in its strict enforcement of population control measures.

<sup>132</sup> Shanthi Dairiam, p. 10.

**Summary of Common Concerns**

All three of the countries studied here have made progress in enacting laws to protect women's equality. The constitutions of all three contain equality guarantees and prohibit discrimination. Thailand and Vietnam have enacted specific equality laws to strengthen existing legislation. Nonetheless, the CEDAW Committee has expressed concerns common to all three countries, some relating to the way the laws are drafted, and others to enforcement of the laws and monitoring of their implementation.

One consistent concern is that existing constitutional provisions do not adequately define substantive equality and direct and indirect discrimination. Since harmful cultural practices and notions limit women's experiences of *de facto* equality in all three countries, formal guarantees are not sufficient to initiate change. The Committee has recommended amending constitutional provisions or incorporating more robust and complete definitions into new equality legislation.

Another concern is that laws addressing violence against women are inadequate and ineffective. Some laws are too narrow, and as a result, do not capture other widely recognised forms of violence, such as emotional violence or non-penetrative sexual abuse, or they do not extend protections widely enough, for example, to women not married to perpetrators in the case of domestic violence. Many anti-violence laws lack appropriately severe penalties (or penalties of any kind) and do not put in place mechanisms for enforcement. In all countries, women experiencing violence lack access to judicial systems and support services. The Committee has expressed general concern

about pervasive and persistent gender stereotypes that support a culture of impunity with respect to domestic violence and rape. The Committee has also noted that prosecution rates for sexual and gender-based violence and trafficking remain low.

The Committee has consistently noted the need for countries to set the minimum age for marriage at 18 for both men and women, and to ensure that women enjoy symmetrical rights with men in divorce.

Regulations guaranteeing women's labour rights continue to be inadequately enforced.

The Committee has also emphasized that more use could be made of temporary special measures, particularly in providing employment and economic opportunities and in women's representation in government, both in elected and appointed positions.

In addition to revising the texts of the laws and providing better access to justice, the Committee has repeatedly stressed the importance of raising awareness about women's equality rights among the general public and providing gender sensitivity training to key personnel such as judges, law enforcement officers, health care providers and social workers.

Clearly the issues that each country must tackle to advance women's equality are to a degree unique to its own culture and history. However, given the breadth of legal reform required, it is not surprising that similar approaches have been adopted, and that two of the countries have opted to enact broad equality and anti-violence laws that would harmonize other, existing legislation with the principles in CEDAW.



**Table 2: Progress on Laws Relating to Women's Rights and Protection Cambodia, Thailand, Vietnam and Myanmar<sup>133</sup>**

**Constitution and Guarantees of Equality (including specific Equality Laws)**

| Indicator   | Cambodia | Thailand        | Vietnam | Myanmar | Comments   |
|---|----------|-----------------|---------|---------|--|
| Guarantee of equality   | √        | √               | √       | √       |  |
| Prohibition of discrimination based on sex/gender   | √        | √               | √       | √       |  |
| Full definition of discrimination (including direct and indirect discrimination) <sup>134</sup>   | X        | X               | X       | X       | This could be added to a specific Anti-Violence Against Women laws.  |
| Definition of substantive equality (ensuring that the laws guarantee equality in their impacts and effects, and do not just treat men and women the same) <sup>135</sup>                                    | X        | X               | X       | X       | This could be added to a specific Anti-Violence Against Women laws.  |
| Temporary special measures to accelerate women's enjoyment of equality (i.e., laws for preferential hiring of female workers or promotion of women in the civil service and appointed government positions) | X        | √               | √       | X       | This could be added to a specific Anti-Violence Against Women laws.<br><br>Vietnam includes temporary special measures in the <i>Law on Gender Equality</i> and various labour laws. |
| Specific equality legislation, aimed at preventing discrimination, addressing inequality and protecting women's rights  | X        | Drafted in 2008 | √       | X       | Proposed as new Anti-Violence Against Women laws in Myanmar  |

**Rape and Other Forms of Sexual Violence**

| Indicator   | Cambodia | Thailand | Vietnam | Myanmar | Comments  |
|---|----------|----------|---------|---------|---|
| Prohibition of rape   | √        | √        | √       | √       | Despite the existence of <i>de jure</i> laws, enforcement remains an issue. |
| Prohibition of marital rape   | √        | √        | X       | X       |   |
| Broad definition of rape (including non-penile penetration, penetration of other orifices, and other acts of sexualized violence) | √        | √        | X       | X       |   |
| Consent as defining feature of rape   | Partial  | √        | X       | √       | Cambodia's law refers to coercion, not consent, requiring victim to         |

<sup>133</sup> A complete and thorough analysis of all relevant laws in case study countries was beyond the scope of this study, and as a result some information may be incomplete

<sup>134</sup> An example of direct discrimination is a law or policy stating that only men may be hired for certain positions, for example, as police officers. An example of indirect discrimination is a law or policy that states that candidates for certain positions must meet minimum height requirements, even though these do not relate to the work.

<sup>135</sup> Substantive equality requires that historical and cultural factors do not limit women's enjoyment of equal rights. For example, laws saying that men and women have equal control over common marital property may be meaningless if most property is traditionally registered in the husband's name, or if the wife cannot seek protection from domestic violence and therefore does not have an equal voice in decision making.

Myanmar Laws And CEDAW

The Case for Anti-Violence Against Women Laws

| Indicator  | Cambodia | Thailand | Vietnam          | Myanmar | Comments   |
|--|----------|----------|------------------|---------|--|
|  |          |          |                  |         | prove she resisted.  |
| Protection of victims' rights re: evidence, prosecution of cases (i.e. acceptance of uncorroborated testimony by victim, non-disclosure of victim's sexual history, victim's right not to testify or to testify <i>in camera</i> ) | ?        | ?        | X – see comments | X       | Vietnam has general procedural protections but they are not specific to gender-based violence and could be improved. |
| Compensation (right of victim to bring civil suit for damages for injury or receive compensation through government programs) <sup>136</sup>   | ?        | ?        | ?                | √       | In Myanmar there are provisions for compensation to rape victims, in practice victims rarely seek compensation.      |
| Prohibition of incest  | √        | ?        | √                | X       |  |
| Definition of sexual assault/other crimes of sexualized violence and harassment  | ?        | ?        | X                | X       |  |
| Services provided country-wide, including shelters, counselling, legal aid   | √        | √        | X                | X       |  |

**Domestic Violence**

| Indicator   | Cambodia | Thailand | Vietnam | Myanmar | Comments   |
|---|----------|----------|---------|---------|--|
| Prohibition of domestic violence  | √        | √        | √       | X       | Existing laws do not effectively curtail domestic violence and enforcement remains an issue. |
| Definition of domestic violence includes people in intimate relationships who are not married or not cohabitating (including same sex relationships), other relatives | X        | ?        | X       | X       |  |
| Prohibition on stalking   | ?        | ?        | √       | X       | Vietnam's prohibition is part of its <i>Penal Code</i> .                                     |
| Provisions for restraining orders, preventing aggressor from contacting victim  | ?        | ?        | √       | X       | Vietnam's <i>Penal Code</i> has general provisions.  |
| Policy of mandatory enforcement of the law and prosecution of cases   | X        | ?        | ?       | X       |  |
| Services provided, included shelters, counselling, legal aid  | √        | √        | X       | X       |  |

**Sex Work and Trafficking**

<sup>136</sup> The possibility of compensation to victims *in addition to* criminal sanctions against perpetrators should not be understood as a substitute for criminal charges. Rape victims should never be coerced to accept compensation in lieu of charging perpetrators of rape. Compensation is an additional means of addressing the injuries suffered.

Myanmar Laws And CEDAW

The Case for Anti-Violence Against Women Laws

| Indicator  | Cambodia | Thailand | Vietnam | Myanmar | Comments  |
|--|----------|----------|---------|---------|---|
| Prohibition of exploitation of prostitution                      | √        | √        | √       | √       |   |
| Sex work not criminalized  | Partial  | √        | X       | X       | In Cambodia, solicitation is criminalized and frequently results in arrests of sex workers. |
| Sex workers protected against violence                           | X        | X        | X       | X       |   |
| Prohibition of trafficking                                       | √        | √        | √       | √       | Primary issue is enforcement.   |
| Definition of trafficking includes a range of coerced activities | √        | √        | Partial | √       | Vietnam's definition does not meet all the criteria in the Trafficking Protocol.            |
| Law targets traffickers, not trafficked persons                  | √        | √        | X       | √       |   |
| Services provided to victims                                     | X        | √        | X       | √       |   |

**Health Law**

| Indicator                                    | Cambodia | Thailand | Vietnam | Myanmar | Comments  |
|--|----------|----------|---------|---------|---|
| Abortion not criminalized                    | √        | X        | √       | X       | Abortion is allowed to save the mother's life in Thailand and Myanmar, and under certain conditions (incest, rape) in Thailand. Sex-selective abortion is illegal in Vietnam. |
| Sterilization permitted without restrictions | ?        | ?        | √       | X       |   |

**Family Law**

| Indicator  | Cambodia | Thailand | Vietnam | Myanmar | Comments  |
|--|----------|----------|---------|---------|---|
| Minimum age of marriage set at 18 for both parties   | X        | X        | X       | X       | Note that compulsory registration of all births aids in determining parties' ages at marriage.  |
| Consent of parties (only) required   | √        | √        | √       | X       | As a matter of customary practice, not law, parental consent is often "required" in all countries.  |
| Compulsory registration of marriage  | √        | √        | √       | X       |   |
| Bigamy/polygamy prohibited   | √        | √        | √       | X       |   |
| No-fault divorce available   | X        | √        | X       | Partial | Cambodia and Thailand discriminate by placing time periods restricting women from remarrying immediately after divorce.   |
| Presumption of equal division of marital property  | √        | √        | √       | Partial | In Myanmar, the law varies by parties' religion.  |
| Law recognizes property and other rights in <i>de facto</i> marriage-like relationships that are not registered  | ?        | ?        | X       | Partial |   |
| Spousal maintenance available and set with consideration for length of relationship, roles of parties, and need. | ?        | ?        | √       | √       | More research is needed in all countries on how spousal maintenance is determined, and whether spousal support is payable in no-fault divorce. In Myanmar, the amount of maintenance available is negligible. |

## Myanmar Laws And CEDAW

### The Case for Anti-Violence Against Women Laws

| Indicator  | Cambodia   | Thailand | Vietnam | Myanmar | Comments  |
|--|--|----------|---------|---------|---|
| Child support agreement required                                 | ?  | √        | √       | X       |   |
| Enforcement mechanisms for spousal maintenance and child support | ?  | √        | √       | √       | Enforcement remains a problem in all countries where mechanisms exist. Myanmar's mechanisms could be strengthened and rates of child support increased. |
| Prohibition on discrimination in inheritance based on gender     | Note: this has not been addressed because of inadequate documentation, but is an important aspect of family law and requires further research. |          |         |         |   |

#### Laws on Nationality

| Indicator   | Cambodia | Thailand | Vietnam | Myanmar | Comments  |
|---|----------|----------|---------|---------|---|
| Equal rights of both sexes to acquire, change or retain their nationality, including when marrying a non-national | √        | √        | √       | √       | Despite legal guarantees, in all countries, administrative procedures complicate enjoyment of this right. In Myanmar, there are a lot of complications in practice.                           |
| Parents of both sexes have equal right to pass nationality to children  | √        | √        | √       | √       | In Myanmar, there are a lot of complications in practice. In most countries, this is a problem of <i>enforcement</i> that disproportionately affects rural women from minority ethnic groups. |

#### Labour Laws

| Indicator   | Cambodia | Thailand | Vietnam | Myanmar | Comments  |
|---|----------|----------|---------|---------|---|
| Guarantee of equal pay for work of equal value  | Partial  | Partial  | Partial | Partial | All constitutions guarantee equal pay for equal or similar work. They should guarantee equal pay for work of <i>equal value</i> , since women are often restricted from doing the same jobs as men.   |
| Temporary special measures to increase women's participation in male-dominated occupations      | X        | X        | √       | ?       | Vietnam employs preferential hiring practices favouring equally qualified female candidates. Note, though, that in Vietnam and Thailand, protective restrictions (i.e., limits on heavy and dangerous work) also undesirably limit women's occupational choice. |
| Prohibition of refusal to hire and dismissal because of marital status, pregnancy or maternity. | ?        | √        | √       | ?       | Even where these regulations exist, enforcement can be an issue.  |
| Paid parental leave   | Partial  | √        | √       | Partial | Cambodia's law governing private employers provides for payment of half an employee's salary during parental leave.   |
| Prohibition of workplace sexual harassment  | ?        | √        | X       | ?       | Thailand's existing sexual harassment laws are insufficient in their scope.   |
| Labour tribunal to deal with discrimination cases   | √        | √        | ?       | ?       | General labour tribunals exist in Cambodia and Thailand, but it is not known how frequently they deal with cases of gender  |

Myanmar Laws And CEDAW

The Case for Anti-Violence Against Women Laws

| Indicator                              | Cambodia | Thailand | Vietnam | Myanmar | Comments  |
|--|----------|----------|---------|---------|---|
|  |          |          |         |         | discrimination.   |
| Regulations for informal labour sector | X        | X        | X       | ?       | In all countries, where the informal sector is dominated by women, there is inadequate regulation and protection of rights. |

Laws Concerning Women's Representation in Government

| Indicator  | Cambodia | Thailand | Vietnam                  | Myanmar | Comments  |
|--|----------|----------|--------------------------|---------|---|
| Guarantee of equal rights to vote and run for office | √        | √        | √                        | √       |   |
| Quotas in legislature                                | X        | X        | √ (policy sets 20% rate) | X       | Thailand requires political parties to put forward equal numbers of male and female candidates. |
| Quotas for ministerial positions                     | X        | X        | X                        | X       | Thailand requires one third women among NGO representatives to Social Issues Committee.         |
| Quotas in civil service                              | X        | X        | X                        | X       |   |

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