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# **Expert Meeting Women & Legal Justice**

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**Asian Women's Fund**

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## INTRODUCTION

By Yozo YOKOTA

Professor, Tokyo University, Faculty of Law

Throughout the human history, women have been consistently victimized and oppressed by long-established customs and institutions. Under the modern legal system, law-enforcement bodies, such as court and police, which are supposed to help those who are vulnerable have become oppressors of women.

First of all, law itself has discriminated against women, because both legislators and legislative organs themselves are gender biased. Up until recently, women in many countries were deprived of the right to own property or the right to vote in the national laws. Even today, not a few countries have discriminatory laws and regulations against women in terms of marriage and divorce, as well as control of prostitution. Because of these discriminatory legal system, a great number of women are still labeled as criminals or forced to become criminals as they struggle to survive.

Furthermore, when any woman is accused as a suspect, she has to suffer ill-treatment by police, prosecutors, and judges who are mostly men. Even those women who have been victimized, they are not always treated with care and assistance, although law-enforcement and other institutions should provide proper services for their redress. Many cases have been reported that female victims suffer twice, once by criminals and secondly by judicial institutions.

Women's dignity is affronted and their human rights are violated under the legal system not just in Asian countries including Japan, but throughout the world. Fortunately, in recent years, women's dignity under the legal system has become increasingly a major concern as a consequence of growing awareness of women's rights in the international community.

Several approaches to protect women's dignity and human rights under legal system have been seen in many countries including Japan. Although they are far from satisfactory, these activities should be welcomed. If we exchange our experience and learn from each other, activities to protect women's dignity and human rights could be encouraged much further. Thus, we have decided to hold the Expert Meeting on Women's Dignity and Human Rights under Legal System. As a member of organizing committee for the meeting, I am most happy to have had experts from Asia/Pacific region including India, Sri Lanka, Philippines, Australia, as well as other parts of the world such as North Africa and Eastern Europe. It is grateful that all the experts contributed to lively and fruitful exchange of information and dialogue during the meeting.

**THE EXPERT MEETING ON WOMEN AND JUSTICE**

Nirmala Pandit

Rapporteur

The Asian Women's Fund had invited experts from the Asia-Pacific region to discuss the different and intricate situation of Women in the context of national justice system. The experts brought with them the wealth of experience as judges, lawyers, academicians, activists and diplomats. Members of the UN sub-Commission on the Promotion and Protection of Human Rights also brought their expertise to the deliberations of the meeting. This is the summary of the discussion that followed during the meeting.

**Welcome address**

Prof. Yokota opened the session sharing a common belief that men have created the legal system for their benefit and therefore it has inherited some inadvertent disadvantages for women. Women are impaired in this system of courts and the patriarchal norms of the society and the traditional socio-economic conditioning of the members of the community. Some of the court systems have introduced a few protective and affirmative actions in order to provide better protection to women. Unfortunately the court system that is male dominated and ordinarily operated by men who may not understand the delicate situation of women and therefore ignore the provisions that are being incorporated for the benefit of women.

The purpose of the expert meeting was to recognize and identify the problem and not point fingers at any particular judicial system or the State. To appreciate and share the efforts made by some of the States to improve the situation of women while they interact with the judicial system. The purpose of the meeting as to discuss the measures and suggest improvement in the situation of women at all levels, national, regional, international.

This meeting was the first effort in this direction and the AWF would continue its efforts in this field. Prof. Yokota welcomed the participants and encouraged them to share their expertise and give a definitive direction for further action in this area through their deliberations.

The participants were requested to present their views to initiate the discussions. The presentations were followed by discussions among the participants who shared their country experiences.

### **Session I : Protection of women's Dignity and Rights in Court Proceedings**

Chairperson: Ms. Yoko Hayashi (Japan) :

1. **Zarinazana Abdul Aziz (Malaysia)**

Generally the experience is that the Court process is cold and intimidating. Woman, a victim of violence, subjected to familial and social pressures, conditioned by the distinction between the private and the public sphere of activities, finds herself ill equipped to stand before this system. She finds the entire court system biased against women. There are amendments made to the laws relating to rape, domestic violence, sexual harassment including administrative and procedural changes in the working of the court proceedings. In Malaysia, regarding certain cases the court proceedings are held in camera. Some of the laws are amended to prohibit, admission of certain kind of evidence, e.g. evidence as to indicate that the rape victim was in fact a woman of 'loose and immoral' character is prohibited. Rape laws have been amended, e.g. the defense of consent is not permitted in cases of rape of children below the age of 16 years. To breach the public/ private sphere the matter is brought before the criminal courts. A Woman victim has to be familiar with the court. May be her view of the accused is blocked so that she is not threatened. Such similar changes are essential in order to protect women.

2. **Jocelynn Scutt ( Australia)**

Promoting women's rights in court proceedings...is the task of the Anti-Discrimination Commission. The scope of this legislation is based on the age, sexual

orientation ( bisexual, transsexual, homosexual), sex and gender, political belief, irrelevant criminal records, physical disability or association.

The commission does not believe in the 'win –win' situation. The reality is that one has to win while the other is punished for the wrongful acts; e.g. a child abuser does not have to be in the winning situation. It is important to affirm rights and dignity of women, who are litigants, expert witnesses or accused. Men, judges, jury, recorders, attorneys, etc man all the courtrooms that are repositories of women's right. The Australian experience has been that the close courts are not necessarily beneficial to women. It is important that the media reports on the court proceedings in order to protect women. Media can be harmful, but it is necessary for adding transparency. There is a need for training for the all who are involved in the court system.

3. Hiroto Fujiwara (ICTY)

The International Criminal Tribunal for former Yugoslavia has 14 judges with 3 women judges. The working of this tribunal is based on two documents, the Statute and the Rules of procedures. In regard to the protection of women as witnesses in the cases of sexual harassment, the proceedings are posted on the web site and reported by the media. To protect the identity and privacy of the women witnesses the names and addresses are blocked from the records. Also the images and the voices are altered. Sometimes the proceedings are held in camera. There is the need for further improvements in the area of compensation and restitution for damages, witness protection during and after giving the testimony.

4. Kamar Ainiah Kamaruzaman (Malaysia)

Two legal systems exist in Malaysia, the civil system and the Islamic-Shariah system. Many a time the presence of a dual legal system leads to conflicting situations. There is the need for wider definition of rape, including marital rape, child sexual abuse, and compensation for the victims.

5. Sapana Malla

Trafficking is a major crisis area in Nepal. A large number of women from Nepal are trafficked to India. However it is observed that very few cases are registered against traffickers. The women who are rescued are held in shelter homes and not released,

in order to present them as witnesses. Corruption, delay in court proceedings, social stigma in using certain words, the language used by the victims, patriarchal words and norms followed by men, etc further hampers the means of legal protection for women.

## **Discussions**

1. Language used by men and women in the court is a point of concern. However that practice cannot justify for the closed system of courts. Role of interpreters is important, particularly when the language used in the court is different from the language used by the witnesses/experts/victims/accused. Particularly in the international courts/tribunals this becomes a crucial matter.
2. Dual system of laws/legal system as in Malaysia is a point of concern due to the conflicting provisions in the civil and shariah law.
3. Integrated service system is to be encouraged, e.g. in rape cases, it is important to know the initial proceedings, whether to go the police first or to the hospital and provide help to the victim who is facing the trauma.
4. In Algeria, there are more women magistrates. Sexual harassment and marital rape is not an offence therefore the Supreme Court does not punish such offenders.
5. In India, the recent amendments to the laws provide relief to women from court fees. A burden of proof in certain cases lies on the men to prove their innocence in situations of traditional offences against women, The Supreme court has issued directions on incidences of sexual harassment in work places, dowry deaths and eve teasing, etc.
6. In Japan, there are 10% women judges, prosecutors, and lawyers. This number is increasing since the ratification of CEDAW by Japan. Courts are open but family courts are held in camera, rape witness is heard through video recording. Stalking is an offence while in cases of domestic violence (in the form of a draft bill) family counseling is provided. Reconciliation courts handle divorce cases. Marital rape is still not an offence. Sexual harassment is not an offence but the name of the company where such action has occurred needs to be published.



7. Mere increasing the number of women in the legal system is not necessarily promoting women's rights. It is important to see how these women react to the women's issues.
8. In Hong Kong, number of women in judicial system is increasing. But they are still not in the position to show any impact in spite of the fact that they may be sympathetic towards women's issues.
9. The number of women in the judicial system is important but that is not sufficient to promote and protect women's rights.
10. In Nepal, there are five women judges in the entire judicial system. Unfortunately even they are not gender sensitive.
11. The 'UN 2000 Outcome Document' regards the need to consider marital rape and domestic violence against women as offences in all the National Laws.

## **SESSION II : Rights of Women Detainees**

Chairperson : Hiroko Hashimoto (Japan)

### **1. Prathan Watanavanich (Thailand)**

In Thailand, many changes have been made in the laws in order to protect Women, particularly, in the criminal law system. Thai law was changed in order to accommodate the UN minimum standard so as to provide protection to women in prisons. Presently there are more people in prison than the prisons could accommodate. The number of women prisoners has also increased. The situation is turning into inhuman situation. Thai law has a gender free approach. But the legal system is favorable to richer class people than towards the lower social class. Female staff is harsher than male staff towards women in prison. Law requires that the prison staff consist of women in the women part of the prison where the living quarters of men and women are separated. Illegal foreigners are detained in detention houses for a long time. Corruption is another factor that hampers improvement and functioning of the detention centers.

### **2. Kanae Doi (Japan)**

In Japan, the law is not gender neutral. Persons are detained in the Police detention rooms, up to a period of 24 hours. The law requires that the body search and medical examination be carried out by the woman officers. Unfortunately that is done in the presence of men officials. She has to announce loudly before using the lavatories or request for a sanitary napkins from the men officials. The detention house has men and women in the same rooms. In case of foreigners, the detained women and children are better treated than the men.

3. Leila Zerrougui (Algeria)

Algeria is a Muslim country but is not governed by the sharia law. The law applicable is a civil law. In case of criminal law, men and women are equal but in reality, there is positive discrimination in favor of women, e.g. in terms of lesser punishment to women than to men. In case of pregnant women the execution takes place after the child completes the age of 2 years. However there are no separate prisons for women but merely a separate quarter for women in the same prison. There are fewer women in the prison and the prisons are not equipped for women prisoners nor are there any efforts for their rehabilitation while in the prison. When a woman is in the prison, the family does not support her unlike in the case of a man prisoner. Generally the family refuses to receive the woman after she completes her prison term, particularly the ones who were completing their prison terms on account of their involvement in terrorist groups or sexual offences.

**Discussion :**

1. Psychological programmes are needed for the benefits of women detainees.
2. ICRC has adopted a code and also sends a body of experts to investigate the complaints of torture victims in the prisons. The ICRC does not release this information to any other body except the state authority.
3. In Nepal, a distinction is maintained between the prisoner, the legal detainees and the illegal detainees. However the government machinery is not equipped to handle situations of psychological trauma, presence of insane women in detention. Custodial

rape is sometimes used as a method of extra judicial punishment against the women members of the Maoist terrorist groups. Rights of detainees are not necessarily upheld, including provisions for education, (for children of detainees), health and questions relating to reintegration into the society.

4. Australian prisons have created the drug problem and addiction due to anti depressants prescribed while in the prison. The research has shown that there is a high level of suicide attempts among the detainees after their release from the prison, particularly the ones belonging to the indigenous community. 75% of the women in the prison have their children with them. Women in immigration detention houses are doubly abused due to their illegal status.
5. Need for positive discrimination during and regarding detention of women.
6. In Hong Kong the Vietnamese refugee women were worst treated among those who were detained on account of their illegal status. The same now applies in cases of Chinese immigrants to Hong Kong. Many are sent home without proper trial. However many cases do not get reported as women do not necessarily report the cases.
7. Reliable statistics need to be collected. But there are always difficulties in collecting such data for various reasons, women are silenced, NGOs do not have access to a large data, etc.
8. The state is afraid of transparency in giving information to the public about the detainees. They share information only when they are sure that the information is not very detrimental to the sanctity of the state.
9. Need to use international forums to bring action and attention to the cause of women's rights and dignity.
10. Need to discuss the benefit of separate prisons for women or separate cells for women in the prisons so that they could be closer to the family residences in order to facilitate visits from the family members.
11. Possibility of privatization of prisons/detention homes and separation of detention homes from the police departments.

### **SESSION III : National and International Framework for Protection of Women Victims Including Trafficking**

Chairman : Yozo Yokota (Japan)

1. Makiyoshi Uehara (Japan)

Nearly 5 million foreigners visit Japan every year. This led to improvement in transportation, tourism, IT industry and economy of Japan. This also led to increase in the organized criminal activities. The immigration office has to address all these aspects including police aspects of immigration control. Forced deportation by the immigration office is an administrative act, which comes into effect only after the criminal procedure comes to an end. With regard to forced deportation, all aspects of human rights are taken into consideration, e.g. treatment during detention, police treatment, etc. There are incidences of trafficking, exploitation of women and illegal immigration. A special permission is granted to women to stay in Japan if they are married to Japanese men and have children. This is done on the humanitarian grounds. The illegal immigrants are kept in the protective custody. However they are released from the custody on the medical grounds. Women victims of trafficking in Japan are an international issue and require international cooperation among the nations. UN adopted the two protocols under the Convention against the Trans-national Organized Crimes.

Large number of illegal immigrants enters Japan with the counterfeit passports. In order to approach this problem, several actions are taken up, e.g. public awareness, strict enforcement of laws and deportation. Since 1999, Japanese law has recognized that illegal stay in Japan without proper documents is a crime.

2. Nirmala Pandit (India)

Shared the information about the international efforts in approaching the topic of trafficking. The role of NGOs and their efforts towards eliminating trafficking and protecting the victims of trafficking was also discussed. It is not necessary that the work against trafficking and protection of women must evolve only through the international convention relating to women. There are provisions against trafficking in many international conventions and covenants. The treaty bodies under these international instruments, the special mechanisms established under the Commission of Human rights and its subsidiary body, the Sub-Commission of

Protection and Promotion of Human Rights with its working group on contemporary forms of slavery and the special Rapporteurs are equipped to approach the question of 'trafficking in persons'. The Office of the High Commissioner of Human Rights has identified the anti-trafficking initiative as a priority area among its activities. It is very essential that the anti-trafficking initiatives must focus on the efforts needed in order to prevent trafficking, protect victims of trafficking and prosecution of traffickers at all levels, national, regional and international.

3. Hing Chun Wong (Hong Kong)

In Hong Kong, the government has issued two ordinances, Sex discrimination and Family discrimination Ordinances. These have paved way for protecting women victims of trafficking, rape, family violence, etc. Government is receptive to suggestions from the NGOs.

4. Yuriko Moto (Japan)

The recently adopted Protocols in Vienna Process are not very promising, since many of the suggestions of the NGOs and the UN agencies are not accepted. The action is left at the discretion of the States. Multiple discrimination faced by the victims of trafficking arising out of ethnicity, socially and economically marginalised communities, nature of their economic activities, etc.

5. Julia Antonella Motoc (Rumania)

Attention was drawn to universal phenomenon that there is high level of legal protection and low level of effective protection in the area of human rights of women. Efforts at the regional levels are directed towards the effective protection for the rights of women. A new phenomenon is emerging from the experience of Central and Eastern Europe in area of trafficking women. The impact of the fall of communism on the women was discussed, which reflected in the increased number of women participating in the legal systems. Yet the positive impact of participation was marred by the patriarchal system that prevailed. This resulted in increasing the discrimination against women.

## Discussions :

1. A victim of trafficking is deported to the country of origin, yet she /he can proceed with the claims for unpaid wages in Japan. The law was focusing on attacking the criminal rackets of employers and recruiters and not the victims' rights.
2. Each case is screened in order to ensure if a person is entitled to be a refugee or be sent back to the country of origin because she/he is an illegal entrant.
3. In cases of sexual exploitation of children, the exploiters are prosecuted in Australia on their return to Australia and children submit evidence through video links. New law is passed in Japan to punish those who are engaged in exploitation of children. One needs to work on the domestic level before we approach the international forum.
4. A major concern is, when an illegal entrant is also a victim of trafficking, what is the strategy of a government in treating this person, deportation or protection? Presently, the deportation law would be applicable but soon this would change with UN efforts in Vienna.
5. The participants regarding lack of regional mechanisms in Asia expressed a concern.
6. From the experience of Europe, it appears that raising the human rights standard would help in decreasing the discrimination against women.
7. European regional efforts are closely focusing on the issue of human rights through the convention and the protocols. Many of the women's rights in the European system are not judicial protections. The fact that the level of political standards in all the countries in the European region is not uniform.
8. It is essential that all the officials be educated in order to handle the cases of trafficking.
9. How does one make the distinction between smuggling and trafficking? It is important that this aspect be taken into consideration in determining the decision about deportation of an illegal entrant. Trafficking and smuggling can be differently determined.
10. The victim of trafficking would be provided with the higher level of protection than those who are smuggled in a country.
11. Is a special status recognized of the people who are trafficked in other country? It is a different status than the refugee status. There may be a need to grant some amnesty to the victims of trafficking.

12. How is the deportation worked? In Hong Kong the temporary residence is extended till the cases are finished.

## **CLOSING SESSION**

Many topics have been touched upon:

Court proceedings, court structure, language used in the courts, composition of Judges, attorneys, lawyers, detention system, gender aspects, women's psychology, women's rights and impact of economic, cultural and social aspects on woman's rights, multiple discrimination faced by women, different mechanism available at national, regional and international levels, deportation, and trafficking and smuggling of women and different approaches by the States in handling cases, role of education, training and sensitization of all involves in the protection of women's rights, need to discuss the about the regional efforts at the regional level in the Asia-Pacific, aspects of violations of women's rights were discussed in the form of rape including marital rape. There is need to give more attention towards the legal protection through national legislations, humanitarian protection and amnesty.

### **Actions to follow:**

To continue efforts in this direction and strengthen the efforts of the AWF.

The Chairman thanked the participants.

## Women in the Algerian Penal System

Leila Zerrougui

Magistrate, Member of the UN Sub-Commission

### Introduction

In all societies, men and women have had, neither the same status, nor the same rights, even if a law seems to be similar for both sexes and gives them the same rights, considerable differences between men and women do persist in their application or in their practice.

A striking inequality in the facts can correspond to a perfect equality in the texts to the extent, that certain people ask themselves questions on the nature and contents of the laws. Though legal protection and equality are necessary, at least, to allow those women who have the means to claim their rights, in order to be able to base themselves on legal texts and make things improve for the benefit of the underprivileged.

In fact, if customs and behaviors have been influenced, some changes have been obtained, at a slow pace then increasingly fast, it is just because the laws have been changed, thanks to a hard struggle of women and men among the elites that are the most active and the most convinced throughout the world.

Indeed, undeniable efforts have been made by the governments, the civil society and the United Nations, in particular since the 1995 Beijing conference, in order to improve women's situation in the world, unfortunately, the accomplished progress is low and irregular and still a lot remains to be done.

In the field that concerns us, that is, the legal protection of women, within the judicial systems particularly in the penal justice system aims at assessing the effectiveness of the



legal protection that the national systems recognize to women, against the transgressions of their rights, mainly, when they are victims of violence under all its forms and which they undergo, owing to their women's status on the one hand, and on the other one, the impact of this same status, on their rights, if they come to be prosecuted, convicted or jailed.

This communication will deal with the Algerian penal system and the legal protection, which it grants to women, the dichotomy of our laws which while consecrating without the remote ambiguity, the equality between the sexes in the Constitution, in the practice of the civil and political rights, in the penal and commercial laws, and in the economic and social rights, remains under the influence of the Islamic law and the patriarchal society's customs, when it deals with the woman's status within the family.

This dichotomy and the survival of discriminatory behaviors against women in the Algerian society, reducing to the minimum the legal achievements, and weakening women's status who meet difficulties to make the most of their rights, and impose themselves as full rights citizens.

## **I Women's legal protection within the Algerian system**

The role of first tier box, played by the Algerian women during the liberation war, could only lead to the establishment of an egalitarian legal system; any form of an institutionalized discrimination against militant women of the national cause would have been unacceptable.

### **1) Constitutional equality and its consequences on women's legal status**

This historical reality has urged the authorities to consider the equality of sexes and the prohibition of all forms of discrimination against women in all Algerian Constitutions (1963-1976-1989-1996).

In the 1996 Constitution, that is in force today, the constituent always addresses the citizens, men and women, without distinction, it then recognizes the same rights, and imposes on them, the same duties. It is even precised that "the aim of the institutions is to ensure the

equality of rights and duties of all the citizens, men and women, by removing the obstacles which hinder the progress of the human being and impede the effective participation of all in political, economic, social and cultural life.”

This constitutional consecration, of equality of sexes, has been expressed by an equality of treatment, in all the texts that have been promulgated after the independence.

Except for the family law, the Algerian framework legislation recognizes the woman as a subject of right able to own properties, to fulfill commercial acts without previous authorization and to work normally in all sectors, with a legal access to education, to public service and justice. In other respects, it recognizes her the practice of her civil and political rights, without any restriction related to her quality of woman. It goes without saying that the Algerian law consecrates the principle of equality of the salaries between men and women for equal qualifications.

In fact, the equal access to the public service has allowed the women to be present in all the sectors including the police and justice. In the magistracy, for instance, although there was only a limited number of them at the independence, they represent today more than 32% of the global number (772 women along 2696 magistrates that belong to the sector). In the last three classes of the National Institute of the Magistracy they are in their majority (around 125 on the total number of 200).

However, and despite this breakthrough, women remain under-represented in high rank jobs, up to now, no woman has never been nominated as chief of a high court (Public prosecutor or chairperson).

## 2) The woman's status in the penal justice

In the penal matter, Algeria has opted right from the independence, for a modern judicial system, strongly inspired from the Romano Germanic law, commonly called “civil law” and applied in the majority of the Western Europe, in which a compromise has been adopted between the procedure of inquisitory type and the one of accusatory type. In fact, in the

pre-trial process, entrusted to an examining magistrate, the proceeding is written and secret, but in the trial phase it is oral and public.

It is in this context that have been consecrated the principles of innocence presumption, legality of offenses and penalties, the non-retroactivity of penal law except if it is smoother, individuality of indictment and personality of the punishment.

The consecration of these principles has been done without any discrimination against women, what is expressed by an equality of treatment in the penal code, in the code of penal procedure and in the code of penitentiary reform, which do not contain any discriminatory provisions.

In all these texts, the woman is treated similarly as man, either she is a witness, a suspect, an offender or a victim. Once convicted, she enjoys the same rights and is submitted to the same obligations imposed on her fellow men with, however, a positive discrimination which allows the adjournment of her penalty when she is pregnant or when she is bringing up a child. Her women's status is sometimes kept as extenuating circumstance in certain infringements (abortion-infanticide).

Moreover, Algeria has ratified among other instruments, the Pact related to the Civil and Political Rights and its first Optional Protocol, the Pact related to the Economic Social and Cultural Rights, as well as the Convention on the Elimination of All Forms of Discrimination Against Women. This supposes that the woman is in a position to enjoy all her rights, since the Algerian Constitution devotes the primacy of the treaties ratified by Algeria on the internal law.

Unfortunately, and as all patriarchal societies notably those of the Arab-Islamic sphere, the woman's legal status within the family, remains discriminatory and prevents her from asserting all her rights, in particular, when she is victim of sexual abuses or house hold violence. The social pressure and the precariousness of her status in the society often impede her blossoming out and weaken her position, even if nothing prevents her from acting legally.

## **II The impact of the dichotomy of women's status face to violence**

As modern legislation, the Algerian law has done its best to ensure the protection of the victims against ill treatments, corporal punishments and sexual abuses, through a severe network of repressive provisions, which allow any victim to take proceedings against criminals and obtain an equivalent remedy to the undergone injury.

This law is though, not always obvious, nor easily practiced when the victim is a woman or an underage girl, particularly, when the author is the one who holds a given power on her (the husband, the father, the brother). Moreover, and even in cases when violence is committed by a third party, the woman's social status can wreck the action against the authors of violence.

Hence the necessity to foresee the affirmative actions, which guarantee the woman a real protection, taking into consideration the frailty of her social status. These provisions, today absent from our penal framework, are claimed insistently, by Algerian defense associations of women's rights.

### **1) Violence against women in the Algerian Society**

The terrorist violence which run over the recent years on our country, has of course not spared women, to the contrary, the mean ideology propagated by these groups, has chosen them as privileged targets. The violence was of an extreme virulence against women and children even if men have also paid their bier.

Kidnapped, raped, reduced to slavery in the Maquis and often murdered, women have been particularly targeted by terrorism. And even if in armed conflicts, systematic large scale rape has become an ordinary practice, in Algeria the virulence of terrorist groups against women, is only equaled by the fierce resistance with which women opposed these groups and the religious extremism vehiculed by the latter.

In fact, to face this violence, women were not alone, they often benefited from the sympathy,

the support and the solidarity of people and public authorities and despite the humiliation felt by the families, they are accepted and rarely abandoned. Which is far from being the case, when women are confronted with accustomed violence, in ordinary situations, be it household violence or violence committed by a third person, especially when it has to do with sexual violence.

The victim of sexual violence in a patriarchal society like ours, is discouraged on two folds, weakened by the sustained traumatism, made guilty by shame, often abandoned by her nearest and dearest, she must in addition face a society and structures generally skeptical, although women are increasingly present in these structures.

Household violence is the other painful reality which beats women, enchains them in silence and forces them to sustain complete indifference. It is true that it is not a phenomenon specific to the Algerian society, we find it in all societies, including the most developed and in all civilizations. What specifies it in the Algerian society, is that it is surrounded with taboos and unvoiced remarks.

The sacralization of the family and marriage, the latter remains a tradition and an obligation for founding a family, in addition to the difficulty to assume a divorce, aggravate the disarray of these women when they are confronted with a violent husband or a pervert father. The legal framework, which stands now, does not incriminate some violence and comprises gaps in procedures, which render it sometimes, insufficient to make stricken women feel secure.

## 2) The running procedure to apprehend the cases of violence

The prosecution of the offenders, in general, falls in the Algerian system, within the competence of the judiciary, what ever serious are the facts incriminated by penal law/

The initiative of this prosecution is left to the appreciation of the public prosecutor, representative of the state and the society in a court. The latter is often detained of a complaint lodged by the victim, her legal representative of a rightful member if she is underage or incapable.

The refusal to take the complaint or to start the prosecution, entitles the plaintiff to go directly to the examining magistrate for a complaint to suit for damages, according to the dispositions of articles 74 and following of the penal code.

The victim of the offence is sometimes not in a position to complain either because she is afraid or deprived of freedom, or because she is incapable and that her rightful representatives, for different reasons, refuse to reveal facts to the justice. Incest and rape are rarely brought before justice, unless followed by a pregnancy, which could not be kept hidden.

For women, underage or disabled victims of violence, the situation is of the most dramatic when these violence are committed in the premises supposed to be the most protective (family, school or professional premises) and sometimes by those enabled by law in order to act on their behalf or support them next to the authorities.

The information gathered by police services show that it is in the family and even at school that vulnerable person undergo most violence including sexual abuses. The most dramatic in these cases is that the authors of these crimes remain unpunished, because their misdemeanors are not revealed to justice.

If the violence is undergone at school, the fear of reprisal against the child prevents the parents from going to court. Often in the most unfavorable circles parents wrongly believe that the teacher or instructor has the right to beat the child.

If else the violence is undergone in the family, it is often the husband or the father who commits it. The unsecured wife or mother under the influence of a violent husband, fearing a rupture with dramatic consequences for all the family, prefers to renounce complaining. In the cases where the victim is the child (generally the daughter), the mother who supports her in the procedure held against the father is subject to the pressure of in-laws.

In other cases, it happens to the mother to break with the victim child to preserve the rest of the family. Pressure is sometimes exerted on the victim, to keep silent, and if the facts are unveiled to justice, the mother often denies them. The child is made feel guilty, then

abandoned by his relatives, and moreover for his psychic balance already broken , accused of lying, in such circumstances, it would be impossible for his to sustain an accusation before the judge.

### 3) The deficiencies of the legal framework in practice

The Algerian legal framework in force incriminates and punishes almost all known violences (breach to physical integrity, rape, indecent assault, procuring...). However, it has not considered the new offences, which have recently, been integrated in penal legislation, especially in Western countries to ensure more protection to women.

The matter concerns particularly sexual harassment and marriage rape, even if for the latter its non incrimination is a consequence of the definition of rape, as adopted by the Algerian jurisprudence: "unlawful coitus with a women it is known that she is not willing" and not as a result of the law.

However, the Algerian law continue to penalize adultery and abortion, even if for the latter, public authorities have had a more conciliatory attitude towards women raped and made pregnant by terrorists. A circular emanating from the Ministry of Health has authorized doctors to practice abortion to preserve the psychic balance of the women if she demands. It must however be noted that if adultery is punished with the same sentence, either the author is a women or a man, regarding abortion, and if the women practices it on herself in the cases not authorized by law, she benefits extenuating circumstances.

Another gap is noticed in the present penal code, which has not stipulated a specific framework, enabling to consider marriage violence or, the state of vulnerability of the pregnant wife as an aggravating circumstance to hold against the author of violence. Household violence and sexual abuses for the reasons mentioned earlier, are mis-defended before jurisdiction and remain often unpunished.

The Algerian law has unfortunately not yet, allowed women's rights protection associations to assist women victims of violence in the pre-trial and trial process.

Some countries are now allowing this assistance which enables fragilized and miss-advised victims to be supported and face the complexity of the procedure, and when necessary the resistance of society or the family.

#### 4) The status of the women offenders

In the Algerian law when the woman commits an offence, either she is suspect, defendant or convicted, her status has no difference with that of her male fellow. Unless positive discriminations, (infanticide and abortion are less severely punished when the author is the mother).

The only discrimination undergone by women in these cases, is a result of the promiscuity consequent of the lack of prisons for women in Algeria and the in adaptation to their needs of the quarters reserved to them within prison for men. The problem poses with more acuity when these women serve their sentence while bringing up a child or when they pregnant.

The precariousness of the detained women's conditions is not specific to Algeria, it is generally due to the relatively low of women's criminality in the world. Which does not facilitate the setting up of efficient means guaranteeing the respect of the minimum rules adopted by the United Nations regarding the detention condition of women. In Algeria, women represent today only 2% of prison population (they are 702 detained women, among whom 33 underage).

It is difficult with this number dispatched over the national territory to seek an efficient policy of rehabilitation particularly that this figure comprise a patchwork of underage, adults, recidivists, occasional delinquents, some for serious offence... To gather all these women in a single prison could be a practicable solution, but it could come at the expense of family closeness and will penalize the families.

Being a minority in prison, in addition to the insufficiency of means, women are obviously discriminated. This is posed in almost all the countries of the world and concerns all the vulnerable categories of prison population (underage, HIV victims, disabled...).



It, however, must be expected an important increase of the rate of women criminality with globalization, the liberalization of exchanges and the flows of women's labor on job market whose rate of penetration is in constant increase.

This situation will unavoidably lead to the implication of more and more women in reprehensible behaviors which will require actions and measures adapted to this kind of criminality.

## **Conclusion**

It appears in light of what has been set forth that though the Algerian penal system is not discriminatory towards women, the equality before the law is not always concretized in facts, through the effective exercise of the consecrated rights. This reality weakens the protection legally acknowledged to women and makes it inoperative.

This reality compels public authorities to consider women as part of the vulnerable categories of society, which requires the setting up of positive measures enabling them to get rid of social constraints.

These measures should reinforce the legal framework in force by consecrating within the family law the equality between husband and wife and bringing to women a real legal, psychological and financial assistance when they are victims of any form of violence.

In the framework of the implementation of the current reforms whose guidelines have been set forth by the National Commission of the Reform of Justice instituted in 1999 by the Head of State, public authorities are thinking of the way to extenuate the gaps of the legal machinery in force and handle some preoccupations of women and the civil society.

Modifications will be made in the different codes (penal, penal procedure, the penitentiary, family law, code of nationality), at least this is the will expressed by the present Government. It remains to know at what extent will women's aspiration be answered in the face of the conservatism of broad social strata duly represented in Parliament.

There is space for hope as changes are discernible and visible in society, women gaining ground every day. They are increasingly present and active and force the hand of those who want to shut them up in role of minor importance within society.



## **Upholding, Promoting and Affirming Women's Dignity and Rights in Court Proceedings**

Jocelynn A. Scutt

Anti-Discrimination Commissioner

### ***Introduction***

Women in all capacities in court proceedings are at risk of being denied dignity and rights. This includes women litigants in civil proceedings; women as accused persons; women as victim witnesses; women as expert witnesses; women as witnesses generally; women attorneys; women as judges, magistrates, tribunal members, etc; women jurors; women court attendants; women as court recorders (recording proceeding by shorthand, recording machine or taping machine, etc); women court reporters (journalists); women as members of the public. Because the courtroom is a space designed with men in mind, and is dominated by male persons in various capacities - as judges, attorneys, courtroom attendants, litigants, etc - women are at a disadvantage from the start. This disadvantage plays itself out at the 'simple' level of courtroom furniture and spaces, and amenities attached to the courtroom (in jury rooms, for example), as well as in more complex ways - language, substantive and procedural law, and court procedures generally. All aspects impact (in varying degrees) on women coming into the courtroom, whatever their role.

### ***Victim/Survivor Witnesses and Civil Litigants***

Victim/survivor witnesses and civil litigants can be intimidated, humiliated, offended, insulted and ridiculed by defence counsel. This occurs most often in rape and sexual assault cases. However it can equally occur in sexual harassment cases (civil litigation), in discrimination claims (also civil), family law and in consumer credit and all other cases where women appear in the witnessbox. The concentration on women in rape cases, focusing on problems impinging on women's dignity and rights, sidesteps the fundamental

issue: it is that women are 'got at' *because* they are women-in-court, not only because they are victim/survivor witnesses in rape cases. This is confirmed where women are *accused* of crimes. A similar dynamic operates: women are questioned in an intimidatory way, with questions frequently focusing on their sex/gender, so that 'sexuality' becomes a focus where women are cross-examined. 'Sexuality' or sex/gender is *not* a focus where men are cross-examined, except where they are homosexual or transsexual, or are 'suspected' to be so by reason of the crime of which they may be victim/survivor witness, or of which they are accused.<sup>1</sup>

### ***Women as Expert Witnesses, Attorneys, Judges, etc.***

Women as expert witnesses may be similarly intimidated and ridiculed, with their sex/gender and sexuality becoming a focus as it never is for male experts, attorneys or judges. Cross-examination can imply or assert that the woman expert has an 'agenda' or some 'personal' reason for appearing as witness. With child sexual abuse, rape or criminal assault at home (victim compensation claims, for example) it is suggested that because the expert is a woman, she has a stake in the outcome, or is 'emotionally involved' or has a 'problem' with men. This is sometimes stated blatantly, or may be insinuated or addressed by innuendo.<sup>2</sup>

Women attorneys can be bullied by male attorneys at the bartable or prior to commencement of proceedings, or at other stages - in conciliation, mediation or settlement discussions. Judges and magistrates can engage in this conduct - comments about women's hair, dress, perfume, losing weight or putting it on; addressing the bartable as 'gentlemen'; refusing to 'see' or 'hear' the woman attorney because she is wearing trousers in court or is 'overlooked' with preference or priority given to male attorneys. Women judges and magistrates can be spoken to insolently by male attorneys or ridiculed privately, or

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<sup>1</sup> See Jocelyne A. Scutt, *The Incredible Women - Power and Sexual Politics*, vol 1 and 2, 1998, Artemis Publishing, Melbourne, Victoria, Australia.

<sup>2</sup> Ibid, also Susan S.M. Edwards, *Sex and Gender in the Legal Process*, 1996, Blackstone Press, London, UK; Jocelyne A. Scutt, *Women and the Law*, 1990, Law Book Co., Sydney, NSW, Australia; Anne Thacker, ed, *Women and the Law - Judicial Attitudes as they Impact on Women*, 1998, Deakin University Press, Deakin, Victoria, Australia; Jocelyne Scutt, 'Access to Law in an Age of Mean Spiritedness' in *Women, Public Policy and the State*, Hancock, ed, 1999, MacMillan Education Australia, Melbourne, Victoria, Australia, pp. 124-43.

even in the courtroom, in ways men judges or magistrates would not generally be treated - at least never to their face.<sup>3</sup>

### ***Jurors, Attendants and Others***

Judges, magistrates and male attorneys can speak disrespectfully to women jurors and others. Sex/gender and/or sexuality is a focus - for example, the woman juror being spoken to as if she is a 'naughty girl' when a male juror would not be treated in this manner.<sup>4</sup>

### ***Solutions.***

Judges, magistrates, attorneys and all working in the legal system require ongoing, compulsory training out of discriminatory patterns and practices which infuse the legal system. 'One off' seminars or conferences are insufficient, for discrimination infuses society and is endemic in the legal system.<sup>5</sup> Judges and prosecutors must be attuned to the need to stop or object to questions that are irrelevant, inadmissible, insulting, humiliating or ridiculing. The *Anti-Discrimination Act 1998* (Tasmania) says:

- s. 17(1) A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of sex/gender, marital status, pregnancy, breastfeeding, parental status or family responsibilities in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

Courtroom furniture and the way courtrooms are set out and structured need to be changed so as to properly accommodate women as well as men. The problems of courtrooms - size

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<sup>3</sup> Anne Thacker, ed, *Women and the Law*, 1998, Deakin University Press, Australia; Jocelyne Scutt, 'Access to Law ...' in *Women, Public Policy and the State*, 1999, MacMillan Education Australia.

<sup>4</sup> See Beth Wilson, 'Beyond the Legal Mystique' in *Breaking Through - Women, Work and Careers*, 1992, Artemis Publishing, Melbourne, Victoria, Australia, pp. 206-15, at p. 211.

<sup>5</sup> The endemic nature of discrimination 'in society' or 'in the world' has been recognised as a matter for judicial notice in *Minister for Health v. Aramugum* and *Victoria Police v. McKenna* (both Supreme Court of Victoria, Australia, cases).

and location of furniture, for example - has been criticised when child witnesses and persons with disabilities are before the courts. However, attention has not been paid (and should be) to this issue where women appear; it should be. To ensure that women's rights, dignity and wellbeing are preserved and upheld in the courts, courts must be kept open. It is only in this way that we (the public, citizens) can know that women's rights are being acknowledged or abused. Although women are often cajoled into believing that courtrooms should be 'closed' when women give evidence - particularly in rape cases, for example - this approach renders women more vulnerable rather than less. The woman will be giving her evidence not into an empty room, but into a courtroom structured by men, for men; it will be populated in the main by men - the judge, the associate, the courtroom attendant, at least half the jury, attorneys. Those who will be kept out are those who may be supporters of the woman witness, and the media which, for all its faults, can report on what happens in the courtroom. The public needs to know what happens in the courtroom. If questions that are intrusive, irrelevant and inadmissible, humiliating, ridiculing or insulting, are put to witnesses, we need to know. This is the only way that a stop can be put to this conduct which denies women's rights, denies women dignity and downgrades the legal system by downgrading the women appearing within it.

**JUSTICE, SELF-DEFENCE AND WOMEN'S LIVES**  
**REFLECTING ON REALITY AND UNREALITY IN CRIMINAL JUSTICE - A CASE STUDY IN**  
**SELF-DEFENCE AND SAVING WOMEN'S LIVES**

Jocelynn A. Scutt  
Anti-Discrimination Commissioner

The temptation to avert one's eyes from seeing the ways in which gender, race, ethnicity, class and sexual orientation frame judgments is powerful ... What does one do in the face of pervasive gendered and racialized interpretations of fact, of credibility, and of legal doctrine? How does one run a court system?

Judith Resnick, 'From the Senate Judiciary Committee to the Country Courthouse: The Relevance of Gender, Race, and Ethnicity to Adjudication' in *Race, Gender and Power in America*, 1995

In 1998 in Ethiopia, a young woman was acquitted of murder on grounds of self-defence, when she shot the man who had taken her as his wife, raped and abused her.<sup>1</sup> Would she have stood such a chance in courts of law in other countries?

Aberash was fourteen when she was kidnapped and delivered up to the man who planned to marry her once she was pregnant. This tradition has had its counterparts in social mores of other countries, whether in this time or another. In other legal systems, will the woman who kills in such circumstances be exonerated by her country's laws? Can a woman who kills because she is raped or fears rape be classed as killing in self-defence?

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<sup>1</sup> This case was the subject of a article in the national daily newspaper, the *Australian*, in May 1999.

In legal systems deriving from Britain, the law has held that self-defence applied only where a person believed she or he was about to be killed. Only then could the killer be acquitted on self-defence grounds. In the 1980s, Australian High Court said that fear of being raped or ravaged could found a claim of self-defence. Yet this change has not assisted women, for self-defence laws continue to operate unequally where women rather than men stand accused of unlawful killing.

This is clear where the claim of self-defence is founded in facts and circumstances most likely to confront women: where the woman has been beaten or sexually abused on an ongoing basis in the course of a marriage or de facto relationship. In some cases, in an effort to have the law cover women in these situations, the so-called 'battered women syndrome' has been applied. The proposition is that the woman was so locked into a violent relationship that she 'learned helplessness' so that the law should recognise this as a 'special case' and acquit her of murder or at least find her guilty of manslaughter only.

Does this approach to the criminal law and women's place in it ultimately assist women, render the criminal justice system 'equal' for women and men, or advance women's rights? The problem is that in labelling women as 'helpless', this approach means that a few women may be advantaged, yet many more will be more likely to stand convicted because the contradiction of asserting that a woman is 'helpless' in the face of her evident lack of helplessness in that she has killed the aggressor can readily be thrown up to judge and jury as a reason not for an acquittal, but for a conviction.

As well, this approach bluntly contradicts the reality of women's lives.

### ***Expert Evidence and Women Who Kill***

In cases where women kill after a history of violence inflicted by a partner, courts in Australia, the United Kingdom, the United States, Canada and elsewhere have come to hold that 'expert evidence' may be given about battering and abuse in marriage and de facto relationships and their effect upon women's lives, and the effect on the particular women who stands accused of



unlawful killing. The proposition is that judges and juries may be assisted in understanding the reasons for the woman's killing the man, or the way in which she may have come to do this, because she saw no other choice or escape.

Yet if this evidence is to be of any real value to the woman who kills, it needs to be central not to some 'new' 'defence' of 'battered woman syndrome', but to principles of self-defence or provocation law as they have developed to exonerate men from liability for killing.<sup>2</sup>

The Australian case of *R. v. Osland* is a textbook example of the way in which the law may be used against the interests of women - and justice - through seeing the position of the woman who kills a violent partner as 'different' or outside the law of self-defence, as if a 'new' defence must be concocted to free her from liability for his death.

There, expert evidence was allowed by the court both in relation to sexual abuse and the so-called 'battered woman syndrome'. Dr Petersen, a general practitioner, gave evidence about Ms Osland's visits for medical treatment. These occurred on a continuing basis from the time the family moved from country Victoria to Karratha in the north west of Western Australia. Dr K. Byrne, a forensic and clinical psychologist, gave evidence of what he called the 'battered woman syndrome'.

However, it is not sufficient to simply allow expert evidence to be given.

The trial judge is under an obligation to ensure that the jury is properly instructed as to the use/s to which such evidence may be put.<sup>3</sup> If this is not done, the jury is confronted with evidence without having its relevance to the law revealed. This was what happened in *Queen v. Osland*.

Provocation and self-defence were referred to by the Court in the context of Ms Osland and

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<sup>2</sup> *R. v. Dziduch* (1990) 47 A.Crim. R. 378, 379; *R. v. Lavelle* (1990) 55 C.C.C. (3<sup>rd</sup>) 97; *Malott v. The Queen* (unreported 12 February 1998, No. 25613, Supreme Court of Canada).

<sup>3</sup> *State of Washington v. Allery* 683 P. 2d 312 (Wash. 1984); *Lavelle* (1990) 53 C.C.C. (3<sup>rd</sup>) 97; *Malott v. The Queen* (1998, Supreme Court of Canada).

her participation in the killing of Mr Osland, but the focus on 'battered woman syndrome' was unhelpful. Throughout the case there was a confusion about:

- what 'battered woman syndrome' is;
- the relevance of 'battered woman syndrome' to Ms Osland and her trial;
- the relevance of 'battered woman syndrome' to self-defence;
- the relevance of 'battered woman syndrome' to provocation.

### ***The Nonsense of the 'Battered Woman Syndrome'***

For some thirteen years of a marriage punctuated by separations initiated by Heather Osland and replete with violence against her and her four children inflicted by Frank Osland, Heather Osland and the children lived under his effective control. Early in the relationship he set down 'the rules' by which she and the children were required to live: quiet at all times; meal times directed by when he sat down to eat, with him determining who should eat and in what order - beginning with his needs and those of no one else; house spotless; a packed lunch prepared by Heather Osland early each morning; sleeping patterns punctuated according to his desire to sleep or wake - or his demands and that she and the children should sleep or wake in accordance with a pattern set by him alone. There were many more 'rules'. Violence included holding a gun to her head; breaking one child's jaw and punching another in the teeth so that his gums bled from the braces being squashed into his mouth; punching, kicking, thrusting her head under the water in the bath, pushing her head into the pillows or carpet so that she feared she would choke to death; pulling her hair; punching her 'where the marks won't show'; killing the family pets by kicking or bashing, or by starving them to death in her sight and that of the children, with threats to their safety if they dared to poke slivers of grass through the bars of the rabbits' cage or toss seed into the empty containers in the aviary.

Rather than explaining the possible relevance of all this to the defence of self-defence or to possible provocation as founding the killing, the Trial Court treated 'battered woman syndrome'

so as to bring only confusion to the jury.<sup>4</sup> He dealt with it in various ways throughout the trial and in the summing up to the jury, describing what was called variously throughout the trial 'the battered woman syndrome' amongst other things:

- as a 'set of symptoms'/'nothing but a set of symptoms'/'not an illness'/'collection of signs and symptoms';<sup>5</sup>
- which had not been a part of the opening – instead 'Stockholm Syndrome' had been;<sup>6</sup>
- as a category into which Ms Osland had to bring herself or 'fall within';<sup>7</sup>
- as something into which it 'may not matter' 'whether she fits ... at all';<sup>8</sup>
- as something that might be used by the jury to 'reach a conclusion that the Crown had not satisfied [them] ... that she had not finally snapped' or 'lost control';<sup>9</sup>
- as a 'defence';<sup>10</sup>
- as *not* being 'a defence';<sup>11</sup>

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<sup>4</sup> With a possible Freudian slip of the tongue, the judge even referred to it as the 'battered syndrome' on one occasion - AB 2048/Trns 1764.

<sup>5</sup> AB 820B/Trns 919, 2046/Trns 1762, AB 2152/Trns 1893 (per Dr Byrne), AB 2153/Trns 1894 (per Dr Byrne), AB 2156/Trns 1897 (per Dr Byrne).

<sup>6</sup> AB 820B/Trns 919 (jury absent).

<sup>7</sup> AB 2005/Trns 1716, AB 2006/Trns 1717, AB 2047/Trns 1763, AB 2048/Trns 1764; AB 2050/Trns 1766, AB 2153/Trns 1894 (per Dr Byrne), AB 2155/Trns 1896 (per Dr Byrne).

<sup>8</sup> AB 2049/Trns 1765.

<sup>9</sup> AB 2050/Trns 1766.

<sup>10</sup> AB 2029/Trns 1745, AB 2182/Trns 1923 (commenting on the Crown's address – 'the battered woman defence did not give her a defence to murder').

<sup>11</sup> AB 2046.

- as supporting provocation or self-defence/to be used if the jury 'accept the facts of the abuse, physical and psychological, when [considering] the defences of self-defence and provocation';<sup>12</sup>
- as 'connected with and forming part of the defences [sic]' of self-defence and provocation;<sup>13</sup>
- as being something other than related to provocation or self-defence;<sup>14</sup>
- as something upon which the defence for Ms Osland 'relied', without signifying or stipulating in what manner, or for what purposes (in law) it was relied upon;<sup>15</sup>
- as 'now being recognised by the law' although 'the ramifications of this defence, which in terms of personal experience I only derived from reading fairly limited cases about it ...';<sup>16</sup>
- as 'your battered woman syndrome' ('your' being Counsel for Ms Osland);<sup>17</sup>
- as being an 'unusual matter' (or connected in some way to 'unusual matters') 'littering the legal landscape';<sup>18</sup>
- as providing self-defence and provocation with 'features that are peculiar to her case' or 'special features';<sup>19</sup>
- as being 'hardly necessary' evidence.<sup>20</sup>

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<sup>12</sup> AB 2046/Trns 1762.

<sup>13</sup> AB 2045/Trns 1761.

<sup>14</sup> AB 2014/Trns 1730.

<sup>15</sup> AB 2001/Trns 1712.

<sup>16</sup> AB 236/Trns 204.

<sup>17</sup> AB 216/Trns 184, 219/Trns 187, AB 484/Trns 475, AB 912/Trns 1022 (jury absent), 1052/Trns 1166.

<sup>18</sup> AB 2017/Trns 1733.

<sup>19</sup> AB 2029/Trns 1745, AB 2042/Trns 1758.

<sup>20</sup> AB 2047/Trns 1763.

The vast majority of these comments were contained in the charge to the jury (the 'summing up'). Even where they were not, in the main they were said in the presence of the jury. Those that were said in the absence of the jury could not of course directly affect them. However, the remarks indicate an apparently serious difficulty or confusion as to precisely what 'battered woman syndrome' is or purports to be, or its relevance to the trial of Ms Osland, or its application to the law generally and in particular to that of self-defence and/or provocation. Even more, the comments indicate a denial of the relevance of the violence suffered by Heather Osland to the 'ordinary' rules of self-defence and provocation. They serve to deflect the jury from the task they were set to do: namely, that of determining whether there was an intention to kill unlawfully, or whether something else was operating at the time of the death so as to show that the death came about in consequence of a desire to save life - the life of Heather Osland, rather than an isolated desire to end a life - that of Frank Osland.

Phrases and clauses employed in the charge to the jury included:

**... there are innumerable facts. Some of them are very important, some of them are important and some of them are not all that important. I think it may be said that inevitably there has been some lingering on some insignificant facts by reference to events more than a decade ago, but allowances have to be made. There were some important background matters about the life in Karratha, in particular perhaps the early days in Bendigo. While far distant from the criminal matter here, they are bound up with facts of importance which also came out. They are all put before you because the task of trying to winnow the wheat from the chaff is not undertaken. The matters are put before you for you to determine for yourselves what you believe to be important.**

**It must be said, many of the old facts were unearthed to establish and support the battered woman syndrome, upon which in particular counsel for Mrs Osland rely.<sup>21</sup>**

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<sup>21</sup> AB 2000-1/Tms 1711-2.

[Re experts]

They do not decide the facts in the case. That function still remains with you and they cannot tell you what you should conclude, for example, about Heather Osland, *as to whether or not she falls within battered woman syndrome.*<sup>22</sup>

Dr Byrne was questioned by Mr McIvor ... to extract the number of hours spent on interview ... and .. in consultation ... before he had already reached the conclusion that *she fell within battered woman syndrome*. It is entirely a matter for you whether you think those matters make any significant impact upon the expression of opinion. With respect to Dr Byrne, the key dispute, it seems to me, is not just whether or not on the facts on which his opinion was based Mrs Osland was a person falling within the battered woman's syndrome in his scientific sense, but whether the facts have been established and perhaps *more importantly whether the fact that she was, if you think she was a battered woman, has got anything to do with the killing of Frank Osland ....*<sup>23</sup>

The drawing in of the life and times of the family, and the violences and vices of Frank Osland, has been permitted for a particular reason, *primarily connected with battered woman syndrome, but also connected with the states of mind and possible reactions of the two accused on the night of 31 July.*<sup>24</sup>

... for the reasons I have just mentioned, the legal landscape in this case is littered with some unusual matters; the life and times of Osland, arguably connected with the battered woman syndrome which the Heather Osland defence says is relevant to self-defence and provocation. And, battered woman syndrome or not, the David Albion defence says it is entitled to rely upon Frank Osland's past violence, linked to his threats, as forming part of the self-defence and provocation arguments.<sup>25</sup>

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<sup>22</sup> AB 2005/Trns 1716 (Emphasis added).

<sup>23</sup> AB 2006/Trns 1717 (Emphasis added).

<sup>24</sup> AB 2014/Trns 1730.

<sup>25</sup> AB 2017/Trns 1733.

**There does not appear to be any argument advanced that in terms of complicity that they should be treated differently one from the other. *As will appear the defence raised by Heather Osland is in respect of self-defence and provocation has some features that are peculiar to her case because of her reliance upon the battered woman syndrome defence.* I emphasize, however, in case there is any doubt that there is no battered family defence, although you could be forgiven for thinking it was being run at one stage. However the way in which the defence is put for David Albion, while not battered woman defence, relies upon a related concept.<sup>26</sup>**

Despite the lack of any clear elucidation, immediately after going through the evidence of Dr K. Byrne,<sup>27</sup> the trial judge says:

**I have already told you how you may use the battered wife syndrome. By and large, the support for it was said to arise from the evidence given about the matters and in terms of the expert sense, reliance was placed upon Dr Byrne's description of it and his own opinion.<sup>28</sup>**

This, then, was the sum total of the explanation to the jury of how 'battered woman syndrome' could be used.

After Ms Osland was convicted, she appealed. She gained little better response or explanation for the 'battered woman syndrome' or its use in her case there. The Court of Appeal referred to the 'battered woman syndrome' in relation to Dr Byrne's evidence.<sup>29</sup>

The approach that the issue for the jury in assessing the expert evidence and other material before them was (or may be) whether or not Ms Osland 'fell within' the 'battered woman

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<sup>26</sup> AB 2029/Trns 1745 (Emphasis added).

<sup>27</sup> AB 2152-7, Trns 1893-8.

<sup>28</sup> AB 2157/Trns 1898.

<sup>29</sup> AB 2222, and generally - AB 2225-9, 2231, 2232, 2236, 2239, 2240.

syndrome' or came under some 'classification of battered woman' was adopted without any recognisable critique:

**... the contentions [on appeal] challenge the sufficiency of the directions as to the matter in which the jury should approach the issue of provocation as it related to the evidence *suggesting that the applicant, at the time when the killing occurred, fell within the classification of a battered woman.*<sup>30</sup>**

The Court of Appeal fell into the same error infecting the Trial Court, one that has created difficulty where 'battered woman syndrome' is used, rather than looking at the reality of the woman's life - the violence, its effect, and its relevance to a defence of self-defence or provocation.

That error is to focus on 'battered woman syndrome' or 'battered woman/women' as if what has to be asked is:

- is the woman accused of unlawful killing (murder) a 'battered woman';
- is she 'within the "battered woman syndrome"';
- does she have the characteristics of a 'battered woman';
- does she have any of the characteristics of a 'battered woman',

and, if so, how many and are they 'enough'.

Yet this is not the issue.

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<sup>30</sup> AB 225.



## ***Battered Woman Reality***

'Battered woman syndrome' is a shorthand way of referring to what would be better described as 'battered woman reality' or (in longhand) 'the external circumstances which exist in the life of this particular woman that may show that when she killed, she did so in self-defence (or by reason of provocation)'.

Contrary to the trial judge and the Court of Appeal in *Osland's case* that 'battered woman syndrome' is or has 'peculiar' or 'special' features in some way distinguishing it from self-defence or provocation,<sup>31</sup> it has value in a criminal court only if it is directly about self-defence and provocation. The evidence of violence and its impact upon the woman is directly about the circumstances (the battering, sexual imposition, abuse, and so on) in which the killing took place and whether the Crown has established (as it must do, to prove murder) that:

- in the circumstances (of continuing violence, abuse, sexual aggression/violation etc), the woman claiming self-defence had no belief that it was necessary for her to act in self-defence (she was going to be killed or raped/sexually violated;<sup>32</sup> and
- in the circumstances (of continuing violence, abuse, sexual aggression/violation etc) her killing of the deceased was not reasonable; or
- in the circumstances (of continuing violence, abuse, sexual aggression/violation etc), the woman claiming provocation was not in fact subjected to any wrongful act or insults or series of acts or insults,

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<sup>31</sup> Citing *Ahluwalia* (1993) 96 Cr. App.R. 133; *R. v. Thornton (No. 2)* [1996] 1 W.L.R. 1174. (These cases have been seriously criticised and challenged by feminist scholars. The Victorian Court of Appeal showed no knowledge of this debate or critique.)

<sup>32</sup> See *Zecevic v. DPP (Victoria)* (1987) 162 C.L.R. 645. This is the leading case on 'what is self-defence', setting out the components of the defence and what the prosecution must prove to overcome it.

that could have provoked an 'ordinary person' (of her age) with powers of self-control within the range or limits of what is ordinary for persons of her age, in those circumstances to have killed the deceased, or whether there is a reasonable doubt that she killed in this way.

'Battered woman syndrome' has clearly caused difficulty in the courts. Some courts 'allow' it. Some are skeptical.<sup>33</sup>

No wonder courts are skeptical. There is a nonsense in suggesting that a woman who has 'learned helplessness' can then reverse all that helpless learning in order to kill to save her own life. Bluntly, it doesn't make sense.

### ***Battered Woman Reality***

Not only does this approach not make sense to the courts. It does not make sense of women's lives.

The 'battered woman syndrome' has medicalised the lives of women who live with - and live through - criminal assault at home and other forms of domestic violence, instead of looking at the facts of the lives of those women, and the way society responds to them. Rather than women in these circumstances 'learning helplessness', they learn that they must help themselves.

If there is any 'typical' picture of women who are dealt with violently by husbands or partners (or ex-husbands or partners), it is one of women *seeking* help. The problem is, the help is not forthcoming.

Women who are battered seek help from family, friends and 'others' - such as counsellors, psychologists, men of religion (priests, ministers, rabbis and the like). Too often, when they return (or attempt to return) to the 'extended family' home - the home of their parents - they

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<sup>33</sup> There has been continuing debate on it in Australia, Canada, the United States, the United Kingdom, Aoteara/New Zealand and elsewhere.

find that 'their' room has been taken over by another sibling, or has been converted into a study, sewingroom or the 'junkroom'. Parents find difficulty in accepting that their daughter is being beaten, or the woman may find difficulty in explaining the violence to them - after all, she has difficulty in explaining it to herself. If there is a modicum of recognition of the marriage being 'difficult' or even involving some 'rough treatment', the family's response can be 'you made your bed, you lie in it'. When they go to ministers, priests and others, the response too often is: 'it's your duty to remain with your husband' or 'you are the one responsible for maintaining the marriage' or 'you need to minister to the needs of your husband'. The woman is not listened to.

Similarly when seeking help of medical practitioners or counsellors. Ample research indicates that doctors do not want to hear, and that counsellors and psychologists can be equally obtuse. After all, what have they learned of the realities of women being beaten at home? What content in their university courses alerts them to this phenomenon? In a major national study carried out in the late 1970s and early 1980s in Australia, the response of medical practitioners was found to be that of 'handing out the Valium' or Mogodon or other soporific. The approach appeared to be that of 'giving the woman medicine to keep her out of the doctor's misery'.<sup>34</sup>

Women do go to police for help. They do not generally go on the first occasion of violence, or on the second or third. They approach police when they are in real fear of their safety - indeed, their lives. Women come to 'accept' that a certain level of violence is endurable: that they can 'survive' it. When they call on the police for help, it is because the violence has gone over the level they believe they can handle, or they have a real and intense fear that it will.

Heather Osland and her children called on the police, but were ill-served. Evidence was given to the court by neighbours and others, as well as Ms Osland and her family, that police had been called on more than one occasion, and that they had arrived on several. Once, Mr Osland

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<sup>34</sup> 'I give her drugs to keep her out of my misery' is a title captured by Diana Wyndham in a paper delivered to a national conference on violence against women in 1984, and dealing with this problem of the medial profession in failing to 'read' the realities and the needs of women living in violent relationships.

attached the door of Ms Osland's home with an axe, breaking it down so that he could enter: this was an occasion when she had left him, attempting to make an independent life for herself and the family. On another, police attended yet a neighbour's evidence was that he saw them sheepishly retreating down the driveway whilst Frank Osland stood at the top, waving his fist and arms at them. Once, on Christmas Day, several police cars arrived, lights flashing. Mr Osland was seen by neighbours walking about with a cocky air, delivering a briefcase to a friend he had called to take the case whilst he dealt with police.

Police are notorious for repeating the mantra 'it's not a criminal matter, it's a civil matter' and 'there's nothing we can do'. Intervention orders, non-molestation orders and injunctions have not assisted women in this situation. Rather, they confirm the police in their (wrongly) stated view that it is for the civil courts to deal with criminal assault at home, by issuing 'orders' to desist (honoured in the breach - and even then, action is comparatively rarely taken), rather than for the police to arrest and deal with, through the criminal courts, those who have inflicted criminal violence upon family members.

Women seek help from courts - civil, family and criminal. In one case cited in *Even in the Best of Homes*,<sup>35</sup> the woman was approached by police as she sat in the witness room, waiting to be called to give evidence about her husband's criminal violence against her. 'You don't want him to go to prison, do you, love?' she was asked by a lawyer. 'Why don't you go home, lose some weight and put on some make up - and your husband will love you again.' Wanting to 'lose some weight' and even more have her husband 'love her again', the woman took the 'advice', went home, put on some make up, possibly even lost some weight - and met with more violence, a readily predictable outcome.

When women seek intervention or non-molestation orders, magistrates may issue them. Others respond with such homilies as: 'Why does it matter that he's following her? He's her husband, isn't he? Of course he wants to get her back.' Many cannot understand that flowers

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<sup>35</sup> Scutt, 1983, Penguin Books Australia, Ringwood, Victoria, Australia; update 1990, McCulloch Publishing, Carlton, Victoria, Australia.

and chocolates are not tokens of affection, but evidence of attempted manipulation, pressure, 'blackmail' or stalking.

### ***Medical Evidence, Violence, and Rape***

Similarly medical practitioners are inured against women's words. This failing can be compounded in the courtroom when evidence is given by the doctor and the woman who visited him for help, for two apparently different stories come into the case as evidence. This arises because not only are medical practitioners loath to listen *properly* or listen at all to women who come to seek help when they are being beaten or raped on the homeground, judges have a similar difficulty.

An illustration of the way in which judges may be too often unable to listen to the woman's words, or see the evidence of her attempts to seek help for what they are - clear 'callings out' for attention to be paid - may be found in in ***R. v. Osland***. There, some commentators may say that the jury was not properly directed on the medical evidence before the court. That failure in direction, as assessed by some, might be said to arise demonstrably out of a lack of reflective knowledge or understanding of criminal assault at home and other forms of domestic violence and its relevance to women who kill.

In ***R. v. Osland***, the Court heard evidence from both Ms Osland and from her medical practitioner as to medical conditions that could be illustrative of anal rape. Ms Osland's evidence was that she had suffered anal rape inflicted by Mr Osland. Dr Petersen evidence to the jury was that he had made notes of 'marital discord' - a euphemism that speaks volumes to those who listen.<sup>36</sup>

Research in this field shows:

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<sup>36</sup> In *R. v. Osland*, Dr Peterson's evidence appears at **AB 703-30, 733-6**. The trial judge's recounting of this evidence to the jury appears at **AB 2108-11**. Ms Osland's evidence appears at **AB 834-6** (in chief), and at **AB** (cross-examination).

- women are frequently reticent about speaking about sexual assault, abuse and rape generally, and in particular where it arises in marriage or other domestic relationships;
- women often do not characterise rape as 'rape', particularly where it is inflicted in intimate relationships such as in marriage;
- women often come to recognise sexual assault and rape, etc as 'rape' some time after the acts have occurred, and often after leaving the violent relationship;
- women do not disclose generally to 'their' medical practitioners, or at least a significant number of women do not disclose criminal assault at home and other forms of domestic violence, including rape/sexual abuse, to them;
- medical practitioners are not astute in recognising women patients have suffered criminal assault at home and other forms of domestic violence, including rape/sexual abuse;
- medical practitioners can ignore or pass-over criminal assault at home and other forms of domestic violence, including sexual abuse/rape, or fail to 'recognise' it;
- medical practitioners prescribe 'treatment' in the form of (placatory) drugs – anti-depressants and tranquillisers - where the problem is violence in the home and its consequences.<sup>37</sup>

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<sup>37</sup> See particularly Jocelynn A. Scutt, *Even in the Best of Homes - Violence In the Family*, 1983, Penguin Books Australia, Ringwood, Victoria, Australia; updated 1990, McCulloch Publishing, Carlton, Victoria, Australia. References - Australian Bureau of Statistics, *Women's Safety Australia*, 1996 - Chapter 4, 'Actions Taken in Response to Violence', pp. 28-41; Australian Medical Association, *AMA Position Statement on Domestic Violence*, Adopted by AMA Executive Council on 3 March 1998; Table 2, 'Prevalence of domestic violence in Australian community samples' (1998) 22 (No. 1) *Australian and New Zealand Journal of Public Health* 52; Chapter 6, 'Marital Rape' in *Even in the Best of Homes - Violence In the Family*, 1990, pp. 141-73, 316-19 (see also all items in index under 'medical profession', p.353); Council on Ethical and Judicial Affairs, American Medical Association, 'Physicians and Domestic Violence - Ethical Considerations' (1992) 267 (No. 23) *Journal of the American Medical Association* 3190-3; Council Reports, 'Violence Against Women - Relevance for Medical Practitioners' (1992) 267 (No. 23).

All this applies to anal rape, and may apply with even more force than to non-sexual abuse or violence and other forms of sexual abuse and exploitation. Dr Petersen described a long and ongoing history (up to July 1991) of prescribing anti-depressants and tranquillisers, urinary tract infection, soreness with intercourse, lumps in the vagina, bleeding and pain, etc (Murelax – tranquilliser, Tryptanol and Prothiadine - anti-depressants.) It was here that he noted she had complained of, or told him about 'marital disharmony' etc.

For the perceptive, Ms Osland gave evidence of anal rape. There were a number of contentions in relation to her evidence that she was anally raped by Frank Osland on an ongoing basis for a number of years, up to the time of his death. One was that it was a matter of 'recent invention', because she had not complained of this in the police interviews. Ms Osland said that she did mention it to Mr Miller, the member of the policeforce who was present at the police interviews (together with Mr Thatcher) and who played the secondary role in those interviews. Another was that she had not told Dr Peterson.

The judge's charge to the jury in relation to Dr Peterson's evidence over two pages, then continues with a brief comment about Ms Osland's evidence, including:

**Whether this [forced anal intercourse] occurred and its frequency and whether it was against her will is entirely a matter for you. I am not going to say much about this. The sexual appetites and practices of married people appear to be capable of very few boundaries. You are absolutely free so long as you base your views**

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*Journal of the American Medical Association* 3184-9; Hegarty, *Final Report on GPEP 290 – Barriers to Disclosure of Domestic Violence in General Practice*, 1994, University of Queensland, Social and Preventive Medicine Department/Department of Health, Housing and Community Services (General Practice Evaluation Programme); Roberts, O'Toole, Lawrence and Raphael, 'Domestic violence victims in a hospital emergency department' (1993) 159 (6 September) *Medical Journal of Australia* 307-10; Sugg, 'Primary Care Physicians' Response to Domestic Violence' (1992) (No. 23) *Journal of the American Medical Association* 3157-60; Webster, Sweett and Stolz, 'Domestic violence in pregnancy – A prevalence study' (1994) 161 (17 October) *Medical Journal of Australia* 466-70 (note: no contention violence against Heather Osland by Frank Osland during pregnancy, but see conclusions here re medical profession and particularly recommendation: Because most women will not reveal details about their experience of violence in the home unless asked, a relationship history should be included at the first visit along with medical, obstetric and other histories.)

on the evidence to reach your own conclusions about it. It is only of relevance if it is connected, even distinctly, with the killing and Heather Osland's fears and reasons ...

... it appears she did not ever mention it to *her trusted doctor*, Dr Peterson, notwithstanding that she was being treated for an apparently intractable urinary tract infection, which is not her doctor, a doctor for such a long period, she was reticent about it.<sup>38</sup>

In respect to Dr Peterson the trial judge said amongst other matters:

The doctor was aware, from what he said, that she had some trouble in the marriage. The matter was taken up with Mrs Osland in cross-examination, I think. Generally speaking she said, well, she was reticent about all of these matters, not only assaults but the issue of what she described as forced anal intercourse. That it was a matter that really if he was to say something about it, taken it up, that was one thing, but that she was not going to volunteer it. I will leave that matter to you.<sup>39</sup>

Counsel for Ms Osland asked that the trial judge redirect on his statement that Ms Osland 'did not ever mention it to her *trusted doctor*' – stating that it was incorrect to say to the jury that Dr Peterson was Ms Osland's 'trusted' medical practitioner. He was also asked to clarify that after Frank Osland's death, pelvic inflammatory disease/cystitis or vaginal discharge ceased. The trial judge clarified that Ms Osland's 'urinary tract infection continued to the end, by that I meant up until the death of Osland, because the evidence was that after his death they didn't persist'.<sup>40</sup> On the clearly significant assertion as to failure to disclose to her 'trusted' doctor, the request was refused.<sup>41</sup>

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<sup>38</sup> AB 2110-1/Trns 1844-5 (Emphasis added); see judge's charge to the jury at AB 2108-10/Trns 1842-4.

<sup>39</sup> AB 2109-10/Trns 1843-4.

<sup>40</sup> See: AB 2119/Trns 1856.

<sup>41</sup> See: AB /Trns 1853-5



### ***Model Guidelines for Self-Defence and Provocation in 'Battered Woman Reality'***

Courts cannot be allowed to stumble over the application of self-defence and provocation rules to women who kill any longer. It is incumbent upon courts at the highest level to devise 'model guidelines' or 'model directions' to provide Trial Courts and Appeal Courts with guidance on the use of evidence of violence, abuse, aggression and threats (including sexual violence, abuse, aggression and threats) where a woman has been subjected to it on an ongoing basis or in the context of a domestic relationship.

As was said in *Malott v. The Queen*:

**A ... "battered woman syndrome" is not a legal defence in itself such that an accused woman need only establish that she is suffering from the syndrome in order to gain an acquittal ...**<sup>42</sup>

**How should the courts combat the "syndromization" ... of battered women who act in self-defence? The legal inquiry into the moral [sic] culpability of a woman who is, for instance, claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from "battered woman syndrome" ... By emphasizing a woman's "learned helplessness", her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from "Battered woman syndrome", the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women. Therefore, it should be scrupulously avoided ...**<sup>43</sup>

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<sup>42</sup> Supreme Court of Canada, 12 February 1998, No. 25613, at 12.

<sup>43</sup> Supreme Court of Canada, 12 February 1998, No. 25613, at 13.

The Court in **Malott** went on to note that not only juries have difficulty in dealing with the prolonged history of violence to which women may be subjected and in the context of which they kill, then wish to have their claims self-defence taken seriously:

**How should these principles be given practical effect in the context of a jury trial of a woman accused of murdering her abuser? ... where the reasonableness of a battered woman's belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women's experiences. A judge and jury should be told that a battered woman's experiences are generally outside the common understanding of the average judge and juror, and that they should seek to understand the evidence being presented to them in order to overcome the myths and stereotypes which we all share. Finally, all of this should be presented in such a way as to focus on the reasonableness of the woman's actions, without relying on old or new stereotypes about battered women.**

**Concerns have been expressed that the treatment of expert evidence on battered woman syndrome, which is itself admissible in order to combat the myths and stereotypes which society has about battered women, has led to a new stereotype of the "battered woman" ... It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman ... Needless to say, women with these characteristics are still entitled to have their claims of self-defence fairly adjudicated, and they are also still entitled to have their experiences as battered women inform the analysis.**

### ***Jury Directions - Medical Evidence***

It could be argued that a jury properly instructed on medical evidence such as that available in ***R. v. Osland*** should have been told:

- it was the Crown contention that the evidence of anal rape was 'recent invention';
- as Ms Osland had not specifically mentioned it to her treating doctor, this could support the 'recent invention';
- that she had not told the police officers who interviewed her, during the recording of the interview/s (or at all) this could support the 'recent invention';
- that she said she had told one of the police officers, when not being recorded, and that police officer had not been called by the Crown or by the defence to give evidence or be cross-examined about this;
- that Ms Osland had told Dr Peterson of 'marital disharmony' (alternatively that Dr Peterson had translated what Ms Osland told him about the rape and violence into a tale of 'marital disharmony');
- that she had told him of 'pain during intercourse';
- that she had complained of vaginal or urethral bleeding;
- that many women do not complain to their medical practitioners about criminal assault at home and other forms of domestic violence, including rape in marriage;
- that anal rape or forced anal intercourse may be even more difficult for a woman to tell her doctor;

- that the doctor's evidence was that on a number of occasions she had told him of 'marital disharmony';
- that research shows doctors often do not 'pick up' that their women patients are suffering from criminal assault at home and other forms of domestic violence;
- that research shows that communication between doctors and women suffering violence in the home often fails to ensure that doctors accept or discern that this is the woman's complaint or the reason for her discomfort or illness, or seeking treatment, or visiting the doctor;
- that training is recognised as being necessary to enable medical practitioners to recognise when a patient is suffering/complaining about or may be suffering from/complaining about criminal assault at home and other forms of domestic violence, including rape in marriage;
- that training is recognised as being necessary to enable medical practitioners to treat patients in this category appropriately.

***Jury Directions - 'Battered Woman Reality' and Self-Defence, Not 'Battered Woman Syndrome'***

With evidence before the court of violence extending over years, trial judges should make clear in the charge to any jury that it is not the law that for a woman to 'escape' conviction for murder, she has to 'fit herself within' a 'battered woman syndrome', nor that this evidence is given in order that the jury can make such a determination.

As an illustration, it seems that in ***R. v. Osland***, the 'fit yourself within' the 'battered woman syndrome' approach may be discerned, at least on some readings of the trial transcript, and in the Court of Appeal. That 'battered woman syndrome' evidence appeared to be put to the jury

in this way at least at times during the trial arguably set a hurdle for Ms Osland that was not faced by her son, David Albion, on trial with her. He was presented as claiming a 'straight' self-defence or provocation argument. She was presented as seeking to avail herself of 'something' else.

Rather than ensure that the jury knew their job was to apply the principles of self-defence or provocation to Ms Osland, just as they were bound to apply them to Mr Albion, there was potential (at least) for confusion in the way this aspect was dealt with not only in the charge but throughout the trial.

As was pointed out in *Malott*, expert evidence as accepted in *R. v. Lavelle*<sup>44</sup> for two basic reasons:

- to dispel the myths and stereotypes inherent in understandings of a battered woman's experiences, and of the reasonableness of her actions; and
- because women's experiences and perspectives in relation to self-defence may be different from the experience and perspectives of men, and the perspectives of women must now equally inform the 'objective' standard of the reasonable person.

Apart from other difficulties some may discern as apparent in the courts of this trial in relation to the so-called 'battered woman syndrome' and the evidence of ongoing violence and abuse, including sexual abuse (the battered woman reality or circumstances grounding a defence of self-defence), comments made during the trial by counsel and the trial judge indicate that myths and stereotypes were not dispelled. For example, the trial judge made a number of references to Ms Osland and her remaining with Frank Osland, or in the marriage, despite his violence (her evidence – and independent witnesses' evidence – of his violence). There was reference to 'no bruising' being visible. The trial judge also commented upon Ms Osland being in paidwork during the marriage, effectively contrasting this with her evidence that she was

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<sup>44</sup> (1990) 55 C.C.C. (3<sup>rd</sup>) 97.

subjected to Mr Osland's 'rules' and her (effective) evidence that she was 'locked into' the relationship with him. At one point he speculated that other people found alternative ways of dealing with such situations, such as going to the Family Court.

If they were to be made at all, arguably these comments ought to have been supplemented by reference to the knowledge that exists in this field. The jury could make its decision only on the basis of properly conveyed information relevant to these aspects as raised by the judge and counsel, and arising out of the evidence generally. A reader of the transcript may suggest that the judge could - some would say should - have told them that:

- women are or can be 'locked into' violent relationships through socialisation, economics, responsibility for children, lack of alternatives such as housing, independent income, broader family support, the opinions of neighbours or family friends ('what will the neighbours/my family/friends etc think');
- women may live apparently 'independent' lives, without any (or little) indication to the outside world of the violence occurring within the home, but this does not mean it does not happen, or is not happening;
- women are frequently beaten 'where it doesn't show', so that there may well be no outwardly visible signs, such as bruising, or wear sunglasses or makeup to conceal marks/bruising;
- women are likely to be reticent about complaining to others, or telling others, and 'select' those whom they tell;
- if they do tell (any) others, they are likely to downplay or understate (rather than exaggerate) the violence to which they are being subjected.<sup>45</sup>

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<sup>45</sup> Scutt, *Even in the Best of Homes – Violence in the Family*, 1990; Women's Coalition Against Family Violence, *Blood On whose Hands – The killing of women & children in domestic homicides*, 1994, Victorian Women's Trust, Melbourne, Victoria, Australia.

Specifically in relation to the evidence in this case, some would argue that the trial judge could have - or should have - brought to the attention of the jury that:

- Heather Osland's evidence and that of other witnesses as to her paidwork was that she left jobs because Mr Osland 'stalked' her, because he caused disturbance/s at her place of work (for example, the picture theatre in Bendigo), etc: see references in Transcript/Appeal Books to stalking and other aspects in attached material;
- Heather Osland's evidence and that of other witnesses was that she wore sunglasses (for example), sometimes at night, and wore makeup (which did not ultimately conceal marks/bruises); see references in Transcript/Appeal Books in attached material;
- Heather Osland's evidence and that of other witnesses that she and others (members of the family, neighbours, etc) had sought police assistance on a number of occasions in the past re Mr Osland's violence (without avail);
- Heather Osland's evidence and that of the children that they could 'tell' or anticipate Mr Osland's moods – for example, when he was 'cheery' with his workmates upon arriving home, this was a warning sign -

so that the jury could see the evidence independently of the myths referred to in **Malott**, or at least so that they were apprised of the myths and better able to make a proper assessment of the evidence of violence, abuse and sexual aggression.

The judge's recitation to the jury of the evidence did not set the evidence in a context that addressed these issues. This meant that the jury was left with 'battered woman syndrome' as, in many respects, a catch-cry which on some readings at least was not helpful to them in their deliberations and which may have led them to deal with the evidence of violence against Heather Osland in a way which was different from the way they dealt with the evidence of violence against David Albion. What else could explain the verdict of

'guilty of murder' for Heather Osland, who did not even wield the weapon that killed Frank Osland, nor strike any of the blows that killed him - rather, simply stood there whilst her son wielded the weapon and struck the blow/s? What else could explain this in the face of the inability of the jury to reach a verdict in respect of David Albion's guilt or innocence at that trial?

### ***Jury Directions - Rape and Self-Defence***

Commentators and observers of this trial (and of others where women are charged with unlawful killing of husbands or partners in circumstances of continuing violence) could contend that it should have been explained to the jury how, if they believed rape had occurred, they could fit it in to self-defence and/or provocation. For example, should they have been instructed as to the medical evidence as above, then told that if they accepted that the anal rape did happen, it would be relevant to their deliberations:

- to show or provide a reasonable doubt on the question whether Heather Osland honestly feared, when Frank Osland was killed by David Albion, that Frank Osland was a real threat to her life or her bodily integrity – that is, that her acting with David Albion was as a consequence of her fear of being killed or raped;
- to show or provide a reasonable doubt that in all the circumstances (of the violence and sexual aggression) she acted reasonably in the killing of Frank Osland.

### ***Self-Defence and Provocation - A History of Violence***

In this case study, the trial judge recounted the evidence of violence and the law of self-defence and provocation, but did not integrate them so that the jury could deal with the evidence as properly relevant to self-defence and provocation. Arguably, the evidence ought to have been explained to the jury so that they knew how they could use it in understanding:

- why Ms Osland might remain in an abusive relationship;



- why Ms Osland might not (see herself as able to) seek police assistance immediately before David Albion struck the blow;
- why Ms Osland might not see the police as relevant to her dilemma on the day/night Frank Osland was killed;
- the nature and extent of the violence that may exist in a battering relationship, so that the jury could 'see' (understand) that the evidence given by Ms Osland and others about the violence perpetrated by Frank Osland could be true rather than exaggerated or 'made up';
- why Ms Osland might be able to anticipate Mr Osland's 'moods' and the danger he could have posed to her (and David Albion) on the night he was killed;
- why Ms Osland might be able to anticipate and perceive the danger Mr Osland posed to her (and David Albion) in the period leading up to his death;
- why she might believe it necessary on reasonable grounds to end Mr Osland's life in order to save her own (and that of David Albion);
- why she might believe on reasonable grounds that she could not otherwise preserve herself (and David Albion) from death or grievous bodily harm, than by ending Mr Osland's life.

Equally importantly, it could be argued that the jury should have been properly focused on the circumstances that could confirm (or alternatively discount) that Ms Osland acted in self-defence (or under provocation): namely, the evidence of Mr Osland's violence and abuse over a long period of time. The *reality* of the circumstance of Mr Osland's violence – that is, the evidence of his violence – ought properly to be the focus.

Self-defence is about a rational act of the person who kills in order to save her (or his) own life. 'Battered woman syndrome' does not look at this: rather, it looks at the helpless, hopeless and lost woman who has never sought help, never talked to anyone, never even elliptically referred to the violence in her life and her desire to escape it, her fear and terror that her life is in danger. This is the woman of reality; the 'helpless, hopeless and lost' woman is a figment of the imagination, one that has impeded women's right to a fair trial, and to fair, equal and just treatment in the criminal justice system. It has stood in the way of having the criminal law apply equally to women, taking into account the reality of women's lives, as it does to men.

'Battered woman reality' has the reality of women's lives and the right of women to equal access to the criminal justice system, equal access to criminal laws, equal application of criminal laws that should be designed to recognise or at least assist the jury in moving towards a recognition of 'what really happened'. This is what 'battered woman reality' has as its focus, rather than the notion that a woman who kills in circumstances where she lives in, or has lived in, a violent relationship and fears she will be killed.

Ms Osland's defence was based on a history of violence against her and threats made by the deceased. This history went back, on the evidence, some 13 years. The entire history was put forward as founding the defence of self-defence and/or the mitigation of provocation. Amongst other matters, the entire history was what founded the expert witness Dr Byrne's evidence. It was or ought to have been clear that it was the entire history of violence and threats that was relied upon to found self-defence or provocation.

Arguably, the jury should have been instructed that the defence of self-defence can be constituted:

- by a history of violence against which a single discreet act being the threat to which the accused responds in self-defence, and that act being one which would/might not in other circumstances be reasonably classed as a threat to kill;

- by a history of violence against which a particular circumstance constitutes a threat to which the accused responds in self-defence, that circumstance being one which would/might not in other circumstances be reasonably classed as a threat to kill;
- by a history of violence which in and of itself constitutes the 'act' or circumstances to which the accused responds in self-defence, reasonably believing that the party inflicting the violence intends to kill her (or him).

### **Conclusion**

A trial judge has a responsibility to explain to the jury the law that is constant with an accused's defence/s. Where evidence raised in the course of the trial is consistent with an accused's defence/s, the judge has a duty to explain the law properly to the jury and to say to the jury that if it accepts the evidence, then it can be consistent with her innocence.

Women's position in the criminal justice system and in the legal system as a whole will not be advanced by advancing arguments that paint women as 'sick' when they are reacting to and responding within circumstances that circumscribe their lives. Until the reality of women's lives is accepted in the courtroom as reality, and until those who represent women in the courtroom appreciate the reality of women's lives, women will be ill-served by the criminal justice system and will continue to be convicted of crimes they do not commit.

JAS, November 2000<sup>46</sup>



<sup>46</sup> This is an adaptation of arguments presented in *Osland v. The Queen*, High Court of Australia, 1998.

**Women and Legal Justice**

Hing Chung Wong

Judge, District Court, Member, JUSTICE

**Introduction**

The rights and freedom of the residents of the Hong Kong Special Administrative Region (HKSAR) is guaranteed by the Basic Law of the HKSAR of the People's Republic of China, the constitutional document of the Region. For example: under Article 4 – the guarantee of rights and freedoms; Art.23 equality before the law; Art.26 to 28 – the right to vote and to stand for election; freedom of speech, of press and of publication, freedom of association, of assembly and of demonstration; and the freedom to form and join trade unions. Articles 39 of the Basic Law provides that the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as applied to Hong Kong shall remain in force, and shall be implemented through the laws of the HKSAR. The Hong Kong Bill of Rights Ordinance passed in 1991 and the provisions of all United Nations human rights treaties applicable to Hong Kong (including the Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW)) continue to be implemented after the resumption of Chinese sovereignty over Hong Kong on 1 July 1997.

CEDAW was extended to Hong Kong in 1996. Efforts to promote public awareness of CEDAW has been performed by the Home Affairs Department and the Equal Opportunities Commission set up under the Sex Discriminations Ordinance in 1995. Since 1995, a legislative review has taken place leading to the enactment of a number of amendments and ordinances to eliminate discriminatory or unfair treatment of women. The Sex Discrimination Ordinance was passed in 1995 and the Family Discrimination Ordinance was passed in 1997. The Equal Opportunities Commission is an independent organisation set up to promote equality between women and men and to enforce the anti-discrimination ordinances and for the handling of complaints.

The Initial Report on the HKSAR under the Convention was examined by the United Nations Committee on the Elimination of Discrimination against Women in February in 1999, commented and made recommendations on the report. The HKSAR government further reported recently to the United Nations on the implementation of the Beijing Platform for Action (1995), pledging to strengthen the co-ordination and co-operation amongst government departments and NGOs in handling and combating the problem of battered spouse in Hong Kong through an interdisciplinary working group.

As far as the female victims of human rights violation are concerned, there is in existence in the legislation laws that punish perpetrators and offer protection to victims of violence, domestic or otherwise. In addition, the Domestic Violence Ordinance provides protection to party to a marriage or someone with a long term cohabitation relationship with her/his partner in the form of injunction restraining the other party from molesting the complainant and her children or excluding that party from the home or a part of it. There are suggestions from Non Government Organisations (NGO) that this legislation needs to be reviewed after having been in operation for 14 years. Amendments suggested are: the introduction of clearer definition of violence and abuse to include emotional and psychological abuse, police initiative in prosecuting offenders without the victim's consent, sentencing options such as treatment and re-education through mandatory counseling of offenders, etc.

There are at present 3 temporary shelters catering for women victims of violence and their children. The first shelter is the Harmony House (NGO) in operation since 1985, the second is the Government's social Welfare Department shelter and the third Serene Court is run by another NGO, each has a capacity of 40. The two NGO shelters offer in-house crises intervention counseling, information on and assistance in the processing of application for legal aid and other social welfare and housing benefits available in Hong Kong. There are three 24-hour hotlines providing information, emergency counseling and advice to women in need of assistance. The Harmony House also runs a women resource centre, which operates as a drop-in centre for women and runs support groups for ex-residents. It is the first organisation to act as an advocate against domestic violence, organising seminars on the subject and giving talks to the police and the caring professions such as to doctors, nurses and social workers etc. Starting from the latter part of 2000, an abuser-counseling programme has been set up offering assistance to offenders.

## **Handling Women Victims of Violence:**

### **1. The Police**

#### **(a) Reporting to and investigation by the police-**

Direct reporting of an offence involving violence on a female victim:

The victims often approach the police first; such reports usually take place at a police station or at a hospital where a representative from the Police Department is present. The police upon the laying of complaint is required to process the complaint and to supply the complainant information on where assistance can be obtained such as access to an abused women's refuge, social worker and refer the complainant to hospital if medical attention is required. Specific guidelines and handling procedures have been drawn up for officers handling such cases. The Police Child Protection Unit has recently re-adopted women victims of violence as part of a group that requires sensitive and sympathetic handling during investigation. Victims of sexual violence with gynaecological injuries are care for by gynaecologists who will coordinate with clinical psychologists, psychiatrists, and medical social workers as and when required. A one stop centre for rape victims to be forensically examined and treated after the initial report to police was filed to spare the victims from unnecessary pain and embarrassment is being considered by the HKSAR Government.

#### **(b) Reporting by doctors at the Accident and Emergency ward at public hospitals:**

Doctors at the Accident and Emergency Ward of all public hospitals have been given guidelines on management of victims of sexual assault and is required to report all suspected domestic abuse cases to the police. With the consent of the victims, doctors would refer their cases to medical social workers for advice and counseling. As the injuries of victims in such cases often are of serious nature, the police are bound to investigate.

Many policemen consider domestic violence as domestic affairs and are reluctant to intervene. They complain that victims often change their minds and refuse to pursue the complains or to give evidence in court. As a result, there are instances when

laying complains at police stations, the victims were treated indifferently and discouraged from laying complains against the perpetrators when the perpetrators are the husbands or cohabitants of the victims. There have been complaints by victims of domestic violence that they were ignored or encouraged to return to the abusive relationship without any assistance, information or advice given on where a shelter can be found or where counseling, financial assistance and legal advice can be obtained. Efforts are being made by NGOs to change the attitude of the police through training, public education and the lobbying of various government departments and the government interdisciplinary working group on battered spouse.

## 2. At Trial in Court-

All adult victims are required to give viva voce evidence at the trial in open court, as the accused are entitled to confront their accusers and to an open and fair trial. Victims under the age of 14 years, and those in cases involving sexual abuse, cruelty and assault up to the age of 17 years, may give evidence by live television link i.e. in a video-linked room next to the court room and may be accompanied by a social worker, a female police officer or a volunteer. The video-recorded evidence of such victims is admissible as evidence in chief, provided they are available to give evidence in cross-examination. Witnesses who are threatened and put in fear for their safety may request for police protection before and during the trial. The identity of victims of a sexual offence under the age of 16 are protected and not permitted to be published by the media. Under exceptional circumstances, arrangements can be made for vulnerable witnesses to access the court building through entrances and exits not usually opened to the public.

At the Family Court, facilities for children are available for parents who bring their young children to the court building.

Evidence of the complainant in sexual offences had to be corroborated though evidence involving children and accomplices have been abolished. This is of particular disadvantage to victims of sexual offences, a bill has been introduced to

the legislative council in Hong Kong to abolish the corroboration rule in sexual offences cases. It is at present under the council's scrutiny.

The Crimes ordinance outlaws trafficking in people, causing prostitution, are exercising control over commercial sex workers. It renders unlawful anyone who takes an unmarried girl under the age of 16 out of the possession of her parents or guardians without their consent and anyone who abducts an unmarried girl under 18 with the intention that she shall have unlawful sex with men. The maximum sentences is 7 to 10 years of imprisonment.

### 3. Women Suspects and Convicted Prisoners in Detention:

#### (i) In police custody

Female suspects are put under the supervision of female police officers at police stations. The detention should be a short one for all suspects are charged within 48 hours of their arrest. Should suspects require medical attention, they will be sent to public hospitals for treatment.

#### (ii) Detention in prison:

Female Suspects - can be visited by their legal advisers as often as is required. They are entitled to legal aid provided their means are within the limit set down by law. They are not required to perform any paid or unpaid work while in custody.

Female Prisoners - there are 1130 convicted female prisoners in Hong Kong prisons and 168 female suspects in remand awaiting trial at the end of October 2000. All prisoners are assigned duties and are paid a daily wage for the work they perform in prison. Female inmates are not required to perform heavy-duty work; they work mainly in the laundry, garment workshop, at bookbinding and gardening. They are also given cooking and beauty classes and are visited by their families and friends once a month. Those who gave birth to a child at correctional institution are allowed to keep their child with them until the child reaches the age of three.

Those with young children under the age of 6 years are eligible to join the



'child visit programme' and may be visited by their child or children once a month under the supervision of social workers.

For those requiring counseling, clinical psychologists will be assigned to offer such assistance.

Young offenders under the age of 21 sentenced to less than 3 years imprisonment are housed in special institutions for youth and are given vocational training.

#### *Compensation to Victims*

Victims of violence may apply to the Criminal Compensation Board established under the law and the supervision of an independent board appointed by the Government under the law to be compensated by a fund established by the Government for this purpose. In addition, they may file a claim in Court for compensation under the civil jurisdiction of the Court against the offenders.

#### *The Courts*

These are five levels of courts in Hong Kong; the numbers of female judges and judicial officers are as follows:

- i) Court of Final Appeal: the Chief Justice and three Permanent Judges –all male (0%);
- ii) Court of Appeal: one of 9 Justices of Appeal is female (the first woman justice of appeal was appointed in September 2000) (11%);
- iii) Court of First Instance: 4 of 22 judges are female (18%);  
High Court Registry: 3 of 7 masters are female (42%);
- iv) District Court: 7 of the 31 judges are female (22%);
- v) Magistracy and Special Tribunals: 24 of the 88 judicial officers are female (27%)

Since the appointment of the first High Court judge in 1995, the number of female judges in the High Court was increased to 2 in 1996, and there are

now 6 appointed. In the District Court, the first District Judge was appointed in about 1985, since 1995 their numbers have more than doubled.



## **International and Regional Initiatives to Prevent and Prohibit Trafficking in Persons**

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### **I. International Initiatives**

1. Trafficking has been an age-old concern for the human race. However globalisation and mobility increased the potential of its spread as a contemporary form of slavery. International law forbids trafficking, slavery, forced labour, debt bondage, torture, arbitrary detention, and many other practices associated with trafficking. At the national levels, a number of States are reviewing their national laws and are implementing trafficking laws within their borders. At the regional and sub regional levels the efforts and the resources are pooled in to work on the issues of trafficking and its allied manifestations. The Organisation of American States, The Organisation of African Unity, the Council of Europe, the South Asian Association for Regional Cooperation and the Association of South East Asian Nations and their affiliated organisations are creating conditions and spreading awareness for further actions in their respective regions. Despite the existence of a variety of instruments containing rules and regulations to combat trafficking, there is no universal international instrument covering all aspects of trafficking in persons.
2. This article reviews the existing legal provisions, relating to the anti-trafficking initiatives at the international and regional levels. Some of these initiatives are directly applicable to the issue of trafficking, while others refer to some of the associated components of trafficking. For example, the UN Convention on the Rights of the Child refers to the trafficking in children, while the Slavery Conventions refer to the abolition of slavery and institutions and practices similar to slavery and thereby focusing on preventing exploitation of persons as the end product of a trafficking cycle. Many of the regional institutions are focusing to devise means to prevent exploitation of prostitution of

persons particularly women and children. It is true that many of the women and most of the children are trafficked and forced into this activity. They constitute the most vulnerable group that needs immediate protection and relief from exploitation.

3. This article also discusses the existing international and regional mechanisms that have been created to prevent exploitation from trafficking, protect the trafficked persons and promote prosecution of and punishment to the traffickers. Not all the existing mechanisms are effective in combating trafficking in all its manifestations nor are they equipped to address all the components of trafficking as reflected in the modern times.
4. The issue of trafficking is now high on the international agenda. At the international level, the members of the United Nations have adopted two protocols to the Convention on Transnational Organised Crime. It is very important that this effort, while focussing on the crime prevention aspect is also addressing the human rights perspective by providing protection and promotion of the rights of the trafficked persons. Information regarding these two protocols is covered in a separate article. Effective eradication and prevention of trafficking is possible only if it is linked with the protection of the rights of the trafficked person, and prosecution followed by punishment to traffickers.

## **I.1. International Legal Framework**

### **i. International Anti-Trafficking Laws**

5. The main weakness of the international anti-trafficking law is the lack of a comprehensive definition of trafficking. The current definition fails to encompass all the facets and ingredients of trafficking as seen in the present times. Trafficking has traditionally been regarded as an activity primarily engaging women and girls into prostitution. However it cannot be ignored that men, women and children are being trafficked and forced to live in miserable conditions. They are engaged in many exploitative activities like begging, domestic service, forced marriage, forced labour, etc. The present article reviews the existing legal framework which in some ways reaches to prevent and prohibit trafficking in persons and /or protects men, women or children from the various associated components of trafficking, e.g. violence against women, illegal adoption, prostitution, sex tourism, irregular migration, sale of persons, etc.

a. **UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others**

6. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 (the Suppression of Traffic Convention) consolidated the earlier instruments relating to the White Slave Trade and Traffic in Women and Children. This is the first international instrument to conceive of trafficking in gender-neutral terms by referring to 'traffic in persons' without restricting the scope to women or children.
7. The Suppression of Traffic Convention makes it an offence to procure, entice or lead away a person for the purpose of prostitution even with the consent of that person (art. (1)). The same article requires that the person trafficked has been recruited 'for purpose of prostitution' and 'to gratify the passion of another'. The Suppression of Traffic Convention does not cover any other kind of trafficking that does not constitute direct recruitment into prostitution. Further, in Art. 2, State parties agree to punish any person who keeps, manages, or finances a brothel.
8. Trafficked persons are to be repatriated if they so wish or if the 'expulsion' is ordered in conformity with the law' (art. 19 (2)). Immigrants with an irregular resident status in a country are likely to be expelled under this clause. One reason for the low level of prosecutions in cases of trafficking is that the women who could testify against the perpetrators are deported because of their irregular resident status.
9. The Suppression of Traffic Convention does not require that the trafficking has to be across international borders. The experience is that a significant amount of illegal trafficking operations occur within national borders. However the parties are required to monitor immigration and emigration routes in order to halt trafficking for prostitution (art. 17).
10. The enforcement mechanisms provided by the Suppression of Traffic Convention are weak. State parties are required to report to the UN Secretary-General annually, indicating laws, regulations and other measures they have adopted with respect to trafficking (art. 21). The UN Secretary General is required to publish these communications periodically. Since 1974, state parties have been required to submit reports regarding slavery and trafficking to the UN Sub-Commission for the

Promotion and Protection of Human Rights.<sup>1</sup> There is neither an independent supervisory body to monitor implementation of the provisions of the Trafficking Convention, nor is there any provision for anybody to receive or act on petitions brought by or on behalf of victims of trafficking. This weakness of the Suppression of Traffic Convention is further aggravated by the fact that relatively few countries have ratified it<sup>2</sup>.

**b. UN Convention on the Elimination of All Forms of Discrimination against Women and the Protocol**

11. The State parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are under international legal obligation to remove obstacles and provide conditions for women to exercise their human rights. Article 6 of this Convention requires the States to 'take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women'. The term 'trafficking' encompasses a broader range of cases than those covered by the Suppression of Traffic Convention. CEDAW covers trafficking into domestic labour or forced marriages in addition to incriminating the exploitation of prostitution of women<sup>3</sup>.
12. The State parties are required to submit periodic reports on measures they have taken to implement the provisions of CEDAW (art.18). In the last few years, the CEDAW Committee has been increasingly attentive to the problem of trafficking in women.
13. In 1999, an Optional Protocol to CEDAW established a complaint and an inquiry procedure<sup>4</sup>. Once the Protocol enters into force<sup>5</sup>, a woman or a group of women, acting on behalf of a woman, may lodge a complaint before the CEDAW Committee,

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<sup>1</sup> The sub-commission was formerly known as UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. ECOSOC Decision 16 (LVI) of 17 May 1974, cited in UN Doc.CN.4/Sub.2/AC.2/1995/1/Add.1, 28 March 1995

<sup>2</sup> 72 states have ratified the Convention

<sup>3</sup> CEDAW General Recommendation No. 19 on Violence against Women, 11<sup>th</sup> session, 1992. The General Recommendations issued by the CEDAW Committee are considered to be authoritative interpretations of the provisions of the treaty. The Committee explicitly enlists domestic labour and organised marriages in addition to established forms of trafficking.

<sup>4</sup> The text was adopted by the UN Commission on the Status of Women in March 1999 and finally by the UN General Assembly in October 1999 (A/RES/54/4). The text as well as the status of ratification is available at [www.un.org/womenwatch](http://www.un.org/womenwatch)

<sup>5</sup> By now, 23 states have signed the Protocol, and there have been no ratification deposited yet.

claiming that there have been a violations of rights guaranteed under CEDAW, including the violations under article 6. The Committee may proceed with the inquiry, if it has reliable information on grave or systematic violations of the CEDAW provisions by a State party. The application of both procedures requires that the state concerned is a party to both the CEDAW and its protocol.

#### **c. UN Convention on the Rights of Child**

14. The Convention on the Rights of the Child (CRC)<sup>6</sup> has been ratified by almost all the UN Member States and specifically prohibits trafficking in children (art.35). The State parties are under obligation to take 'all appropriate measures to prevent the abduction of, sale of or traffic in children for any purpose or in any form'.
15. The primary mechanism for monitoring implementation of the CRC is the State reporting procedure (art. 44). While reviewing the periodic reports submitted by the States, the Committee under CRC raises concerns about trafficking in children. The Committee also encourages the NGOs to submit alternate or shadow reports on the situation of children in their countries

#### **d. International Covenant on Civil and Political Rights**

16. Under the International Covenant on Civil and Political Rights (ICCPR)<sup>7</sup> signatory States have an obligation to ensure that 'no one is held in slavery and servitude' (art. 8(1,2)) and 'that no one shall be required to perform forced or compulsory labour' (art. 8(3)). This provision is similar to the one incorporated in Article 4 of the Universal Declaration of Human Rights. The Important factor is that this provision is non derogable (art. 4(2)) and the States are under permanent obligation to give effect to the provisions of Article 8 of the ICCPR.
17. The State parties are obliged to submit periodic reports to the Human Rights Committee (art. 40). In the last twenty years, the committee has referred to only two incidences of trafficking<sup>8</sup>. The Optional Protocol to the ICCPR<sup>9</sup> enables individuals to

<sup>6</sup> UN GA Res 44/25 of 20 November 1989, entry into force on 2 September 1990

<sup>7</sup> UN GA Res 2200A (XXI) of 16 December 1966, UNTS Vol. 993, p 171, entry into force on 23 March 1976. As of 1 January 1999, the Covenant has been ratified by 142 countries.

<sup>8</sup> Between 1977 and 1995, the Annual Reports issued by the Committee contain only two references to trafficking, one in relation to Spain in 1991, and one with respect to Peru in 1994.

submit complaints regarding alleged violations of their rights under the Covenant directly to the UN Human Rights Committee. Despite this provision, the individual complaint mechanism has never been used to address a situation involving trafficking in women or children.

**e. International Covenant on Economic, Social and Cultural Rights**

18. The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>10</sup> does not directly address trafficking. However it refers to matters that would help in preventing trafficking of persons, including women. It contains numerous rights central to women's livelihood, such as the right to gain their living through work they have freely chosen, the right to just and favourable conditions of work and the right to social security (art. 6,7,9). The non-discrimination provision (art. 2(2)) requires that all these rights have to be executed without any discrimination, including the one based on sex.
19. The Committee on Economic, Social and Cultural Rights is the central organ established by the Economic and Social Council (ECOSOC) to monitor implementation of the ICESCR. It reviews the reports submitted by the State Parties, makes recommendations to the States, and issues comments on Economic, Social and Cultural rights prevailing in individual States, in addition to issuing an annual report.

**f. ILO Convention no. 182, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour**

20. The ILO Committee of Experts on the Application of Conventions and Recommendations identified the use of children for prostitution as one of the worst forms of forced labour. Consequently, the focus of the ILO's efforts in the area of forced labour has been on trafficking in children. In June 1999, the ILO adopted the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (the Worst Forms of Child Labour Convention), banning the worst forms of child labour, including slavery and trafficking.<sup>11</sup> The Worst Forms of Child Labour

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<sup>9</sup> First Optional Protocol to the ICCPR, UN GA Res 2200A (XXI) of 16 December 1966, UNTS Vol. 999, p171, entry into force on 23 March 1967

<sup>10</sup> UN GA Res 2200A (XXI) of 16 December 1966, UNTS Vol. 993, p 3, entry into force on 3 January 1976

<sup>11</sup> Convention concerning the Prohibition and Immediate Action for the Elimination of the worst Forms of Child Labour, adopted by the ILO General Conference on 17 June 1999.



Convention aims to protect those under 18 and targets child slavery, forced labour, trafficking, debt bondage, serfdom, prostitution, pornography and exploitative work in industries using dangerous machinery and hazardous substances (art. 3).

21. The ILO conventions have more effective mechanisms for monitoring enforcement and compliance than the other conventions discussed above. Under article 19(5)(e) and 6(d) of the ILO Constitution, the governing body may request reports from each Member State on the position of its laws and practice in regard to the matters dealt with in the basic ILO Human Rights Conventions (or Recommendation) whether ratified or not. The Worst Forms of Child Labour Convention has been recognised as one of such basic ILO conventions. These reports are also examined by the Committee of Experts and forms the subject of a 'General Survey' which is examined each year by the conference<sup>12</sup>

## **ii. Trafficking as a form of Slavery**

22. Definition of both slavery and trafficking has caused controversy since the beginning of prevention of these activities started by the international community. Various forms of slavery have been identified by the Temporary Slavery Convention in 1924 and later approved by the League of Nations. After the Second World War the United Nations continued working towards the elimination of slavery, and as a result it has now become a well-established principle of international law. UN Working Group on Contemporary Forms of Slavery in 1974, stresses that the trade of women is a new way of slavery, trafficking in women and children has been recognised as a form of slavery<sup>13</sup> and the international anti-slavery treaties also cover trafficking.

### **a. Slavery Convention**

23. A definition of slavery first appeared in an international agreement in the League of Nations' Slavery Convention of 25 September 1926. It defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of

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<sup>12</sup> See, The International Labour Organisation and Fundamental Human Rights, Standards and Mechanisms, Principles of the Basic ILO Human Rights Convention, ILO publication, Geneva, 1999.

<sup>13</sup> UN Working Group on Contemporary Forms of Slavery, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/AC.2/1991/1/Add.1

ownership are exercised" (art. 1(1)). It further defined the slave trade as "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves" (art. 1(2)). The Convention also distinguished forced labour, stipulating that "forced labour may only be exacted for public purposes" and requiring States parties "to prevent compulsory or forced labour from developing into conditions analogous to slavery" (art. 5).

24. Despite the requirements made by the Slavery Convention, and although governments are required to submit reports to the UN Secretary General with respect to the relevant laws enacted and enforcement mechanisms provided at the national level there is no supervisory body in place to monitor the implementation of the provisions of the Slavery Convention.

**b. Supplementary Convention on the Abolition of Slavery, Slave Trade, and Institutions and Practices Similar to Slavery**

25. The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 (the Supplementary Convention) "went further and covered more ground than the 1926 Convention."<sup>14</sup> It obliged State parties to abolish, in addition to slavery, the following institutions and practices, identified collectively as "servile status":<sup>15</sup> These being, debt bondage, serfdom, forced marriage or inheritance of wife after the death of her husband and child labour.
26. Women and their services as prostitutes are pledged as "security" for debts accrued in the process of transporting them from one place to another. The amounts of the debts are arbitrarily established, bearing no relationship to the actual costs involved in transportation. Additionally, it may not be clear at all how long a woman needs to work in

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<sup>14</sup> Mohamed Awad, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Question of slavery and the slave trade in all their practices and manifestations, including the slavery-like practices of apartheid and colonialism" (E/CN.4/Sub.2/322), report to the Sub-Commission, 1971, para. 12.

<sup>15</sup> The term "servitude" is not used in the Supplementary Convention, which refers instead to "institutions and practices similar to slavery" and "persons of servile status".

order to be able to repay the debts. This may be extended indefinitely as "debts" continue to accrue.

27. According to the reporting mechanism established by the Supplementary Convention, the States simply undertake to send to the UN Secretary General "copies of any laws, regulations and administrative measures enacted or put into effect to implement the provisions of this Convention" (art. 8(2)). The Secretary General must then communicate the information received through this process to the State parties, as well as to the ECOSOC for consideration regarding further recommendations that ECOSOC might make on abolishing slavery.

### **iii. Trafficking as Forced Labour**

28. The use of forced labour has been condemned by the international community as a practice similar to, but distinct from slavery. The League of Nations and the United Nations have made a distinction between slavery and forced or compulsory labour and the International Labour Organization was given principal responsibility for the abolition of the latter.

#### **a. ILO Convention no 29, Forced Labour Convention**

29. The Forced Labour Convention, 1930 (Convention No. 29) provides for the abolition of forced labour.<sup>16</sup> It defines forced or compulsory labour in article 2(1) as meaning "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." It is clear from this description that forced labour as understood by the international community does not include a concept of ownership as does slavery. Yet the practice imposes a similar degree of restriction on the individual's freedom -- often achieved through violent means.

#### **b. ILO Convention no. 105, Abolition of Forced Labour Convention**

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<sup>16</sup> The ILO Forced Labour Convention, 1930 is the most widely ratified ILO convention with 139 States parties.

30. The Abolition of Forced Labour Convention, 1957 (Convention No. 105) provides for the immediate and complete eradication of forced labour in specific circumstances.<sup>17</sup> Article 1 imposes an obligation on the State parties to suppress the use of forced labour for political purposes, for purposes of economic development, as a means of labour discipline or punishment for strike action, and as a means of discrimination. ILO Convention No. 29 and ILO Convention No. 105 (collectively referred to as the "ILO forced labour conventions") concerning the abolition and control of forced labour are essentially the only international instruments that set out a definition of forced labour, although its prohibition is endorsed by many treaties, both international and regional.

#### **iv. Trafficking among Migrants**

31. While all the existing instruments concerning slavery, servile status and forced labour apply to aliens and migrant workers as well as others, certain techniques of exploitation akin to slavery affect migrant workers in particular. These practices include employers confiscating workers' passports and, particularly in the case of domestic workers, keeping them in virtual captivity. They require special remedial action.<sup>18</sup> Migrant workers are subjected to a wide range of abuse and discrimination, most of which do not constitute slavery, servitude, or forced labour. The 'International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families', was adopted by the United Nations in 1990 in order to counter these practices. But it has not yet entered into force. The ILO has also adopted a series of conventions to address the employment of migrant workers<sup>19</sup>.

##### **a. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

32. The term 'migrant worker' is defined in article 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (The

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<sup>17</sup> The Abolition of Forced Labour Convention, 1957 entered into force on 17 January 1959.

<sup>18</sup> The range of abuses was described in detail by the Sub-Commission's Special Rapporteur on exploitation of labour through illicit and clandestine trafficking, Halima Embarek Warzai, appointed in 1973. Her final report was issued as a United Nations publication in 1986 (Sales No. E.86XIV.1).

<sup>19</sup> ILO Conventions nos. 97 and 143.

Migrants Convention) as: "...a person who is to be engaged, is engaged or has been engaged in a remunerative activity in a State of which he is not a national". This definition refers exclusively to migrant workers, who are outside their own country. The article 2(2), contains definition of several categories of migrant workers such as frontier workers, season workers, seafarers, workers on offshore installations, itinerant workers, project-tied workers, and self employed workers. This list however does not include the economic migrants who are moving in search of better living possibilities in different locations, both within and outside the countries. The definition includes undocumented workers who enjoy certain rights as recognised in part III of the Migrants Convention.

**v. Trafficking in the context of Armed Conflicts**

33. Trafficking tends to worsen in conflict or post-conflict situations. Traffickers exploit the situation, in particular of the fact that many persons are in vulnerable situations, undocumented and separated from their families.

**a. Geneva Conventions and The Protocols**

34. Enforced prostitution and other acts of sexual violence against women committed during armed conflict are prohibited under international humanitarian law. Acts of "torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health" committed in international armed conflicts constitute grave breaches of the Geneva Conventions<sup>20</sup>. Article 27(4) of the fourth Geneva Convention on the Protection of Civilian Persons in Time of War requires the protection of women against "rape, enforced prostitution, or any form of indecent assault". Similar provisions applicable to non-international armed conflicts can be found in the common article 3 of the four Geneva Conventions and article 4 (2(e)) of Protocol II to the Geneva Conventions.

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<sup>20</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, UNTS Vol. 75, p 31, Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, UNTS Vol. 75, p 85, Geneva Conventions relative to the Treatment of Prisoners of War, UNTS Vol. 75, p 135, Geneva Convention Geneva Convention on the Protection of Civilian Persons in Time of War, UNTS Vol. 75, p 287, all of 12 August 1949, entry into force on 21 October 1950. Additional Protocol I relating to the Protection of Victims of International Armed Conflicts, UNTS Vol. 1125, No. 17512, Additional Protocol II relating to the Protection of Victims of Non-international Armed Conflicts, UNTS Vol. 1125, No. 17513, all of 8 June 1977, entry into force on 7 December 1978.

**b. Statute of the International Criminal Court**

35. Under the Rome Statute of the International Criminal Court (the ICC Statute)<sup>21</sup>, acts of trafficking in human beings and forcing persons into prostitution can be prosecuted as crimes against humanity and as war crimes.
36. Article 7 enumerates enslavement and lists of crimes against humanity including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence, whether committed in peacetime or in armed conflict<sup>22</sup>. Enslavement is defined as the "exercise of any or all of the powers attaching to the right of ownership over a person and includes [...] trafficking in persons, in particular women and children."
37. In periods of armed conflict, acts of forced prostitution, and trafficking in persons can be prosecuted as war crimes: Article 8 of the ICC Statute enumerates inter alia acts of "rape, sexual slavery, enforced prostitution, forced pregnancy [...], enforced sterilization" and other forms of sexual violence violating international humanitarian law<sup>23</sup> as war crimes to be prosecuted by the ICC. The ICC shall have jurisdiction in respect of war crimes in particular when committed as a part of plan or policy or as part of a large-scale commission of such crimes.
38. It is important to note that the explicit enumeration of crimes of sexual assault in the ICC Statute has not brought any changes to existing international law, under which these crimes are already prohibited.
39. Similarly, acts of trafficking and enforced prostitution violating international humanitarian law are under the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia<sup>24</sup> and the International Criminal Tribunal for Rwanda<sup>25</sup>.

<sup>21</sup> A/CONF. 183/9, of 17 July 1998. The statute has not yet entered into force, as this requires ratification by at least 60 states. Currently, 96 states have signed and nine of them have ratified the ICC Statute (<http://www.iccnw.org>).

<sup>22</sup> The acts enumerated constitute crimes against humanity under the jurisdiction of the ICC, if they are "part of a widespread or systematic attack against any civilian population".

<sup>23</sup> any other forms of sexual violence constituting a grave breach of the Geneva Conventions (Art. 8(2)(b)(xxii)) for international armed conflicts) or a serious violation of the common Article 3 of the Geneva Conventions, (Art. 8(2)(e)(vi)) for non-international armed conflicts).

<sup>24</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. UN Security Council Resolution (SC Res) 827 of 25 March 1993

<sup>25</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994. UN SC Res 955 of 8 November 1994

## **I.2. International Monitoring Mechanisms**

40. National authorities have the primary obligation to protect the human rights of individuals within their territories, including, of course, the prohibition of slavery and slavery-like practices.<sup>26</sup> The efforts of national authorities are augmented, by international human rights norms and procedures. International law generally recognize that Governments are obligated "to respect and to ensure to all individuals within its territory and subject to its jurisdiction" the guaranteed rights. The States are to take the necessary steps, in accordance with its constitutional processes and with the provisions of the treaty, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the treaty. The primary responsibility of national authorities to protect human rights is underlined by the general rule of international law that all available domestic remedies must be exhausted before resorting to international settlement procedures.<sup>27</sup> There are therefore important links between national and international monitoring methods that cannot be overlooked, although the focus of this section is on international mechanisms. International human rights law has evolved a number of mechanisms for ensuring implementation and monitoring.
41. Under the authority of the Charter of the United Nations rather than on the basis of a specific human rights treaty, the United Nations Commission on Human Rights has developed several additional mechanisms for monitoring human rights. One of the most visible measures which the Commission has taken with respect to a violating Government is to authorize a special rapporteur, special representative, or a working group to investigate and publish a report on the situation. The Commission has also established thematic special rapporteurs and working groups to deal with particular kinds of violations, for example on the sale of children.
42. Generally, these thematic mechanisms have the capacity to receive information from individuals, to make direct appeals to Governments, to visit countries, and ultimately to seek an end to specific violations. Their prompt action and capacity to act in regard to all countries -- regardless of whether the country has ratified a specific treaty -- make the thematic procedures one of the most effective human rights tools in the United

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<sup>26</sup>International Covenant on Civil and Political Rights, art. 2. Individuals also have an obligation not to engage in slavery; see, e.g., Rome Statute of the International Criminal Court, art. 7(c).

<sup>27</sup> See, e.g. International Covenant on Civil and Political Rights, art. 41(c).

Nations system and covering wide range of topics, e.g. helping to save lives, to stop torture, to find disappeared people, and otherwise to protect individuals. The rapporteurs provide comprehensive reports each year to the Commission.

43. In 1996 the General Assembly also authorized the post of Special Representative on the impact of armed conflict on children. Now called the Special Representative for Children and Armed Conflict, the mechanism works in cooperation with UNICEF and OHCHR. Similarly in 2000, the General Assembly appointed a special representative for the Human Rights Defenders.
44. In 1970 the Economic and Social Council adopted resolution 1503 (XLVIII) authorizing the Commission on Human Rights to receive and review communications alleging the existence of a consistent pattern of gross violations of human rights. In the nearly 30 years of that procedure the Commission has dealt with over 65 country situations.
45. The Sub-Commission on Prevention of Discrimination and Protection of Minorities (renamed in 1999 as the Sub-Commission on the Promotion and Protection of Human Rights) has been authorized by the Economic and Social Council and the Commission on Human Rights, to establish three inter-sessional working groups, on contemporary forms of slavery (1975), indigenous populations (1982) and minorities (1995).
46. Most of the international mechanisms for implementation have been developed since the advent of the treaties which prohibit slavery and slavery-like practices and thus those treaties did not incorporate procedures which are now considered to be indispensable for monitoring compliance with States' human rights obligations.
47. The Office of the High Commissioner for Human Rights (OHCHR) has conducted field operations in 27 countries since 1992. It is here the international norms are translated into reality and thus reflected in national legislation and practice. The field offices help in promoting human rights through information and education, effectively acting to prevent violations and establishing linkages with the international, regional and national machinery in collaboration with the members of the civil society and the NGOs.

#### **i. UN Treaty Bodies**

48. Since the adoption of the International Covenant on Civil and Political Rights in 1966 all major human rights treaties have provided for an expert body, such as the Human Rights Committee under the International Covenant on Civil and Political Rights, to



oversee implementation of their respective multilateral conventions by receiving and reviewing periodic reports from the Governments, that have ratified the relevant treaties. Most of the treaty bodies issue conclusions and recommendations after reviewing each State party's report. Most of the treaty bodies also occasionally issue general comments<sup>28</sup> or recommendations that authoritatively construe provisions of their treaties and summarize their experience in reviewing States parties' reports.

49. Further, three of the treaty bodies -- the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee against Torture -- may receive communications from individuals, complaining about violations of those treaties and thus issue adjudicative decisions, interpreting and applying treaty provisions. The Committee on the Elimination of Discrimination against Women, will be able to do so once the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, gets sufficient ratifications since its adoption by the General Assembly on 6 October 1999 in resolution 54/4, enters into force.<sup>29</sup>

## **ii. UN Working Group on Contemporary forms of Slavery**

50. The mandate of the Working Group on Contemporary forms of Slavery is to monitor the existence of "slavery and the slave trade in all their practices and manifestations."<sup>30</sup> The Working Group operates with a large degree of flexibility and receives information from Member States and non-governmental organizations (NGOs) relating to slavery, servitude, forced labour and other slavery-like practices. Although the slavery conventions provide for Member States to submit reports to the United Nations, the Working Group has developed a practice of receiving information from whichever Governments may wish to present information. Normally, at each session the Working Group receives information from NGOs and then promptly informs the relevant Governments that they have been mentioned and may wish to submit further information. Since the Governments are rarely given more than a couple of days' notice,

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<sup>28</sup> General Comments under the UN treaty Bodies. HRI/GEN 1/REV 4

<sup>29</sup> A similar complaint mechanism is being developed for the Committee on Economic, Social and Cultural Rights. It should be noted that no individual communications are known to have related to contemporary forms of slavery.

<sup>30</sup> Economic and Social Council decision 16 (LVI) of 17 May 1974.

their responses are often spontaneous and they often offer to submit further information when it can be obtained.

51. The Working Group, has emerged as an informal forum within which States and non-governmental organizations can discuss issues of slavery or related practices but it has not developed effective procedures to follow up conclusions reached and recommendations adopted. The Working Group has interpreted its mandate in an expansive manner and has been creative in its interpretation of what constitutes slavery to cover a wide range of issues, for example problems concerning the rights of women, children and migrant workers.

**iii. Special Rapporteurs and Independent Experts Appointed under the UN System**

52. Among the Special Rapporteurs and independent experts that are appointed by the Commission of Human Rights, the Special Rapporteur on Violence against Women, its Causes and Consequences, the Special Rapporteur on Migrant workers and their Families, and the Special Rapporteur on Sale of Children, Child Prostitution and Child Pornography cover the topic of Trafficking under their mandate.

**a. The Special Rapporteur on Violence against Women its Causes and Consequences**

53. The Special Rapporteur on Violence against Women its Causes and Consequences, has submitted her report on 'trafficking in women, women's migration and violence against women' to the Commission of Human Rights in accordance with Commission of Human Rights resolution 1997/44<sup>31</sup>. It is a comprehensive report which details the evaluation of the Special Rapporteur's position on trafficking. It includes an overview of the Special Rapporteur's work undertaken through out the year in regard to trafficking. The report also provides a critique of the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitution of Others.

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<sup>31</sup> E/CN.4/2000/68

54. The Report<sup>32</sup> highlights the fact that women move and are moved, consensually and non-consensually, legally and illegally or numerous reasons, including social, political, cultural and economic reasons. The report also addresses the root causes of trafficking and migration. Responsibility of the States' to prevent, investigate and punish acts of trafficking in women and provide protection to trafficked persons is also highlighted. The Special Rapporteur sets out her conclusions and outlines several recommendations, at the root of which are the protection of and promotion of women's human rights.

**b. The Special Rapporteur on Human Rights of Migrants**

55. The Special Rapporteur on Human Rights of Migrant workers and their families in her first Report<sup>33</sup> has described the context of the feminisation of migration and growing interest of the international community in this phenomenon in the outline of her work programme. She has placed special emphasis on the need to take into account the problem of trafficking in persons, and not restricting it to prostitution alone.

56. The Special Rapporteur believes that the concept of trafficking can be approached from various perspectives. However she feels that the term trafficking needs to be distinguished from 'smuggling' which refers to services provided in unlawful border crossing while trafficking includes complex organisation of contacts.

**c. The Special Rapporteur on the Sale of Children, Child Prostitution and Child pornography**

57. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography in her report to the Commission on Human Rights<sup>34</sup> focused on the issue of sale of children. It has been brought to the light that in most cases where there is sale, there is also trafficking involved. In her report, she highlights on the causes, aims and manifestations of trafficking in children, trafficking routes, and effects of trafficking on children.

58. The special Rapporteur attributed a major obstacle in combating trafficking to the fact that there is no clear understanding of the term 'trafficking' and the problem is further

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<sup>32</sup> *ibid*

<sup>33</sup> E/CN.4/2000/82

<sup>34</sup> E/CN.4/1999/71

compounded by constantly changing and innovative forms of recruitment strategies and varying modes of deception, coercion and forced employment in the process.

#### **iv. ILO Mechanism**

59. The ILO conventions have more effective mechanisms for monitoring enforcement and compliance than the other conventions discussed above. This includes a reporting requirement, provisions of advisory services to State parties, and a Committee of Experts on the Application of Conventions and Recommendations. Its 20 members review state reports and make recommendations or requests for reply to relevant governments.<sup>35</sup> Further, member States, employers and workers' organisations may file complaints or representations<sup>36</sup> to the International Labour Office regarding a government's failure to comply with ratified conventions. NGOs have been recommending a provision enabling non-governmental groups or individuals to file complaints, something they are presently unable to do except in conjunction with the entitled parties.

#### **1.3. Regional Efforts**

60. At the national levels most of the countries have some laws and policies to combat trafficking. Many of the countries have assigned specific government agencies to protect children and women from trafficking. However not all the anti-trafficking initiatives are successful in combating trafficking. The reasons may be attributed to weak enforcement, corruption, conflicting and contradicting laws, and traditional biases against women and girls<sup>37</sup>.

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<sup>35</sup> *Nicolas Valticos*, The International Labor Organization, in: *Stephen Schwebel* (ed.), *The Effectiveness of International Decisions*, 1991, pp 134, 145

<sup>36</sup> *Virginia Leary*, Lessons from the Experience of the International Labor Organization, in: *Philip Alston* (ed.), *The United Nations and Human Rights: A Critical Appraisal*, 1992, pp 580, 586 n.6

<sup>37</sup> *Tumlin, Karin C.*, 'Trafficking in Asia; a regional overview', An ILO-IPEC Paper forthcoming Official document, February 2000, p. 19

61. Realising that the issue of trafficking tends to be , but not restricted to 'transnational', more and more States are coming forward in search of bilateral and multilateral arrangements. Regional and sub-regional arrangements are emerging in order to compliment and strengthen the national and the international efforts.

## **i. Africa**

62. The Organisation of African Unity (OAU) has adopted the African Charter on the Rights and Welfare of the Child<sup>38</sup>. Under article 16, of this Charter, the State parties are under an obligation 'to take all measures to protect children from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse while in care of parent, legal guardian or school authority or any other person who has the care of the child'. The State parties are to take all the measure to prevent sexual exploitation and abuse and prevent their engagement in prostitution, pornographic performances or activities (art. 27). The State parties are further expected to take measures to prevent abduction, sale of, or traffic in children for any purpose or in any form or by any person, including all forms of begging (art. 29).

63. The OAU, is elaborating the Protocol on the Rights of Women in Africa<sup>39</sup>. This Protocol expects that the State parties would respect dignity of women (art. 2) and take specific positive actions to overcome discrimination against women (art. 4). While guaranteeing the physical security of women, the State parties are to prohibit commercial and/or sexual abuse, violence against women and girls, including rape (art. 5).

64. The African Commission has appointed a special rapporteur on the rights of women.

65. The West African Nation have agreed to fight child trafficking across the borders. The first such bilateral agreement was signed between Mali and Cote d'Ivoire. An agreement between the west and central African nations has been adopted to end child trafficking and exploitation.<sup>40</sup>

## **ii. Americas**

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<sup>38</sup> The African Charter on the Rights and Welfare of the Child was adopted in 1990.

<sup>39</sup> The Draft Protocol to the African Charter on the Rights of Women in Africa, DOC/OS(XXVII)+%)b, November 1999.

<sup>40</sup> See, West Africa- IRIN-WA Weekly round up 36, (2000909)

66. In 1994 the Organisation of American States (OAS) adopted the 'Inter- American Convention On The Prevention, Punishment, and Eradication Of Violence Against Women (Convention Belém do Pará)'. For the purpose of this Convention, 'violence against women' is understood to include physical, sexual and psychological violence<sup>41</sup>. It may occur within the family or domestic units or in the community and may be perpetrated by any person, covering among others, rape, sexual abuse, torture, trafficking in persons, forces prostitution, kidnapping, sexual harassment in the work place as well as in educational institution, health facilities or any other place. (Art. 2(b)).
67. The State Parties agree to undertake specific measures, including programmes to promote awareness, modify social and cultural patterns of conduct, promote education and training of those involved in administration of justice, police and other law enforcement officials, provide specialised services for women who have been subjected (art 8) to violence and abuse.
68. According to article 9, the State Parties have agreed to take special account of vulnerability of women to violence by reason of their race, ethnic background, or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence, who are disabled, are of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedoms.
69. Under the Protection mechanism (articles. 10,11,12), the State Parties are required to submit reports to the Inter-American Commission of Women on measures adopted and obstacles confronted in addressing gender violence. This convention authorises individuals to file petitions with the Inter-American Commission on Human Rights, complaining of a violation of its principal undertakings. This complaint may be submitted by any person, group of persons or legally recognised NGOs. The complaints are processed by the Commission according to its regulations. In cases of conflicts regarding the meaning and scope of the Convention, the State party or the Commission of Women may request the inter-American Court to issue an advisory opinion on the interpretation of the convention<sup>42</sup>.

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<sup>41</sup> Article 2, of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women. The Convention was adopted by on June 9, 1994, at the twenty fourth regular session of the General Assembly and at present ratified by 14 countries.

<sup>42</sup> See the 'Report of the Inter-American Commission of Human Rights on the Status of Women in The Americas'. The report was presented to the Commission on March 6, 1998 during its 98<sup>th</sup> period of sessions by the Special Rapporteur on Women's rights and adopted by the Commission during its 100<sup>th</sup> period of sessions.

70. The Inter American Commission of Women has undertaken a joint study with the International Human Rights Institute. The focus of the study is to investigate the worldwide problem of the international trafficking of women and children. The preliminary study would focus on the most vulnerable group, viz. women and children in the eight representative countries of the Americas: Argentina, Brazil, Columbia, Chile, Costa Rica, Dominican Republic, Jamaica and Mexico. The results of this study would be presented to the meeting of experts and the ministerial meetings in the early part of 2001.

71. The OAS has also adopted an Inter-American Convention on International Traffic in Minors<sup>43</sup>. Under this convention the international traffic in minors means the abduction, removal or retention or an attempt for abduction, removal or retention for unlawful purpose or by unlawful means (art. 2). The unlawful purpose includes among others, prostitution, sexual exploitation, servitude or any other purpose unlawful in either the State of minor's habitual residence or where the minor is located. Kidnapping, fraudulent or coerced consent, giving or receipt of unlawful payment or benefits to achieve the consent of the parents, persons or institutions having care of the child are some of the means that have been identified among others as unlawful means for procuring children in trafficking. The convention emphasises the need for regional and bilateral co-operation among the States for investigation of the crime, extradition of the accused, protection and return of the minors.

72. The Inter-American Children's Institute of the OAS has been working on eradication of prostitution of children. This institute is also studying trafficking as found associated with the illegal adoption.

### iii. Asia

73. In 1992, the ILO created the international Programme for the Elimination of Child Labour (IPEC). Under this programme the ILO-IPEC works with governments, workers' and employers' organisations, NGOs and IGOs in over 60 countries of South Asia and South East Asia to combat child labour including trafficking of children.<sup>44</sup>

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<sup>43</sup> Inter-American Convention on International Traffic in Minor was adopted in 1994 at its fifth Inter-American Specialised Conference on Private International Law (CIDIP-V)

<sup>44</sup> *supra* note 13.

74. Under IPEC programme, a new Mekong Sub-Regional Project to combat trafficking in children and women has started. The Project aims to design and implement reliable mechanisms to combat trafficking, through capacity building, awareness raising and advocacy and direct assistance. These activities are to be implemented in Cambodia, China's Yunnan Province, Laos, Thailand and Vietnam.
75. The UN Economic and Social Commission for Asia and the Pacific (ESCAP) is also working on a regional level to address the issue of child trafficking. The ESCAP project focuses sexual abuse and exploitation of children and therefore addresses only the trafficking for the purposes of prostitution. Bangladesh, Cambodia, China, (Yunnan Province), India, Laos, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand, and Vietnam are participating in this regional initiative<sup>45</sup>. This programme aims to train social and health service providers who work with sexually abused and exploited children. The programme would also address access to health and social services for these children, their reintegration into home communities and families and the development of alternative income-generating skills.
76. UNDP has initiated a Mekong Sub-Regional UN-interagency working group to combat trafficking in children and women. This group is composed of 16 relevant UN specialised agencies and other international organisations and aims to improve information sharing and co-ordination mechanisms at the national and sub-regional level. UNDP is planning a similar initiative in South Asia.
77. At the Sub regional level the member States of the South Asian Association for the Regional Cooperation (SAARC) have drafted a regional Convention against Trafficking in women and children for Prostitution<sup>46</sup>. NGOs and UN agencies have commented on this draft and attracted the attention of the member States to the fact that the Draft has a very narrow approach to trafficking being limited to prostitution and that the draft ignores the other causes why people are trafficked<sup>47</sup>.

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<sup>45</sup> 1997 ESCAP Resolution 53/4 on Elimination of Sexual Abuse and Exploitation of Children and Youth in Asia and Pacific.

<sup>46</sup> SAARC, Ravalpindi Resolution of 1996.

<sup>47</sup> A letter by the High Commissioner for Human Rights addressed to the Heads of Member States of The SAARC, dated July 5, 1999. The Position paper on the Draft SAARC Convention on Prevention and Combating Trafficking of Women and Children for Prostitution, submitted by the Special Rapporteur on Violence Against Women, dated Aug 27, 1999.



78. The Association of South East Asian States (ASEAN) has addressed child trafficking under the rubric of transnational crime. In 1997, ASEAN member States have adopted a declaration on Transnational Crime calling for joint efforts to combat transnational crime-including, trafficking in children and women in the region. It also calls for the creation of an ASEAN Centre on Transnational Crime (ACTC) to co-ordinate regional efforts to fight such crimes. This declaration was adopted in 1999.

#### iv. Europe

79. In Europe, especially among the member States of the European Union (EU), authorities have increasingly identified trafficking in women with illegal migration. This has led to a focus on protecting the state from illegal migrants, with much less importance given to the need of protecting women from abuse and coercion. The crime that law enforcement agencies concentrate, is illegal entry or residence, the violation of State immigration laws, rather than violence against women.
80. In 1950, the member states of the Council of Europe adopted the European Convention of Human Rights (ECHR)<sup>48</sup>. All EU member States have ratified this Convention. It is the most advanced instrument for the protection of human rights, being legally binding on member States. According to article 34 of the ECHR, individuals and NGOs may bring a claim against a State for violation of human rights under the Convention. In theory such a claim against a trafficker may be heard before the European Court of Human Rights, in case of a State's failure to implement legislation protecting the victim's rights under the ECHR. However, there are limitations to an individual's ability to seek legal remedies against trafficking.
81. Although the ECHR does not contain specific provisions regarding trafficking in persons, the Articles 3 and 4 contain relevant language. According to article 3, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Article 4 declares that "[n]o one shall be held in slavery or servitude [...] and be required to perform forced or compulsory labour." It remains to be seen, whether the European

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<sup>48</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS (European Treaty Series) No. 5, entry into force on 3 September 1950, as amended by Protocol No.11 to the European Convention on Human Rights, restructuring the control machinery established thereby of 11 May 1994, ETS No. 155, entry into force on 1 November 1998

Court will interpret Art. 3 and 4 of the ECHR to apply to cases of trafficking in women for forced prostitution.

82. Following a seminar of the Council of Europe<sup>49</sup> in 1991, the Steering Committee for Equality between Women and Men (CDEG) established a specialist group to draw up proposals for action to be taken by member States to combat trafficking. According to CDEG's request, a Plan of Action Against Traffic in Women and Forced Prostitution was finalised in 1996<sup>50</sup>. Despite the recognition of the fact that trafficking encompasses also other forms of exploitation than forced prostitution, the document mainly focuses on "trafficking in women for prostitution and sexual exploitation"<sup>51</sup>. The CDEG has been engaged in various initiatives, including drafting recommendations to the Council of Ministers and Member States, and organising various seminars, such as the seminar in 1998 on the Action Against Traffic in Human Beings for the Purpose of Sexual Exploitation and the Role of NGOs<sup>52</sup>. Unfortunately the term 'trafficking' remained without an exact definition.
83. Apart from the fact that neither "trafficking" nor "sexual exploitation" is satisfactorily defined in EU documents, the general European policy reflects the narrow view of trafficking in Europe, neglecting the fact, that persons, including women, men and children, are trafficked for purposes other than the commercial sex work alone.
84. The Treaty of Amsterdam<sup>53</sup> requires EU Member States to co-operate in police and judicial matters in criminal cases, in order to combat organised crime, including trafficking- in persons and criminal acts against children<sup>54</sup>. The term "trafficking" remains undefined in the Treaty of Amsterdam. The inclusion of the national authorities, especially the judicial authorities, of the EU Member States and Europol<sup>55</sup> is a crucial factor of this co-operation. The long-term perspective of the Treaty of Amsterdam is a Europe-wide alignment of the national criminal codes of the EU Member States.

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<sup>49</sup> Seminar On Forced Prostitution And Trafficking as a Violation of Human Rights and Human Dignity, Strasbourg, 1991

<sup>50</sup> *Michele Hirsch*, Plan of Action against Traffic in Women and Forced Prostitution, EG (96) 2, Strasbourg, 9 April 1996

<sup>51</sup> The Plan of Action proposes to define trafficking in women, "[...] when a women is exploited in a country other than her own by another person (natural or legal) for financial gain, the traffic consisting of organising (the stay or ) the legal or illegal emigration of women, even with her consent, from her country of origin to the country of destination and luring her by whatever means into prostitution or any form of sexual exploitation."

<sup>52</sup> Strasbourg, 29-30 June 1998, EG/NGO/SEM (98) 8 rev.

<sup>53</sup> Official Journal (OJ) C 340/1997, p 1, signed on 2 October 1997, entry into force on 1 May 1999

<sup>54</sup> Art. 29 of the Treaty of Maastricht, as amended by the Treaty of Amsterdam

<sup>55</sup> European Police Office

85. The mission of the European Police Office (Europol) is to make a significant contribution to the European Union's law enforcement action in preventing and combating serious international crime with a particular emphasis on the criminal organisations involved. The establishment of Europol in the Maastricht Treaty on the European Union<sup>56</sup> should improve co-operation between Member States in the areas of unlawful drug trafficking, terrorism and other serious forms of international organised crime, where there are factual indications that an organised criminal structure is involved and two or more Member States are affected<sup>57</sup>. This includes trafficking in human beings as well,<sup>58</sup> which is defined in the Europol Convention<sup>59</sup> as follows:

[S]ubjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children. These forms of exploitation also include the production, sale or distribution of child-pornographic material.<sup>60</sup>

86. This broad definition is neither clear in terms of "exploitation of prostitution" or "sexual exploitation" nor is it a workable definition for co-operation purposes.

87. Europol supports member States by facilitating the exchange of data (personal and non-personal), in accordance with national law. It provides operational analyses in support of member States' operations, general strategic reports and crime analyses on the basis of information and intelligence supplied by Member States, generated by Europol or gathered from other sources. Europol also provides expertise and technical support for investigations and ongoing operations carried out by law enforcement agencies of the Member States under the supervision and legal responsibility of the Member States concerned. Europol is active in promoting awareness of crime analysis and harmonisation of analytical methods at the EU level.

<sup>56</sup> Art. 29 of the Treaty of Maastricht of 7 February 1992, as amended by the Treaty of Amsterdam, OJ C 340/1997, p 145

<sup>57</sup> Art. 2 para 1 of the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316/1995, p 2, signed on 26 July 1995, entry into force 1 October 1998

<sup>58</sup> The actual mandate of Europol comprises illicit drug trafficking, illicit trafficking in radioactive and nuclear substances, crimes involving clandestine immigration networks, illicit vehicle trafficking, trafficking in human beings and illegal money-laundering activities in connection with these forms of crime (Art 2 paras 2, 3 of the Europol-Convention).

<sup>59</sup> Annex referred to in Art. 2 of the Europol Convention

<sup>60</sup> The last sentence has been introduced into the definition by the Council Decision of 3 December 1998 supplementing the definition of the form of crime 'traffic in human beings' in the Annex to the Europol Convention, OJ C 26/1999, p 21.

88. According to a European Parliament Resolution (EP Resolution) of 1989<sup>61</sup>, which adopted the definition of forced prostitution as slavery or slavery-like practice entailed in the 1956 UN Supplementary Convention on the Abolition of Slavery, Art. 4 of the ECHR should apply to cases of trafficking in persons for forced prostitution. The European Parliament Resolution 1993<sup>62</sup> addresses "trafficking in women for prostitution" and urges the need for international co-operation and the improvement of the position of victims. However, the Resolution does not define the term trafficking and it remains unclear what exactly the EU Member States are called upon to do.
89. In a noteworthy European Parliament Resolution on Trafficking in Human Beings, adopted in 1996, the European Parliament called upon the Commission and member States to "take action at an international level, to draft a UN convention to supersede the obsolete and ineffective Traffic Convention of 1949. Any new convention should focus on coercion and deception". The resolution further calls upon the member States to provide a clear definition of 'trafficking in human beings', and to identify trafficking as a violation of human rights and a serious crime. The European Parliament also calls for trafficking in human beings to be covered by Art. K.1<sup>63</sup> of the Treaty of the European Union, thus it should "fall within the sphere of Community jurisdiction."
90. In 1996, the European Commission, in collaboration with the International Organisation of Migration (IOM), organised the European Conference on Trafficking in Women for the Purpose of Sexual Exploitation, which took place in Vienna. The conference resulted in a 'Communication of the European Commission' in 1996 on Trafficking in Women for the Purpose of Sexual Exploitation<sup>64</sup>. The Communication focuses only on trafficking in women for the purpose of sexual exploitation and does not address trafficking for other purposes, such as domestic work or any other slavery-like occupation. Additionally, the term sexual exploitation remains undefined.
91. Based on the Code of Conduct, the EU member States address trafficking in the non-binding 'Hague Ministerial Declaration on European Guidelines' for "Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual

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<sup>61</sup> Resolution on the Exploitation of Prostitution and the Traffic in Human Beings of 14 April 1989, OJ C 120, p 352

<sup>62</sup> Resolution on Trade in Women of 4 October 1993, OJ C 268, p 141

<sup>63</sup> As amended by the Amsterdam Treaty, former Art. K.1 (now: Art. 29) of the Maastricht Treaty, explicitly includes trafficking in human beings. See chapter 4.2.1

<sup>64</sup> Communication from the Commission to the Council and the European Parliament on Trafficking in Women for the Purpose of Sexual Exploitation of 20 November 1996, COM (96) 567

Exploitation.”<sup>65</sup> The EU member States therein reaffirm their commitment to maximise co-operation in the fight against trafficking in human beings, and against trafficking in women in particular<sup>66</sup>. As in other EU documents, the term trafficking remains undefined. They call for the promotion of the ‘STOP’ multi-annual Programme adopted in November 1996 by the European Council, devoted to persons responsible for combating trafficking in the Member States and for encouraging the co-operation of European NGO networks and the European Commission on a regular basis. They stress that they intend to make full use of the PHARE<sup>67</sup> and LIEN<sup>68</sup> Programmes, and promote the participation of the Central and Eastern European Countries in the STOP Programme. Furthermore, the Ministerial Conference recommends member States to appoint national rapporteurs who report to their governments on “the scale, the prevention and combating of trafficking in women”<sup>69</sup>.

92. In the Communication of the European Commission in 1998<sup>70</sup> on ‘Further Measures to Combat Trafficking’, the Commission refers to the above mentioned Communication of 1996 and urges the member States to make use of all the machinery (including judiciary and police) and evaluate strategies and measures to combat trafficking.
93. The European Council held a special meeting in Tampere on the creation of an area of freedom, security and justice in the EU in October 1999. The Tampere summit<sup>71</sup> called upon the EU to undertake concentrated efforts against illegal immigration and stressed among others the need for taking effective measures for the prevention of all forms of trafficking in human beings.
94. The Committee on Women’s Rights and Equal Opportunities of the European Parliament adopted a report on the above mentioned Commission Communication of 1998<sup>72</sup> that calls for giving top priority to the fight of trafficking in human beings. The

<sup>65</sup> 26 April 1997

<sup>66</sup> Despite mentioning “trafficking in human beings”, the Declaration is called “[...] to prevent Trafficking in Women for the Purpose of Sexual Exploitation” and is focusing mainly on trafficking in women.

<sup>67</sup> In 1989, the European Union established PHARE as a financial instrument to assist the Central and European countries in their transition from an economically and politically centralised system to a decentralised market economy and democratic society. PHARE’s role has also evolved to keep pace with political developments, in particular with regard to the future enlargement of the European Union. For further information, see <http://europa.eu.int/comm/dg1a/phare/index.htm>

<sup>68</sup> Link Inter European NGOs (PHARE programme)

<sup>69</sup> So far, only the Netherlands have appointed a national rapporteur against trafficking in women, Ms. Dien Korvinus.

<sup>70</sup> Communication from the Commission to the Council and the European Parliament on further Measures to Combat Trafficking in Women of 9 December 1998, COM (1998) 726

<sup>71</sup> Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999 (<http://www.europa.eu.int/council/off/conclu/oct99/oct99-en.htm>)

<sup>72</sup> Report on the communication from the Commission to the Council and the European Parliament “For further actions in the fight against trafficking in women”, 2 May 2000, A5-0127/2000

report recommends for instance, a joint action in the finding of a definition, a legal framework at EU level and effective measures taken in the areas of prevention, protection and victims' support.

95. Since 1996, the European Commission has been supporting several projects aiming the combat of trafficking for the purpose of sexual exploitation. These initiatives include the STOP programme and the DAPHNE<sup>73</sup> initiative that support NGOs in the field of combating violence against women. In third countries, the European Commission financed projects by *La Strada*<sup>74</sup> through the PHARE and TACIS<sup>75</sup> Democracy Programmes.



<sup>73</sup> The DAPHNE Programme (2000 to 2003) is a four-year programme of Community action that supports preventive measures to combat violence against children, young people and women. For further information see [http://europa.eu.int/comm/justice\\_home/project/daphne/en/gl\\_en.pdf](http://europa.eu.int/comm/justice_home/project/daphne/en/gl_en.pdf)

<sup>74</sup> *La Strada – Prevention of Traffic in Women* is an international programme that operates in the Netherlands, Poland, Ukraine, Bulgaria and the Czech Republic.

<sup>75</sup> The European Commission's Technical Assistance Program for the New Independent States and Mongolia. For further information see <http://www.europa.eu.int/comm/dg1a/tacis/index.htm>

## Protection of Women's Dignity and Rights in Court Proceedings

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Malaysia is a Federation consisting of thirteen states with a Constitutional Monarch, as its Head, chosen in rotation every five years by the hereditary Malay Rulers of nine states.<sup>1</sup> Malaysia has a parliamentary system of government based on the Westminster style. The political system is both secular and democratic; Islam is the official religion but everyone has the right to practice his or her own religion.<sup>2</sup>

Located strategically in the middle of the Silk Route, Malaysia has been subject to a diversity of religious, cultural and linguistic influences throughout its history. Hindu, Buddhist and Islamic faiths spread through trade. From the fifteenth century onwards, the country was subject to colonial dominance by the Portuguese, the Dutch and, eventually, the British. Malaysia gains its independence in 1957.

Malaysia has a population of 22.18 million in 1998.<sup>3</sup> Women account for slightly less than one half.<sup>4</sup> 62 percent of the population is Bumiputera (a term used to describe the Malays and other natives), 27 percent is Chinese and 8 percent is Indian. Women make up approximately 46 percent of the nation's workforce.<sup>5</sup> The government reported a national literacy rate of 91 percent in 1995, an increase of 8 percent from 1991.<sup>6</sup> The literacy rate for women, however, was 80 percent in 1991.<sup>7</sup>

<sup>1</sup> Johor, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Selangor, Perlis and Terengganu. The other four states of Melaka, Penang, Sabah and Sarawak all have Governors.

<sup>2</sup> Federal Constitution, Malaysia, Article 3(1)

<sup>3</sup> Department of Statistics Malaysia website, Current Statistics, updated 3 March 1999

<sup>4</sup> Department of Statistics Malaysia, Monthly Statistical Bulletin, January 1999

<sup>5</sup> Department of Statistics Malaysia, Labour Participation Rate by Sex chart.

<sup>6</sup> The Seventh Malaysia Plan (1996-2000)

<sup>7</sup> Women's Affairs Division, Ministry of National Unity and Social Development Malaysia, An Introduction to HAWA

The legal system in Malaysia is derived from the English legal system and is based on statutory and common law. Apart from the Muslim (Syariah) courts and Native courts (for indigenous people of Sabah and Sarawak), the entire court system is run at a Federal level.<sup>8</sup> The highest court in the land is the Federal Court, followed by the Court of Appeal, High Courts and the subordinate courts (Magistrate and Sessions Court). The Muslim's personal laws relating to family law including marriage, divorce and custody of children, wills, intestacy, endowments, etc are governed by the Islamic Law, which are enacted and administered by individual states. It has its own hierarchy of courts and legal system separate and distinct from the federal.

The Federal Constitution states that all persons are equal before the law and are entitled to the protection of the law.<sup>9</sup> The Constitution also states that no one can discriminate solely on the basis of religion, race descent or place of birth in any law.<sup>10</sup> However, there is no mention of prohibition against discrimination based on sex or gender.

A step forward for women in Malaysia is when the government reaffirmed its commitment to provide certain basic human rights to women by acceding to the United Nations Convention on the Elimination of All Forms of Discrimination against Women on 5 July 1995. However, Malaysia has made reservations with respect to and does not consider itself bound by the provisions of Articles 5 (a), 7(b), 9(2) and 16(1)(a) and (2) of the Convention.<sup>11</sup> At the United Nations Fourth World Conference on Women held in Beijing, China in September 1995, the Malaysian government made four specific commitments<sup>12</sup> amongst which was a promise to "remove legal obstacles and gender discriminatory practices".<sup>13</sup>

Women in Malaysia have come a long way but they still face a high incidence of discrimination in the areas of marriage and divorce<sup>14</sup> and when violence is perpetrated against them, the preservation of their dignity still left much to be desired.

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<sup>8</sup> Federal Constitution, Article 121.

<sup>9</sup> Federal Constitution, Article 8(1)

<sup>10</sup> Federal Constitution, Article 8(2)

<sup>11</sup> Women's Aid Organization (WAO), "A Baseline Report on Marriage and Divorce", October 1999

<sup>12</sup> Fatimah Hamid Don and Ramani Gurusamy, "report of Post-Beijing Implementation in Malaysia", Asia-Pacific Post-Beijing Implementation Monitor, Asia and Pacific Development Centre Gender and Development Program, 1998

<sup>13</sup> The other three being: 1) Enhance the national machinery for women's advancement, 2) increase women's participation in decision-making 3) Safeguard women's rights to health and education.

<sup>14</sup> In civil cases the inequalities lie mainly in discriminatory laws and practices rather than actual court proceedings.



Violence against women being perceived as a private matter between individuals is acknowledged but seldom talked about. It was only in 1985, in Malaysia, that women's organizations actively took it up as a human rights problem which needed to be addressed openly and which requires intervention from all sectors, i.e. the government, the social services, NGOs, community leaders and individuals.

Violence against women takes a variety of forms: domestic violence, child abuse, rape, incest, sexual harassment, prostitution, maltreatment and abuse of maids and migrant workers etc. Such violence are deeply embedded and rooted in a cultural, psychological, material, political and sociological base. They stem from how women are perceived in society, which renders women as insignificant, treated as sex objects to be exploited, as "thumping bags" to ease frustrations, abused to satisfy sexual desires.

After 14 years of campaigning, lobbying and advocacy largely on the part of women's organizations in Malaysia<sup>15</sup>, and supported by government agencies like the police and social welfare departments, significant in-roads have been made in the field of women's human rights. Some of the major achievements are:-

- the acceptance of women's concerns as manifested in the chapter on "Women in Development" for the first time in the nation's Sixth Malaysia Plan, with particular mention to address violence against women;
- amendments to laws related to rape (1988)
- the enactment of the Domestic Violence Act (1994);
- media coverage and support of women's concerns in print and electronic media;
- greater attention and responsibility amongst law enforcers and service providers including the police, medical personnel and religious departments.

Combating violence against women requires addressing the root causes of the problems and not only to treat their manifestations. The meaning of gender, sexuality and the balance of power between women and men at all levels of society must be reviewed. There is a need to raise awareness and change attitudes on the issue of violence against women, especially educating young boys and men to view women as valuable partners in life, in the

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<sup>15</sup> Draft Report of All Women's Action Society (AWAM), "Working Together Towards Better Services for Rape Survivors", December, 1999

development of a society and in the attainment of peace. These are all as important as taking legal steps to protect women's human rights.

Rape and domestic violence are the two main abuses perpetrated against the dignity and rights of women in Malaysia. National statistics on rape in Malaysia are hard to come by. Prior to 1993, neither the police nor the welfare department compiled statistics on the number of rape cases reported or referred to their departments. The social department started compiling sexual abuse cases in 1997. Neither the courts nor the Attorney General's Chambers have any data on the total number of rape cases received per year, all criminal cases being not differentiated.

In 1993 there were 2.4 rapes reported per day to the police. The number increased almost two-fold in 1998 to 4.1 rapes reported daily. This can be attributed to increased awareness on rape issues and services for rape survivors. A conservative study states that out of ten rape cases, only one victim will make a report.<sup>16</sup> 55.8% of rape victims are below the age of 16 suggesting the vulnerability of young females and rape prevention strategies should be designed accordingly. 97.5% of perpetrators are above 16 years. 84% of women are raped by friends or family members.<sup>17</sup> Approximately one out of ten reported cases end up in the successful conviction of the rapist. Four out of five never made it to court. Once the case is in court there is an even chance that the suspect would be convicted.

There are several stages, which a victim of rape has to undergo before she is required to appear in court to give evidence. This process by itself is daunting and can cause further stress on the unfortunate victim. The first stage is the report with the police to kick-start investigations before charging the suspect. The victim files a complaint and her statement taken by a woman Investigative Officer (I.O.) The victim will then be sent to a government hospital for medical examination.

The IO will then open an Investigation Paper (I.P.) after satisfying herself that the sexual intercourse was :

- against the complainant's will

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<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*

- without her consent
- with consent but obtained upon threats to her life or to another
- with consent but obtained under de2ception
- under 16 years of age for which consent is immaterial

The IO will also determine the consistency of the victim's statements and the "truthfulness" of her story. The IP will then be forwarded to the Deputy Public Prosecutor who has the discretion to proceed based on the strength of the evidence accumulated.

Rape trials have been described as the "second rape" as survivors have to relive the rape incident over again and often times are subjected to humiliating questions from the defence. The burden of proof lies on the prosecution, the victim being the prime witness in her own trial. She has no say in the conduct of her case and cannot meet or consult with the Deputy Public Prosecutor assigned to the case prior to the hearing.

During the trial the victim has to prove that she did not consent to the sexual intercourse. She is subjected to strenuous cross-examination, harassment and embarrassing intrusion into her private life by the defense counsel. Despite the Evidence Act having been amended restricting evidence of the victim's sexual history with persons other than the accused, nonetheless her background will be probed and credibility challenged. Lack of corroborative evidence such as physical injuries or signs of struggle will indicate lack of resistance and may indicate that there was consensual sex. The victim's general demeanor after the rape will also be subjected to scrutiny.

Rape myths and stereotypes of rape victims colour society's perception of rape, and the courts are not removed from these biases. A rape victim often makes a report late as she needs time to recover, deliberate and weigh the consequences of lodging a police report. She may not sustain injuries as she did not fight back fearing retaliation and more harm from the rapist. Another misconception is that rapists are strangers or rape their victims in bushes and secluded areas. The fact is that 64% of reported cases are by people whom the victim knows i.e. friends, colleagues, and employers. Rape by family members makes up about 20%. Only 16% are by strangers.<sup>18</sup>

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<sup>18</sup> *Ibid*

Rape trials are conducted in open court. Proceedings are only heard in camera (that is, only the prosecution, the defence counsel, the accused and court staff are allowed) only when the victim is being questioned on the actual act of rape. The court may order the name of the victim not to be published in the media, however, her identity is by no means secret to all those present in the court and its vicinity. Before giving evidence, the victim has to introduce herself, her age and her address for record purposes. This is done in open court. She thereby loses her privacy and the added danger that the accused knows where she lives. The media often reports the name of the perpetrator even in cases of incestuous abusers hence the identity of the victim would surely be known if he is her father or brother.

The definition of rape under the Penal Code is based on the premise that rape is merely a sex crime. Therefore, it is defined in the technical understanding of sexual intercourse that of a penis entering the vagina without the consent of the woman. This definition does not include penetration by foreign objects such as fingers, sticks, batons, bottles etc. Other forms of sexual abuse or molestation such as forced cunnilingus and fellatio are not considered as rape. The Penal Code also expressly excludes sexual assaults by husbands.

Rape is legally both a crime and a tort. A crime is an offence against the state whilst a tort is private injury and the injured party receives monetary compensation as redress. However, in Malaysia, this is not a common practice as it involves another long court ordeal for the victim. It is also expensive and losing if she were to lose the case, the victim will have to pay legal costs and even damages to the defendant. Civil suits also take years to resolve.

Rape is a violation of personal integrity in the most direct and acute way. It is an act of violation that humiliates and degrades the victim. The narrow definition of rape under the Penal Code represents a failure to understand that rape is an expression of power and violence to subjugate the survivor.

In 1988 following public outrage over the murder and rape of a nine-year old girl, major reforms were made to the existing criminal laws. The amendments to the Penal Code, the Criminal Procedure Code and the Evidence Act include:-

- A mandatory jail sentence of five years, including whipping, for convicted rapists.
- The revision of age for statutory rape from 14 to 16 years

- Made the cross-examination of the victim's past sexual history inadmissible in court, except in relation to the accused
- Allow rape victims abortion on medical recommendation to safe guard the mental and physical health of the mother
- The maximum jail term for sexual molestation increased from two to ten years

Despite the aforesaid amendments the law on rape is still not satisfactory. Women organizations and activists have suggested recommendations amongst which are:-

- Widen the definition of rape to include any other orifices of the body by any means or objects other than the penis
- Recognise and punish marital rape
- Presume the absence of consent where a victim so states in her evidence
- Impose graded punishment for aggravated rape to reflect severity of the offence such as rape of children, gang rape, rape of mentally or physically disabled persons
- Recognise the offence of incest as a criminal offence
- Widen the definition of statutory rape law to cover child sexual abuses
- Abolish the requirement for corroboration of evidence for rape
- Have all trials fully carried out in camera so that no member of the press or public will have access to rape trials
- Compensate rape survivors.



## **Protecting Women's Dignity and Rights in Court Proceedings - Is This Enough?**

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Malaysia's legal system is based on the English common law system. However it relies heavily on legislated (statutory) law. The criminal law is embodied in amongst others the Penal Code. Criminal procedure is regulated by the Criminal Procedure Code and the rules of evidence by the Evidence Act.

For the purposes of the protection of the rights and dignity of women in the Malaysian court proceedings, this paper will refer to the examples in the treatment of women and girls in violence cases.

Several amendments to the criminal law process were brought about in the late 1980's. The enhancement of the protection afforded to women in court was in essence demanded from 1985 and is intricately woven with the formation of what is loosely called the Joint Action Group (JAG) i.e a loose platform consisting of several women's and other groups launched on 1<sup>st</sup> October 1985, and through the campaign against violence against women (VAW) and Citizens Against Rape (CAR).

### **Rape**

In an article on March 8<sup>th</sup> 1987, in a columnist's advice to a woman who wrote that "At 11 pm we went to his room. There were 2 beds and he said we could sleep on separate beds. I was naive and trusted him ... what happened afterwards frightened me so much I could not do anything right the ext day. My parents never told me about sex. Only after talking to a doctor did I realise I had been raped... No Indian man will marry me now," the columnist

advised the woman, "... if you are not pregnant, you have a less traumatic choice to make. All you have to do is to keep quiet" as "society traditionally hallows virginity".

Given prevalent social perceptions, women may not report incidences of rape. Further, unless they can be assured that they will obtain fair treatment in court, the implications for women brave enough to take their cases to court may be nothing less than destructive.

The absence of witnesses, the issue of consent and struggle, medical evidence, corroborating evidence and the defence's attempt to discredit the survivor were in need of reform.

Prior to the 1989 amendments to the rape laws, the last was provided in Section 155(d) of the Evidence Act which allows counsel to bring in evidence of the complainant's "loose and immoral character" in order to impeach her evidence. This means that the complainant's evidence in court may be disregarded if defence counsel can prove that the complainant is a sexually immoral person.

The lobby for law reform in the 1980's included:-

1. Re-definition of rape, vitiating consent when consent is obtained as a result of intoxications etc. or if obtained by mistake, deceit, threat or undue influence, and minimum sentence.
2. On evidence, the deletion of Section 155(d) to allow only past sexual history and character between the complainant and accused for the determination of the issue of consent. Secondly the confidentiality of rape trials (in camera – i.e. to be held without members of the public being present).

Through the lobby by JAG and CAR the law was finally changed in 1989.

The lobby was deemed a success. As is so often the case, women's groups then moved on to address other urgent issues. Unfortunately the reality of lobbying for change is that dispelling public perceptions cannot be taken for granted after one successful campaign.

The issue was again brought to the forefront in the controversial allegation in 1995 that the head of government in a state in Malaysia had sex with an under-aged 13 year old girl. Under the law this was statutory rape where the issue of consent would have been irrelevant.

In a newspaper report shortly thereafter, the Attorney-General of Malaysia disclosed that the girl had numerous sexual relationships with boys implying therefore that she had loose and immoral character. There was a call from a federal minister that the girl being a Muslim, be charged under Muslim (Syariah laws) for illicit sexual intercourse (zina). (Under Muslim law, a girl is deemed of age when she first menstruates)

That the Attorney-General himself, the office charged with the prosecution of criminals, should deem it proper to utilise what was by then unlawful defence strategies which has been disallowed in the courts of law, in the media, was an outrage. The difficulties in prosecuting a sexual offender in a system of conflict of laws (namely the separation of jurisdiction between the civil and syariah) and its implication on the survivor was also highlighted.

Would the rape law amendments now be enough to assure women survivors that they should make their cases public as women are now protected in court proceedings?

Another aspect of protection of survivors is non-disclosure of the identity of the girl child survivor.

Under the Child Protection Act 1994 (which shall be replaced with the Child Act 2000 soon), there shall be no disclosure by the media of any information likely to identify a child survivor of sexual offences. This together with the judge's discretion in ordering that rape trials be held in camera is meant to encourage and protect survivors of sexual violence.

Yet due to the pressing desire to bring the most interesting aspect of news to the public, unscrupulous journalists (or their editor) have often breached the provision. Whilst we do not often see the reality of the consequences brought about by these breaches, in one instance, a child survivor of incest whom the Women's Crisis Centre was assisting became the unfortunate victim of this breach.



The criminal trial process is an arduous and drawn-out affair. The process requires numerous court attendances, medical examinations and police investigations. The time taken off the daily lives of survivors do not often go unnoticed.

The particular child survivor had been absent from school. When she returned, a clipping of a newspaper report stating that a fourteen-year-old girl from a village (named) had accused her father of incest. The child promptly dropped out of school.

## **Domestic Violence**

For a long time, survivors of domestic violence never truly resorted to the courts for protection. The only avenue for remedy was for spouses who are subjected to domestic violence to apply for a restraining order from the High Court under divorce proceedings. This was expensive and unsatisfactory in that if the order is breached, then contempt proceedings had to be brought before the court issuing the restraining order. The aggressor would then be punished for disobeying the order and not for having abused his spouse.

Contempt proceedings do not at all address the rights of the women violated but merely the contempt the aggressor had shown the court by not complying with its orders.

Women sometimes did, as a last resort, file police complaints. Unfortunately, their cases, if investigated by the police at all, were often dismissed as private domestic disputes. Thus such matters did not find themselves into the realm of criminal law which is a public matter.

This division between private and public sphere is problematic. A lot of things concerning and to do with women's rights are considered private matters. In Malaysia, Muslim Syariah laws also mainly apply to private matters like family relationships and inheritance.

Thus in considering the protection to be afforded to women in domestic violence, the proposed law will have to overcome the syariah separation of jurisdiction. A compromise was clearly to be considered if we want a law to protect all women, Muslims and non-Muslims. So despite the drawbacks in dealing with domestic violence as a crime (as it

discourages women from lodging complaints knowing that their spouses may be gaoled) the Domestic Violence Act was proposed as part of the criminal law system.

Whilst not making domestic violence (which is defined in the Act) a crime, it recognises that if certain crimes are committed by persons against another in a domestic relationship involving domestic violence, the survivor is entitled to apply to court for a protection order.

An interim protection order restrains a person from using domestic violence against the survivor during the pendency of investigations. During the criminal proceedings itself, the court may issue a protection order. Apart from restraining a person from using domestic violence the Court may also attach certain orders it deems necessary for the protection and personal safety of the survivor. This includes, exclusive possession of a shared residence and continued use of vehicle.

A warrant of arrest may be attached to protection orders and persons breaching such orders will be arrested and brought before the court where unlike contempt proceedings, the aggressor is punished for having again used domestic violence against the survivor. This process is therefore more satisfactory in addressing the rights and dignity of women.

Noting also that women often face difficulties accessing the courts, police and social welfare officers were designated as enforcement officers under the Domestic Violence Act. The duties of the enforcement officers include assisting the survivors to file complaints regarding domestic violence.

This provision has assisted the survivors to access the court process. The officers would file the papers in court and accompany the survivors, submitting to the court the facts of the case thus bringing to issue the very rights of the women to safety and a violence-free home.

### **Counsels for Survivors of Violence**

It is sometimes said that a rape survivor is raped twice more after the incident. The first is through police cum medical investigations (the latter normally physically invasive) and the

third time, at court as the survivor is made to recount the incidence of rape in detail.

Thus, despite the assistance of prosecutors and enforcement officers in ensuring that survivors of violence are protected in criminal proceedings, there is sometimes the need to appoint a counsel specifically to protect women's interest and dignity.

Prosecutors are interested only in ensuring a conviction and may not be sensitive to the survivor's other needs. Watching brief counsels are counsels appearing for the survivor in a criminal trial. As the survivor is not strictly a party in a criminal trial but merely a complainant (the parties being the state and the accused), the survivor's counsel may be recognised by the court with limited rights of audience. Despite limited rights, such counsels may nevertheless be important in protecting the survivor's rights.

Watching brief counsels can explain the court process to the survivors and the reasons for each process. This serves to de-mystify the court process for the survivors.

Watching brief counsels also provide a friendly and familiar face in an otherwise cold court room and may serve to decrease the survivors trauma particularly as survivors are made to face the accused in court.

Still, women's groups as well as watching brief counsels must be careful in discussing the incidence and providing counselling / emotional support to survivors. As women's groups' intervention in such crisis situations increase, defence counsel's allegations of women's groups' "coaching of witnesses" have similarly increased.

These allegations are often raised without further proof and unless watching brief counsels are made aware of the possibility of such allegations counsels may be caught unprepared to rebut such allegations.

In an acid throwing case recently in Penang where the husband burned off half his wife's face, head and arms, his counsel suggested to the survivor that she met up with watching brief counsel (who is also a volunteer at the Women's Crisis Centre) on numerous occasion to discuss what she should say in court.

On another occasion, two lawyers who were not involved in an incest case, intervened and requested the court to recognise themselves as "friends of the court" alleging that there is apparent injustice as the child survivor had watching brief counsel and the accused had no defence lawyer. Later, the same counsels suggested that the Centre by providing counselling services to the survivor had "coached her". Again such allegations were made without proof but merely on the basis of the existence of support services for women survivors of violence.

The second urgent need for counsel is in child cases. In another incident, a child who is the survivor of incest was persuaded by her family to withdraw her complaint on the assurance that the family would protect and ensure that she would not again be violated.

Upon such withdrawal, the parents lodged a complaint with the social welfare department that she was uncontrollable and had attempted to burn the house.

The welfare officer was concerned only about removing her from her family. The child wanted to be placed with her aunt. The magistrate refused to allow her counsel on the grounds that as a child she had no capacity to retain a lawyer.

On review, the High Court allowed counsel to appear on behalf of the child.

Under the new *Child Act 2000*, a child who has been exploited for prostitution shall be considered to be in need of protection and rehabilitation whilst a child who has been exploited for pornography purposes shall be deemed in need of care and protection. The existence of a child advocate may similarly help in protecting the girl child's rights in arguing that it is not the child who is in need of rehabilitation. A child abused is in need of care and protection ... never rehabilitation.

It is submitted that survivors should be allowed as of right to be represented by counsel of her choice in court to ease the survivor's trauma. Watching brief counsel / counsel for survivors should be given similar rights to address the court and participate in the trial.

This is exemplified in a pending sexual harassment case. Despite appearance of watching brief counsel, defence counsel did not inform the watching brief counsel when the accused (being a foreigner) applied for release of his passport. When queried, defence counsel maintained that he has no obligation to inform watching brief counsel of the accused's application.

## **Conclusion**

This paper does not attempt to exhaustively explore the numerous ways to enhance the protection of women's dignity and rights in the criminal process in Malaysia.

What is clear is that women's experiences are not always taken into consideration in reducing the trauma that all women survivors must go through in order to access justice.

The criminal system is weighted in favour of the accused. This bias while not necessarily incorrect, must be tampered with certain mechanisms to protect the rights and dignity of women survivors of violence.



## **Women in Criminal Justice System in Nepal**

Sapana Pradhan Malla

Forum for Women, Law and Development

Guided by the defective value system, discrimination gets institutionalized at home, community and in the State. They become vulnerable to forms of evil such as domestic violence, trafficking for prostitution etc. Even the legal system – the last recourse for any of the victims – does not give favorable treatment to women.

Therefore it is important to examine the ways in which criminal justice systems can help to prevent traditional, discriminatory, criminal violence against and the exploitation of women and girls. The growing threat posed by transnational organized crime makes it necessary to focus on the victims' access to services, bearing in mind the impact the criminal law and procedure, criminal justice processes and crime prevention strategies have on the lives of women and girls.

Transnational organized crime, especially trafficking in migrants, affects all regions of the world. Combating trafficking in human beings requires a twofold approach a criminal justice response, to prevent the crime and deter the offenders; and a human rights response, to protect and defend the rights and integrity of the trafficked persons.

Approximately 5000-7000 Nepalese girls and women are being trafficked to sex market of India every year. As per the official record, only 150 cases were reportedly investigated by the enforcement agency in the fiscal year of 1994-95. The number of cases has decreased in subsequent years as only 133 were investigated in 1995-96, and 107 in 1996-97. As learned from the Government Attorney's officer, out of 150 cases reported in fiscal year of 1994-95, only 39 cases were presented in courts of law. Similarly, in 1997-98, 130 cases

were registered at the Police and only 125 cases were initiated by the Government Attorney's Office, which demonstrates a frustrating state of law enforcement system.

Law enforcement agencies have often argued that it is difficult for them to prosecute trafficking offences under the current system due to the weak law and lack of adequate evidences. It is difficult to convict a trafficker if the key witness has already been deported. Immigration laws, policies and procedures should ensure that the victimization of trafficked persons without compounded by the intervention of the destination, transit or source State. In many cases, strict immigration laws and procedures relating to the deportation of illegal migrants or workers hamper efforts to prosecute trafficking crimes and to protect the human rights of victims. The threat of immediate deportation prevents victims from seeking help from police or other authorities; and victims who are arrested or otherwise escape their traffickers do not receive the assistance or protection that they need.

Effective law enforcement is severely undermined because victims are unwilling or unable to testify against traffickers and in Nepal there is no witness protection programs. There is a need to explore ways and means of giving the protection needed in each individual case. Even when reasonably good laws exist, trafficking in persons remains a relatively low law enforcement priority in a number of countries. As it is generally assumed that specific measures to combat corruption are required.

Many victims of trafficking in human beings are detained by the receiving State, for violation of immigration laws, for prostitution, or even as witnesses. Illegal migrants who are detained by the receiving state have a recognized right under international law to be treated with humanity and dignity, both before and after the determination of the lawfulness of their detention. Trafficked persons who are arrested do not necessarily receive the assistance that they need and are entitled to under international human rights instruments

Specific measures are required to raise public awareness of the seriousness of the impact of certain forms of transnational organized crime, in particular trafficking in women and children. Specific measures are also required to inform potential victims of such trafficking of the risk that they face.

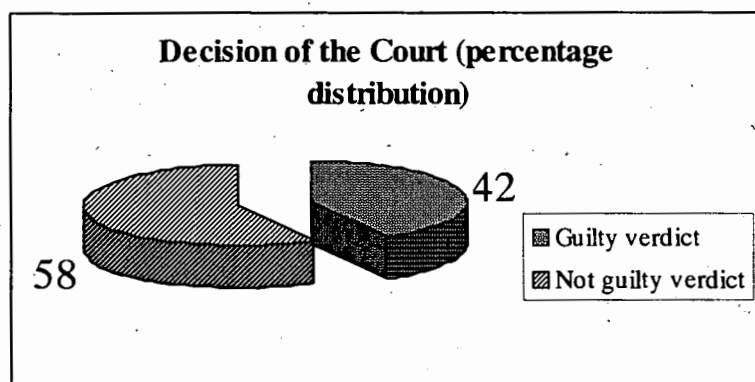
## Women in the Court Room

The courtroom atmosphere is conducive for women to be able to speak openly about the violence they have experienced. Most of the judges also feel that since we have an open court system, it is difficult for a woman to express herself without hesitation. Court is usually crowded in criminal cases, therefore there have been instances where a victim of rape could not answer questions directed at her. In such cases, the system of "camera court" would be effective helping women speak openly about the violence they are facing. Similarly, women legal representatives and women judges would also help in making the situation easier for women in such cases<sup>1</sup>.

## Women's Access to Justice

According to most of the judges, women in cases relating to violence get justice 60 to 80% of the time. They do not deny the fact that it is difficult for women to collect evidences and at the same time they confirm the fact that their judgements are usually based on facts and evidences.<sup>2</sup>

According to a survey<sup>3</sup>, in 58% of the cases the court has given a "not guilty" verdict in the trafficking case.



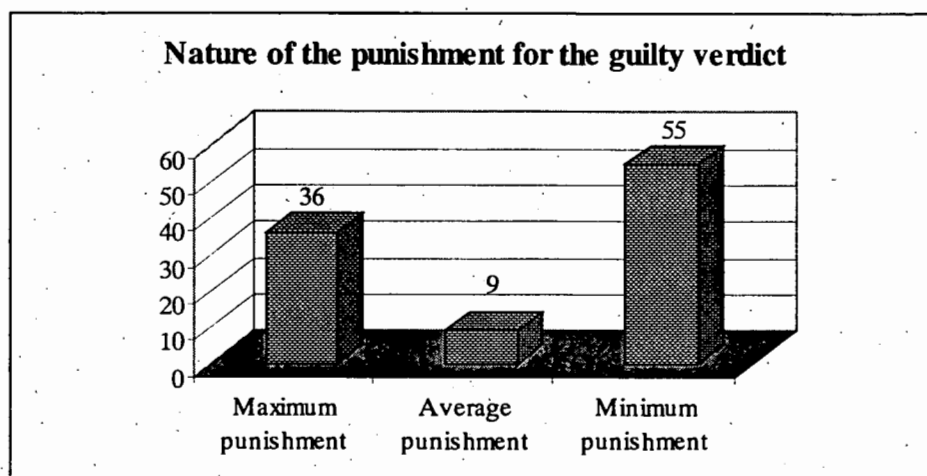
<sup>1</sup> A Study on Gender and Judges, Pro Public, p. 65

<sup>2</sup> Ibid, p. 33

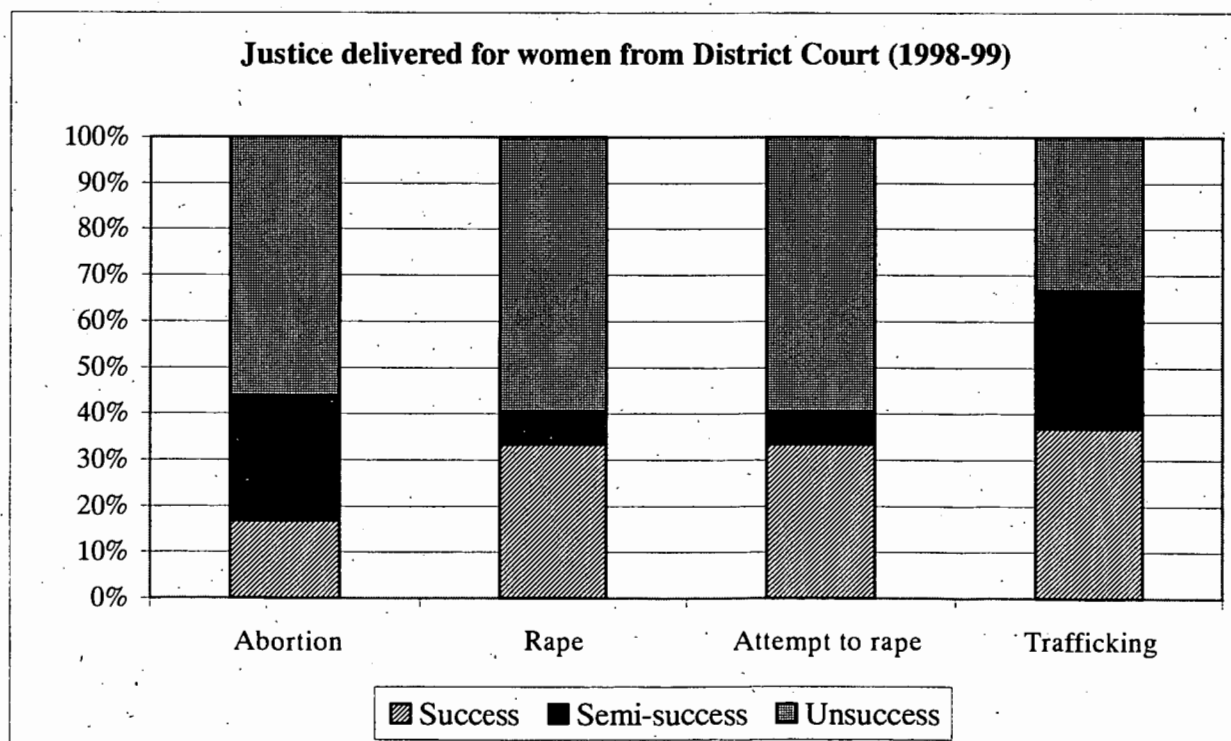
<sup>3</sup> Ibid



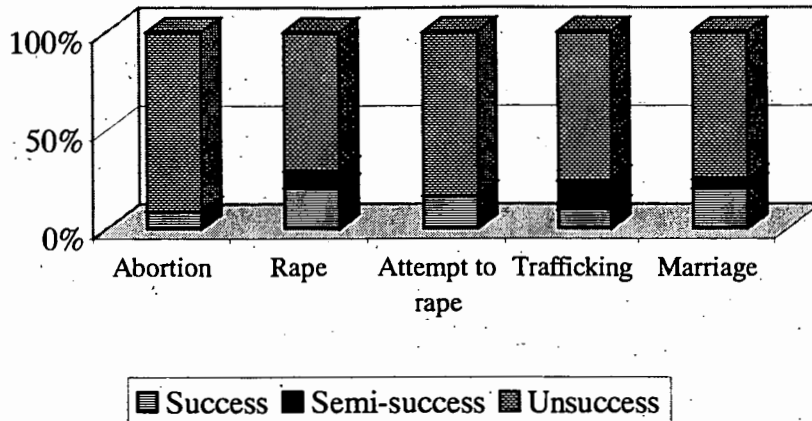
Similarly, in the process of evaluating the sentencing pattern, the court has rendered a minimum sentence in 55% of the trafficking cases. According to the Trafficking Control Act 2043 B.S., a person carrying out trafficking of human being is punishable by 10 to 20 years of imprisonment. Similarly, a person who takes a human being out of the country with the intention of selling him/her is punishable by 5 to 10 years of imprisonment. A person who is involved, has assisted or has encouraged an individual or a party in trafficking of a human



being is punishable by 5 years of imprisonment, but according to our survey, very few cases were decided keeping the above mentioned provisions in mind.



### Justice delivered for women from Appeal Court (1998-99)



### Analysis Judges' Behavior

The general language used to be of sexist nature. Rape cases of minors are not treated with due sensitivity. The emotional state of the victims are not taken into consideration at all. Questions that were discouraging, insulting and embarrassing were not granted permission to be asked, but were allowed to be repeated a number of times.<sup>4</sup>

Lawyers are reported as being biased and insensitive. The overall language used by the lawyers are criticized as being tainted with sexist overtones.

### State of Efficiency and Credibility of the Prosecution System

In cases related to trafficking of girls, the efficient, complete and timely investigation of crimes is crucial for the prompt prosecution of the guilty and release of the innocent.

#### Problems in the way to efficient and fair prosecution.

- Negligence by the authorities to carry out speedy investigation.
- Negligence of the authorities to collect scientific evidence.

<sup>4</sup> A Study on Gender and Judges, ProPublic, p. 65.

- Lack of inclination in police to complete and submit investigation reports in time.
- Government attorneys misinterpret their roles as if lawyers to police.
- Government attorneys often fail to scrutinize the available evidence and documents whilst carrying out prosecution.
- Lack of system for participation by victims in investigation as a matter of rights.

### **Harassment faced by women in the prosecution of cases**

In Nepal, the investigating institutions particularly police comprise of men. They do not consider the offences against women as posing a grave threat to the security of society. This is evident from the record of investigation of only negligible number of trafficking cases.

The gender biases and resulting harassment continue in every stage of the criminal proceeding. The Government Attorney could effectively control the prevailing circumstances of gender biases during investigation by providing accessibility to victims who play a role of indispensable witness. However, this has never been a concern of the Government Attorneys.

### **Harassment During the Trail**

The need to protect witnesses against intimidation has arisen in connection with, inter alia, organized crime. Fear for the safety of the individual concerned and of his or her family members continues to hinder the giving of testimony in cases involving organized crime.

A study<sup>5</sup> conducted on Impact of Corruption in Criminal Justice System on Women has discovered that 10 victims, out of the 71 interviewed, virtually changed the statement they recorded in the police. 22 women, out of the 32 appearing in the courts, report that they received the threat or enticement to change the statement made to the police. It therefore

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<sup>5</sup> CeLRRd June 2000, Page 30

forces us to conclude that the victims face the most deplorable situation during the trial period.

### **Delay in the Justice system**

Frequency of schedules for hearing is one of the indicators of the delay in the criminal justice system. The proceedings of witness examination is one of the most lengthy and constitute a major cause for delay. The delay is further intensified by unregulated practice of postponing the hearing by government attorneys and defence lawyer.

### **Corruption**

The negative impact of corruption that has pervaded in other spheres of society has also influenced the Criminal Justice System in Nepal. This has a direct bearing on the eventual verdict in cases related to trafficking <sup>6</sup>. The plight of the victims is accentuated by the overwhelming presence of male in the proceedings who are not sensitive to the sufferings of women.

### **Judges influenced by patriarchal thinking**

An analysis of the judicial attitude of these judges shows that there is no consistency in the judicial approach towards women's issues. The rule and regulation of our society is based and result of the patriarchal thinking and it is very important to remember that the judges are a product and part of the dominant sections of our society reflects its prejudices and biases.<sup>7</sup> Though the judges are sympathetic towards women, they are influenced by "Protectionist Approach" rather than "Substantive Approach" due to their level of gender sensitization.

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<sup>6</sup> Ibid Page 44

<sup>7</sup> Discriminatory laws in Nepal and their Impact on Women: A review of the current situation and proposals for change, FWLD, August 200, page 93

## **Recommendations and Future Action**

The United Nations mandate to deal with the issues of crime prevention and to improve criminal justice is found rooted in its Charter itself, which express the organization objective to safeguard universal values including the protection of life, health and security of the world's people. Fundamental to this concept is protection against the threat and deprecations of crime and victimization as well as the pursuance of peace freedom and justice.

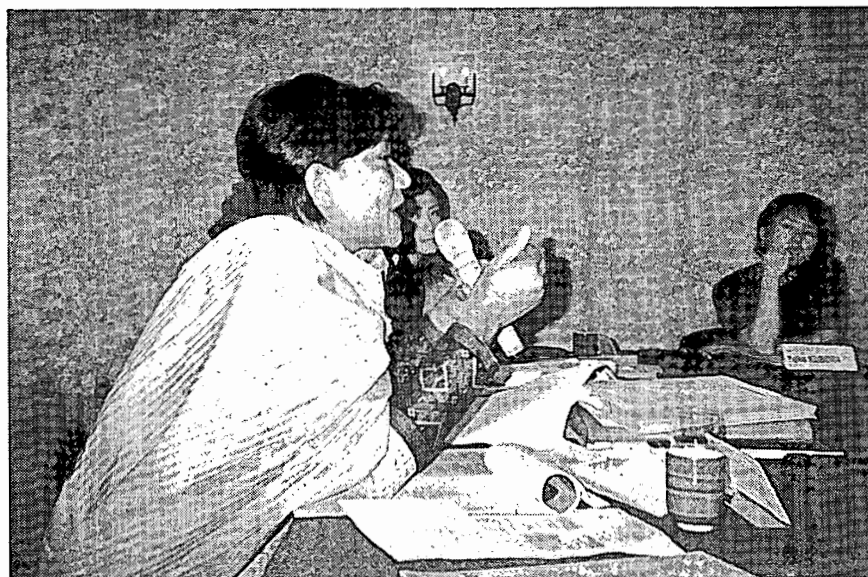
The world community has made its commitment, during the Tenth UN Congress in Vienna, to develop more effective ways of collaborating with one another with a view to eradicating the scourge of trafficking in person, especially women and children and have also expressed their commitment to establish 2005 as the target year for achieving a significant decrease in the incidence of those crimes worldwide and, where that is not attained, for assessing the actual implementation of the measures advocated. Facing account of this it has become necessary to formulate more appropriate strategies for the implementation of these commitments in the national as well as regional levels.

- Specific measures and the plan of action are necessary to implement and follow-up of these commitments. Plan of action in national as well as regional levels should be developed to give effect to the Vienna declaration.
- An effective criminal justice system should be developed with gender prospective. The national legislation and the practices should be harmonized with international norms and standards and should be incorporated in the national plans and programs.
- Information and knowledge about international standards, norms and guidelines should be disseminated as widely as possible. The target of dissemination should not only be the criminal justice officials but also the grass-root level.
- Moreover, model treaties and bilateral and regional agreements can serve as prototypes for new national laws, increasing the harmony of domestic legislation and facilitation of collaborative action. The United Nations model treaties on extradition, mutual legal

assistance and the transfer of criminal proceedings along with the regional models developed by this region could be implemented to complement existing cooperative arrangements. In this regards Draft SAARC Convention on Prevention and Combating trafficking in Women and Children to be rarified broadening the definition and scope, with rehabilitation and reintegration arrangement and with care and treatment mechanism. Provision for a treaty body to be incorporated. in the draft Convention. A Regional Criminal Court to be developed.

- Important path for helping to bring change in our judicial system is through law school education. Little attention is given to upcoming theories and knowledge on gender. Law schools should think seriously about such issues and incorporate these important aspects into their course of study, that would specify the areas where erroneous legal verdicts involving cases of violence against women are proportional to gross violations of human rights. In addition, these courses of study should specifically address CEDAW.
- Cooperation and trust are key elements in developing an effective judicial system. There is still the misconception that the judiciary is an unproductive sector, resulting in lack of cooperation between the executive branch of the government, the legislature and the judiciary.
- Mechanism to carry inspection of works of police and government attorney should be strengthened. Efforts must be made to expand women police cell for investigation of trafficking and rape cases. Scientific and technological improvement of the investigation system must be taken as urgent action.
- There must be an expressed political commitment to eliminate corruption in Justice System an political will is important to eliminate violence against women. Political Manifesto of each political parties to be challenged to make them accountable in their commitment for the rule of law. Voter's education programs to be launched to make Political Parties accountable.
- Gender sensitization training along with human rights norms is important to public attorneys, lawyer, police and judges.

- Amendment of the existing court procedures by implementation of a uniform code of procedures. Scheme for protection of witnesses must be introduced immediately. Right to appeal of the victim has to be protected by the law. Right to investigate on trafficking case to be guaranteed to police without the court approval. Buyer to be punished under the trafficking law and definition of trafficking to be broadened.
- Legal aid services should be made available for the victims of violence, including legal counseling. The attitudes of many persons in the judiciary system towards family violence cases need to be changed. Courts should maintain a record of registered and decided cases related to violence against women.
- NGOs working on violence against women should come together as a joint action group. This is an effective strategy to pressurize and influence the government and its machinery. Co-operation among research institutions and/or organizations for study and research is also extremely useful for advocacy.
- Monitoring teams have to be formed comprising medical doctors, lawyers, counsellors, and human rights advocates. Such a team should have the power to visit shelters and prisons, and to provide the necessary suggestions and support. This team should also monitor how the victims are treated by the police, lawyers, the Public Attorney's Office and the court.



## **Women and the Legal Justice: The European Context**

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Equality between women and men is a fundamental principle of democracy. After the fall of communism, during the nineteen's, the belief in democracy and in its pluralism of values became stronger as well as the need for a more comprehensive participation of women in the political, economic and social life. To mark the beginning of a new era in the women's rights movement, the Vienna Declaration and Programme of Action (1993) and the Beijing Declaration and Platform of Action adopted at the UN Fourth World Conference (1995) stipulated that the human rights of women should form an integral part as an inalienable, integral and indivisible part of all human rights and fundamental freedoms.

These documents appealed to all States to step up their effort in the field of human rights in order to enhance the equality between men and women and to prevent discrimination. A considerable number of recommendations made by the Program of Action and the World Conference have been previously made by others documents. In the same time, the Vienna Declaration and the Beijing Platform of Action called for some major changes in the fields of women's rights. The need for new documents emphasizes the fact that situation of women rights faces a paradox. On the positive side, international instruments, like the Convention on the Elimination of All Forms of Discrimination were ratified by a considerable number of States and a particular emphasis has been done by the work of CEDAW to the specificity of women's rights and to the conflict between universalism and cultural relativism. On the negative side, a relative apathy towards women rights demands started once that a certain level of protection was assured and the discrimination against women persists in several areas, as a double and triple faces discrimination.

One important aspect of human rights in the nineteen's appears to be the question of their



application and effectiveness.<sup>1</sup> For individual and groups who seek to defend their rights, enforcement appears as the most important aspect of the protection of human rights. The relative lack of international means of enforcement gives rise to an additional emphasis put on the national system and on the rule of law. The diminishing capacity of the state to deal with the violations of human rights in the context of globalization call for new and innovative thinking and approaches. As long as the principal responsibility in the field of human rights still belongs to the State, the absence of an effectiveness of the rule of law, and especially of a legal justice was defensible. As cooperation among States moves towards expanded power in the administration of justice, a parallel gender politics must be seen as an indispensable counterpart.

The present article deals with the question of the legal justice and women rights in a regional level, the European one. The analysis does not seek to provide a comprehensive approach, but only to draw the picture of gender discrimination in the field of justice, in the system that is considered the most advanced in the area of women rights protection. In the light of these objectives, the article deals only with institutional matters of women's rights and legal justice in the regional European system, both at the level of the Council of Europe and of European Union.

On one hand, the situation of the women rights in Europe is characterized by very important achievements. Most European countries set up policies in order to enhance equality between men and women in various fields like human rights, education, and representative democracy, economic independence. The level of awareness of the necessity of promotion of gender equality is higher than in other regional systems; the amount of expertise in this area is increasing. On the other hand, the globalization, the breakdown of the regulating functions of State give rise to additional challenges to gender equality. In Central and Eastern Europe, globalization has been accompanied by a lost of legitimacy of policies of equality during communism and progress towards gender equality was blocked.

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<sup>1</sup> S.T. Buerghental, "The Normative and Institutional Evolution of International Human Rights", *Human Rights Quarterly*, 19.4, November 1997

## I The Council of Europe: Moving Towards an Effective Protection

A strong commitment to both women's rights and legal justice is one of the characteristics of the Council of Europe. The European Convention on the Protection of Human Rights, main legal instrument of the Council of Europe, provides in article 6 the right to a fair trial. By the same token, the Convention refers in his article 14 to the right of non-discrimination on the ground of sex. Nevertheless, despite several provisions and policies, the Council of Europe lacks a fully-fledged policy for women in the field of legal justice. Thus, the potential scope of our analysis, the link between women's rights and the legal justice is a very vast one. It would be unrealistic for us to purport a comprehensive critique of every aspect in the field. We are concerned only with the recent development and with the shaping of policy-making and administrative structure adequately equipped to pursue a more specialized dimension.

The 1990s there was a significant evolution in the role played by the different international organizations functioning with a human rights mandate in Europe. Major issues of coordination of overlapping mandates have arisen. The Council of Europe, which once focused almost exclusively on protecting the rights of individuals through judicial and quasi-judicial mechanisms, has now developed a greater focus on broader rule of law issues, has established a European Commission for Democracy through Law, based in Venice.

The Commission for Democracy emphasis in several occasions the importance of the role played by the judiciary as a pillar of the legal civilization. The strength of the judiciary was the guarantee that the rule of law, considered as one of the major achievement of the millenium. However, we have to notice that the Commission of Venice did not take into account the issue of discrimination of women in this area. The question of impartiality is taken into account only in its relationship with the racist or xenophobic remarks make by a judge.<sup>2</sup> It is true that the racist discrimination is considered a norm of *jus cogens*, norms considered as superior and universal. The feminist thinking of international law argues that all the violations of human rights typically included in catalogues of *jus cogens*, genocide, slavery, murder, disappearances, torture, systematic racial discrimination did not take into account women's experiences. The typical example is related to the racial discrimination that consistently appears in *jus cogens* inventories, and discrimination based on sex does

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<sup>2</sup> Commission of Venice, *The right to a fair trial*, CDL-INF(2000) 7.

not, despite the fact that sex discrimination is the most widespread injustice.<sup>3</sup>

Steering Committee for Equality between women and men was created in 1989<sup>4</sup> within the framework of the annual Intergovernmental Programme of Activities in the Council of Europe, to examine the situation as regards equality between women and men in European society and consider its progress, to cooperate with other steering and ad-hoc committees in the implementation of various projects and encourage them to put into practice the strategy of gender mainstreaming with a view, in particular, to improving and developing their activities so as to contribute to the implementation of the objectives.

Gender mainstreaming appeared for the first time in international texts after the Conference of Nairobi in 1985. In this particular document, gender mainstreaming was understood in relation with the role of women in development. The concept acquired a wider definition in the Platform of Action adopted at the Fourth World Conference in Beijing. The Platform of Action made reference to "governments and other actors which should promote an active and visible policy of gender mainstreaming, a gender perspective in all policies and programmes, so that, before decisions are taken, an analysis is made on the effects on women and men, respectively".<sup>5</sup> The definition given by the Steering Committee is the following "Gender mainstreaming is the (re)organization, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making".<sup>6</sup>

This concept shows once again that women's rights is not a one-time undertaking and their consistency depends upon the capacity of implementation in this field of governments and bureaucracies. Thus, one of the principal scopes of the introduction of the concept of gender mainstreaming is the need for a more effective institutional responsible application of the equality between women and men. The equal participation of women and men in the public and private life tends to be swept under the carpet by the governments each time that the actors concerned are not vigilant and risks to remain a formal equality.

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<sup>3</sup> H. Charlesworth, C. Chinkin, "The Gender of *Jus Cogens*," 15 *Human Rights Quarterly*, 63, 1993.

<sup>4</sup> Res(89)40 of the Committee of Ministers.

<sup>5</sup> Gender Mainstreaming, Conceptual framework, methodology and presentation of good practices, Final Report of Activities of the Group of Specialists on Mainstreaming(EG-S-MS(98)2).

<sup>6</sup> *Ibid.*

The discrimination of women in the field of legal justice was recently taken into account by the Committee for the Prevention of Torture which has consecrated a special chapter to "Women deprived of their liberty" in their 10<sup>th</sup> report held in 2000.<sup>7</sup> The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) was adopted in the Council of Europe in 1987. The Convention establishes a Committee for the Prevention of Torture, composed of independent experts, which has "to examine the treatment of persons deprived of their liberty". The Committee makes routine and ad-hoc visits, the visits and discussion are confidential as, in principle the reports. The report may be released, at the request of the State concerned or if the State refuses to cooperate. All states have agreed to the release of the Committee report.

The Committee also emphasizes that any standards which it may be developing in this field should be seen as complementary to those set in other international instruments: the European Convention on Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

1. As a matter of principle, women deprived of liberty should be held in accommodations, which are physically separate from that, occupied by any men. Some States have begun to make arrangements for couples to be accommodated together.
2. As the CPT stressed in its 9<sup>th</sup> General Report, mixed gender staffing is an important safeguard against ill-treatment in places of detention. The presence of male and female staff can have a beneficial effect in terms of both the custodial ethos and in fostering a degree of normality in a place of detention. In this context, a special emphasis was put on the fact that the persons deprived of their liberty should be searched only by the staff of the same gender.
3. The CPT has occasionally encountered allegations of women upon women abuse. However, allegations of ill-treatment, especially of sexual harassment arise more frequently, in particular, when a State fails to provide separate accommodation for women deprived of their liberty.
4. It is axiomatic that babies should not be born in prison, and the usual practice of the Council of Europe, member States seems to transfer pregnant women to outside

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<sup>7</sup> Extract from the 10<sup>th</sup> General Report (CPT/Inf(2000)13).

hospitals.

5. The CPT considers that examples of pregnant women being shackled, restrained to beds or other items could be qualified as inhuman and degrading treatment.
6. Women inmates are offered activities that have been deemed appropriate for them (such as sewing and handicrafts) while male prisoners are offered training of more vocational nature. Such a discriminatory approach can serve to reinforce stereotypes of the social role of women.
7. The CPT emphasizes the difficulty to decide upon the question if children have to stay in prison with their mothers. On one hand, prisons clearly do not provide appropriate environment for babies and young children and on the other hand, the forcible separation of mothers and infants is highly undesirable. The principle, which has to govern this field, is the welfare of the child. Arrangements should also make to ensure that the movement and the cognitive skills of babies held in prison develop normally. The CPT made reference also to the recommendation 1469(2000) of the Parliamentary Assembly of the Council of Europe on the subject of mothers and babies in prison.

The standards put by the Committee in the 10<sup>th</sup> report marked a significant step forward in reducing the discrimination against women. But it still remains that all organisms of Council of Europe involved in the activity of the legal justice take adequate measures in order to assure women's rights in this field. It is also important that the member States developed a proper follow-up by institutional, legislative and administrative measures.

## **II The European Union: Achieving New Competences**

The treaties that found the Communities in 1950 did not contain special provisions related to human rights but the Court of Justice (ECJ) over the years has developed what amounts effectively to an unwritten Charter of rights for the Community. The result is that human rights figure in a number of different Treaty provision. Following the Amsterdam Treaty, in particular its article F, respect for such rights and freedoms is said to constitute one of the basic principles on which the Union is founded.<sup>8</sup>

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<sup>8</sup> P.Craig, G. de Burca. *EU Law, Text, Cases and Materials*, Oxford University Press, 1999, p.296, *Opinion 2/1994 on Accession of the Community to the ECHR*.

The European Court of justice stated in 1996 that the Community lacked competence to accede to the European Convention on Human Rights, the main Council of Europe's instrument, to which all of the Member States are signatories. The opinion of the European Court of Justice 2/1994, concerning the access of the Community to the European Convention on Human rights was widely criticized. The reasoning of the ECJ deals extensively with the issue of competences of the Community and considers that human rights jurisdiction of the Community covers only the field of Community law. In considering whatever the institutions have to respect human rights, the Court considered that the institutions have the duty to ensure the observance of fundamental rights.

A charter for Fundamental Rights has been signed by the Commission in October 2000. The Charter has 50 articles and most of the rights stipulated by the Charter are unwritten rights widely recognized by the European Union and the Member States. Nevertheless, the Charter provides some new rights, which were crystallized during the working of the Convention for the Charter, in new areas of protection like bio-ethics or the protection of data. The Member States have to decide upon the incorporation of the Charter into the body of the Treaty. The article 21 of the Charter states the principle of non-discrimination and article 23 the equality between men and women.

As regard the importance of a Charter for Fundamental Rights, M. Cappelletti states in 1989: "What was important in the American integrationist experience was the ability to agree initially on a basic Charter of rights and to create institutions capable of interpreting that charter through time. The Europeans will necessary change in attitude will have to wait the day when the French, the English and all others regard themselves as being citizens of the Community with rights as such."<sup>9</sup>

Despite the changing and gradually enhanced status of human rights within EC and EU law, the development of the general principles and fundamental rights of EC law, and in particular their development over the years by the ECJ, has been subject to a number of criticism. A first concern is that the Court has attempted to extend the influence of Community law.<sup>10</sup>

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<sup>9</sup> M. Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford University Press, 1989.

<sup>10</sup> *ibid.*

Following the *Handelgesellschaft* litigation, the ECJ continued to emphasize the autonomy of Community's general principles from the specific principles protected within the constitutional law of individual Member State. But at the same time, the Court repeatedly stressed that the source of the general legal principles and human rights protected within Community law were not independent of the legal cultures and traditions of the Members States. In *Nold v. Commission*, having established the autonomous nature of the Community's general principles of law, the Court continued to refer to particular sources of inspiration for these, thereby giving a more positive and concrete foundation to the development of the Community. Some of the most critical comments were prompted by the case of *Grogan* in which Advocate General suggested that the prohibition in Ireland on the provision of information about abortion facilities in other member States should be tested for compliance with other human rights. The ruling was narrowly based on the fact that there was no commercial link between the providers of the medical service in one country and the development of fundamental principles.

The equality between men and women is given as an example of a competence of EU, which coincides with a fundamental right. Moreover, article 13 of the TEC introduced by the Amsterdam Treaty provides that "the Council, acting unanimously and after consulting European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation". Article 2 and 3 of the Amsterdam Treaty provides that the equality between men and women is one of the main task and activity that has to be undertaken Community.

In order to put the Community acts in the wider context of the international instruments in the field of human rights, we have to take into account the influence of the Conference of Beijing. In a communication from the Commission to the Council of 1 June 1995, the Community has identified the following strategic objectives; to actively promote participation in society for all individuals without discrimination, particularly by supporting the ratification and enforcement of the Convention on the Elimination of all forms of Discrimination against Women, to strengthen legislation on violence, sexual harassment and the sexual exploitation of women, to support measures strengthening the role of non-governmental organizations which give more responsibilities to women, to provide support measures to encourage and accelerate

women's participation in decision-making in all public and political bodies, to ensure that women thought the world have the right to decide freely and responsibility on the number, spacing and timing of their children and have the information and means to do so, to adopt measures to redress the horizontal and vertical segregation of the labor market, to encourage changes in the organization of work to ensure an equitable distribution of work responsibilities and household duties, and to take measures that enable people to reconcile personal, social and professional responsibilities.

Sex discrimination is also a complex branch of law, partly because of the blurred boundaries between various kinds of discrimination, which are governed by distinct legal regimes. In *Defrenne V. Sabena* the Court deeming the elimination of sex discrimination to be a fundamental Community Right supported its conclusion by noting that the same concepts are recognized by the European Social Charter of 18 November 1961 and the Convention No. 111 of the ILO of 25 June 1958 concerning discrimination in respect of employment and occupation. The Court ruled in *Defrenne III* and most recently in the case of *Paves* that the elimination of sex discrimination was one of the fundamental personal human rights, which had to be protected within Community law. Community law in this area is divided principally into three parts; equal pay, equal treatment and social security.

The treaty of Rome stipulates the principle that men and women should receive equal pay for equal work. Since 1975, a series of directives has been adopted in order to clarify and develop this basic principle of Community law, Equal pay for men and female workers, enshrined in article 119 (141 of EC) of Treaty, accompanied by a code of conduct intended to give practical advice on measures to ensure the effective implementation of equal pay.

For instance, the rule of implementation of equal treatment in occupational schemes of social security was amended on 20 December 1996 in the light of the conclusion of the *Barber* judgement. In this quite contested judgement, the ECJ states that "It is sufficient to point out that Article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality. Accordingly, it is contrary to Article 119 to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men



and that for men is based on the provided for by the national statutory scheme"

Improving the health and safety of workers who are pregnant or have recently given birth was another necessary step in order to improve the equality between men and women. A directive concerning the pregnancy was adopted in 1992. This document, adopted under article 138 of the Treaty concerning the health and the safety at the work of workers, provides a minimum level of protection for pregnant women, workers who have recently given birth and workers who are breast-feeding. The employers are invited by this directive to take appropriate measures in order to adjust the time of working of those three categories of women. Following the jurisprudence of the Court, the Council states that the dismissal of women in the period of maternity.

The ECJ decided in 1988 in *Danfoss* case that a directive on the burden of proof in cases of discrimination at work to prove that the principle of equal treatment has not been violated, the onus is on defendants accused of discrimination.<sup>11</sup> A directive adopted by the Council in 1997, under Social Policy Agreement Protocol, took this principle. In the same time, a second directive adopted in the same year provides that "indirect discrimination shall exist where an apparent neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision is appropriate and necessary and can be justified by objective factors unrelated to sex."<sup>12</sup>

Concerning the sexual harassment at the work place, the Commission took into account the fact that despite the recognizance by the member States of the sexual harassment as a widespread problem, they failed to reach an agreement upon a legislation in this field. Nevertheless, the Commission adopted in 1991 a recommendation concerning the Dignity of the Women at the work place.

The aim of the Directive 76/207 is to secure equal treatment between men and women in three broad, employment-related areas, namely access to employment and promotion, vocational training, and working conditions. The equal-treatment principle is defined in Article 2 to mean any discrimination 'on grounds of sex either directly or indirectly by reference in

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<sup>11</sup> Council Dir.97/80.

<sup>12</sup> Council Dir. 97/81.

particular to marital or family status." (The third) area of exception to the principle of formal equality is in Article 2(4) the positive action provision which permits measures designed to redress inequality between men and women, and to promote equal opportunity for men and women, and to promote equal opportunity for men and women in particular by removing existing inequalities which affect women's opportunities in the three areas covered by the Directive.

In *Kalanke*, however, the ECJ took the view that article 2(4) was derogation from the right to equal treatment, and thus must be strictly interpreted. The *Kalanke* ruling prompted a flood of criticism and comment, not only from women's interest groups and from academic and practicing lawyers but also from the European commission itself, which issued a communication on the interpretation of the judgement. The Commission took the view that not all quotas would be unlawful, and listed a range of positive action measures, which would, in its view, be acceptable despite the ruling. In the subsequent case of *Marshall*, Advocate General Jacobs suggested that even if individual candidates' circumstances had to be taken into account, a national measure. He criticized the Commission's proposed clarificatory amendment to Article 2(4) for being innovative and insufficiently clear, and referred to criticism of the *Kalanke* ruling as having been misconceived. However, the ECJ did not follow the Advocate General's opinion and it narrowed the potential scope by confirming that while a rule guaranteeing absolute and unconditional priority for women was impermissible a softer quota which did allow for individual consideration of circumstances. It appears that even where male and female candidates are equally qualified, male candidates tend to be promoted.

Such an argument correctly highlights the need for close examination of measures purporting to benefit women. Any measure giving advantage to a group defined according to gender runs the risk of over or under-inclusiveness and may well perpetuate stereotypes. However, this in itself does not imply that anti-discrimination legislation should aspire to neutrality and thereby ignore disadvantage. The risks referred to need to be balanced against the possible gains of such criteria in reducing gender disadvantage.<sup>13</sup>

After the Beijing Conference, the Community adopted a medium-term action (1996-2000) Its

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<sup>13</sup> S.P. Craig, G. de Burca, *op.cit.*

aim was to integrate equal opportunities into the process of defining and implementing the relevant policies at Community, national and regional levels. These measures which were needed for the mainstreaming policies were methodological, technical and financial support for projects designed to identify and promote good practices and the transfer of information and experience, observation and follow-up of the policies in question and the implementation of studies, swift dissemination of the results of initiatives.

As European Union assumes a more important role in the making of policies of integration in the area of human, it was considered that positive integration in the area of gender policies is meaningful one.<sup>14</sup> Nevertheless, in the field of legal justice properly the European Union didn't take significant steps. As the responsibility in the field of Justice and Home Affairs, the third pillar of EU, is still a Member States one, the EU lacks competences in the field. However, we have to notice that EU started to develop a human rights policy in the area of Justice and Home Affairs towards the cooperation mechanisms. Thus, in 1996, the Commission Communication (COM(96)567 final) proposed implementing a multidisciplinary and "cross-pillar" approach with a view to mobilize all Community instruments to fight trafficking in women.

In 1998, a follow-up Communication by the Commission to the Council and the European Parliament has been made. The objectives of the communication were the follows; ensure that fighting trafficking in women for sexual purposes remains one of the EU's priorities, encourage the Member States to comply with their legal obligations, reinforce European and international cooperation by involving governments and NGO-s of the source, transit and destination countries, promote the multidisciplinary approach (prevention, suppression and effective sentencing of traffickers, help for victims, address a clear message to the applicant countries about the need for cooperation in this area.

The call for a coherent and consistent policy in the field of human rights, across all the pillars derives also from the enlargement process. This was a clear development of human rights policies in the field of external relations in the relationship between European Union and the Central and Eastern Europe countries, candidates to accession. In view of its enlargement

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<sup>14</sup> P. Alston, J.H.H. Weiler, An "Even Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights", *Harvard Jean Monnet Working Papers*, 1/1997.

to East, the EU needs to reinforce its policies in the fields of women's rights related to legal justice.



**Violence Against Women in Sri Lanka:  
Are Recent Government Efforts Adequate?**

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Violence against women is a gender based crime which occurs in the public and the private sphere; within the family, in the workplace, in the community and in international and national conflict situations. It can manifest in various different forms such as sexual abuse, threats and physical intimidation and violence in the home and outside, sexual harassment at work, in educational and other institutions, forced prostitution and trafficking, torture, sexual slavery, rape and forced pregnancy in situations of unrest and armed conflict. It may also include gender based violence which is justified on the basis of tradition, culture or religion such as female genital mutilation, honour killings, sati and dowry related violence. Whatever form it takes it is inextricably linked to women's unequal and subordinate status in society. Since the early 1990's and particularly the Vienna conference on human rights violence against women has emerged as a critical area of concern for women all over the world which not only affects women's physical security and well being but their enjoyment of all other rights. Thus although CEDAW does not have a specific provision on VAW, general recommendation 19 adopted by the CEDAW committee in 1992 very clearly states that,

"Gender based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a bases of equality with men."

At the Vienna Conference the international community responded to the question of VAW by appointing a special rapporteur on violence against women and adopting a declaration which seeks to define what is violence against women and the obligations of state parties to prevent VAW. Violence against women was also one of the critical areas of concern recognized by the Beijing platform for action.

These international initiatives have provided strength and momentum to women's groups

and activists working at local level to address the violence against women in their own countries and communities and advocate for legal and other institutional reform to prevent and eliminate gender based violence. There has been much research at national level on the prevalence of gender based violence and the causes and consequences of such violence and how legal systems respond to the issue of violence against women and their shortcomings. However as pointed out by Radhika Coomaraswamy, the UN special rapporteur on violence against women, impunity enjoyed by perpetrators of violence against women continues to be one the main reason for the continuing phenomenon of VAW. Against this backdrop this paper will look at recent government efforts to address the issue of violence against women particularly rape and domestic violence, and continuing shortcomings in the law and in the criminal justice system.

### **Reforming the Penal Code**

In the run up to the 1994 Presidential and Parliamentary elections in Sri Lanka, several women's groups forwarded to all contesting political parties a policy paper setting down a number of critical areas of concern for women in Sri Lanka. The paper identified violence against women as a priority issue which, needed to be addressed by the state. Subsequently the government which came to power undertook to reform the 100 year old Penal Code with a view to strengthening the provisions dealing with violence against women. The amendments to the Penal Code which was passed by parliament in 1995 made significant changes to laws dealing with rape, sexual harassment, incest and domestic violence.

The amendment was a result of a consultative process that was initiated between the State and women's groups and the bill to amend the Penal Code was drafted in consultation with NGO's, Women's groups and the National Committee for Women. However, the two most progressive amendments with far reaching implications for women's security and bodily integrity did not find its way into the final amendment passed by Parliament, due to pressure particularly from the Christian and Muslim lobby within and outside Parliament. The original bill drafted in consultation with women's groups recognized marital rape as a crime punishable by law and also recognized the right of a woman to obtain an abortion in situations of rape, incest or foetal abnormality. In the final amendment the provision on

marital rape was watered down and limited to situations where husband and wife judicially separated and the provision on abortion was completely withdrawn. Abortion therefore remains legally possible in Sri Lanka only if the life of the mother is in danger, but over 300 illegal abortions take place daily with considerable risk to women's lives. While many government and opposition members recognized the need to change these laws, ultimately the powerful religious lobbies won the day in arguments that completely subordinated women's welfare and security in the interest of the 'family' and the institution of marriage. Nevertheless as already mentioned the 1995 amendments were an important milestone in terms of strengthening the laws dealing with VAW, although we have a long way to go.

## **Rape**

The law dealing with rape is contained in the Penal Code of Sri Lanka enacted in 1885. It was a colonial law which had not been amended (until 1995) and clearly archaic. The 1995 amendment sought to strengthen the rape law in a number of ways.

Firstly the 1995 amendment sought to broaden the definition of rape. It defines rape as follows: A man is said to commit rape who has sexual intercourse with a woman under the following circumstances:

- (a) without her consent even where such woman is his wife and she is judicially separated from the man;
- (b) with her consent when her consent has been obtained by the use of force, or threats or intimidation, or by putting her fear of death or of hurt, or while she is in unlawful detention;
- (c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person;
- (d) with her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believed herself to be lawfully married;
- (e) with or without her consent when she is under 16 years of age, unless the woman is his wife who over 12 years of age is not judicially separated from the man (SECTION

### **Evidence of physical resistance**

The explanation to the section goes on to state that evidence of physical injuries to the body is not essential to prove that sexual intercourse took place without consent. This was a welcome departure from the old law which required proof of resistance. Surveys done since then have shown that the change in the law has however had little positive effect because judges still insist on corroboration of an independent witness to support the victim's assertions that an act of rape occurred. Only a few cases have departed from this attitude. In the 1996 case of *PW Rajaratne v AG* (CA 23/01/1996) the court held that this cautionary rule might be ignored so long as the jury is satisfied with the veracity of the evidence. Commentators have however pointed out that this was a particularly horrific case of child rape in which the Court of Appeal had no option but to make an exception from this general rule (Shadow report 31)

Also in the case of *Kamal Addaraarachchi vs the Republic* (case no. 771096) it was held that passivity does not amount to consent. In this case defense counsel submitted that there had been tacit consent since the victim had not bitten or scratched or fought back against the accused and there was not evidence of resistance or violence. This submission was categorically rejected by the High Court which observed that;

To equate submission with consent to overlook the essential character of consent as a social act whereby one person confers on another person the right to do something.

Women may submit for many reasons inconsistent with consent ... Failure to recognize that passivity without more does not permit an inference of consent is reflected in certain common misconceptions and mistaken generalizations that bedeviled the law of rape.: cited Gomes and Gomes 66-67



## **Punishment and compensation**

The 1995 amendment enhanced the punishment for rape by providing for a minimum of 7 years and a maximum of 20 years of imprisonment. Under the old law there was no minimum punishment prescribed by the law and provision merely said that punishment may extended upto 20 years. Judges therefore used their own discretion in sentencing. Often a person found guilty of rape only got about two years in prison and even this was sometimes suspended. The impact of a suspended sentence is to set the man free subject to the qualification that the commission of another offence would put him in prison (Gomes & Gomes: 136)

The law also provides enhanced punishment for gang rape, custodial rape, rape of a minor, a pregnant woman and rape of physically or mentally disabled woman. For these offences there is mandatory minimum sentence of 10 years and maximum sentence of 20 years.

The law also now gives the court the power to grant compensation to rape victims. In the Kamal Addraarachchi case the court ordered Rd. 1 million as compensation. It is now in appeal.

## **Domestic violence**

There is no special law dealing with domestic violence in Sri Lanka. Normal penal provisions relating to bodily injury can however be used even in situations of domestic violence and the offenders can be charged under the provisions dealing with assault (sec 342) criminal force (341), simple hurt (sec 310 of the penal code) or grievous hurt (sec.311). The 1995 amendments to the penal code broadened the definition of grievous hurt by including injuries such as a cut or fracture of a bone, cartilage or tooth, dislocation or subluxation of bone, joint or tooth, etc.

The law however does not cover mental and psychological abuse. This is one of the reasons why women's rights activists are now discussing the need for separate domestic violence legislation.

## **The Criminal Justice system**

When a woman has been raped or abused or battered the police complaint is the first step in accessing the formal judicial system. In Sri Lanka sustained campaigning by women's groups resulted in the establishment of 'Women's and Children's desk in police stations to hear all complains of violence against women and children.

### **Women and Children's Desks**

Acknowledging that insensitivity of police officers to the problems faced by women was a major issue that had to deal with, a special unit was established in 1993 in Police Headquarters in Colombo to be dealt with cases of violence against women and children. Subsequently, Women's and Children's Desk were set up 33 police stations throughout the country. The desks were mandated to monitor and give priority consideration to these issues by entertaining and investigating complaints and taking cases to court. A 24 hour hot line was to be maintained to facilitate complaints and immediate action (CENWOR:2).

The functioning of the desks has however been critiqued by lawyers/activists dealing with issues of gender based violence as they are understaffed and are manned by women who are inadequately trained to deal with complaints of domestic violence and/or rape.

Once the Police hear the complaint they are under a duty to record it investigate it and bring it before the courts.

In relation to domestic violence both the police and the judiciary have shown a reluctance to perceive spousal abuse as a criminal issue except in situations of murder or serious life threatening injury. Most women who are victims of domestic violence do not have the awareness or opportunity to seek the criminal remedy that is available. Even when women are aware they may not be inclined to pursue prosecution. Therefore unless the police takes an active interest in bringing charges against a husband on a complaint made to the police by the wife, women themselves are not interested in prosecution.

Where the woman comes from an urban middle class background is educated or financially dependent she would rather get a divorce and put the whole matter behind her. In case of rural women divorce is most often not an option, because of the stigma attached to divorce. In such a situation a de facto separation is a possibility with a restraining order against the husband. Again it is unlikely that she will pursue prosecution. There are a number of reasons for this reluctance.

- Whatever harm or injury that has been inflicted on her he is still her husband and the father of her children
- If she no income of her own and he is the sole breadwinner, she will have no financial support for herself and her children if he is put in jail
- If the husband is extremely violent she may be afraid that pursuing the criminal remedy will put her in more danger.
- The shame involved in going through such a process
- High expenses involved in legal action

In 1997 alone the Women and Children's Desks in Sri Lanka recorded 45, 127 complaints of what the police categorize as "family disputes" – an euphemism they use for complaints of domestic violence. Of these complaints 34, 674 were 'settled' by the police. Another 2487 were referred to Mediation Boards. Only 1131 cases were taken to court. (Women and Children's Desk, Police Headquarters, Colombo.)

Even in the case of rape, the shame involved in admitting to such a violation inhibits women from making a complaint. As a recent report points even if ultimately victims gain access to the court room they often have to face hostile questions by defense lawyers and in many cases unsympathetic judges. It is the woman who is put on the dock having to defend her decision to not be a silent victim.

### **Delays in the procedure**

Litigation in the courts of Sri Lanka takes an inordinate amount of time. In the case of rape once a complaint is made the criminal procedure in Sri Lanka proceeds on the basis of a non

summary inquiry before the magistrate court to determine whether there is a prima facie case against the accused and whether the accused should be committed to stand trial in the High Court. The Magistrate can discharge the accused if he considers that the evidence is insufficient to put accused on trial. This initial non-summary inquiry itself can take long time – upto one year or more in the case of rape. If on the basis of evidence placed before the magistrate the accused is committed to trial, the trial case will take several more years.

In this process the woman is victimized not once but several times. Traumatized not once but several times. A recent report on violence against women sometimes there is no Blood: Domestic Violence and rape in Rural Sri Lanka by Ameena Hussein, ICES, 2000 cites newspaper reports of two trials for rape which had taken 12 years and eight years respectively. Recently there has been an attempt to circumvent law delays in some highly publicized rape cases, such as Krishanti Kumaraswamy case and the Rita John case by appointing trials at bar to expedite the process (Hussein: 17), but these cases remain exceptions to the rule.

## **Conclusion**

In the sphere of violence against women law reform can only be one step. Changing the law is often insufficient to challenge traditional definitions of rape or many assumptions about women's sexuality or the socio-economic factors that keep women in violent relationships.

## **Prevention of Violence Against Women in the Context of Constitution and Criminal Justice System in Thailand**

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### **Introduction**

The present Thai constitution has set forth basic rights and liberties for the people. The expansion of rights consequently has enhanced women's rights and protection. With respect to fundamental rights, the constitution extends innovation on rights and entitlements. New legal institutions have been established to safeguard the right and liberty of the people. These provisions, among others, are expressly provided for as follows.

- The human dignity, right and liberty of the people shall be protected.
- The Thai people, irrespective of their origins, sexes or religions, shall enjoy equal protection under the constitution.

The articles are refined, from the forerunner constitutions, in concert with the spirit of the Universal Declaration of Human Rights. In the context of equality before the law, article 30 provides, "all persons are equal before the law; men and women shall enjoy equal rights." This simply means that discrimination is prohibited on the grounds of difference in origin, race, language, sex and so on, (a draft discrimination bill is already prepared to submit in the next National Assembly session). The equality of both sexes has been tested in the interpretation of the Civil and Commercial Code in Family Law, especially on the provisions of marriage and divorce pertaining details in subordinate laws and the regulation given on the registered status of women. The equal rights provision, I believe, shall be further challenged by advocates of women's rights to change certain provisions in the family law and legislation respecting the right of married women. However, a bill submitted in the House of Representatives in early 2000 in order to reform the act concerning person's name

and family name to exert a married woman's right to choose either husband's family name, or retain maiden name of her choice was defeated. In practice, a number of Thai married women insert her maiden last name as middle name.

Other significant provisions in the administration of criminal law, among others, are as follows.

- 1 A person shall enjoy the right and liberty in his or her life and person. A torture, brutal act, or punishment by a cruel or inhumane means shall not be permitted; provided, however, that the death penalty as provided by law shall not be deemed a cruel or inhumane punishment.
- 2 No person shall be inflicted with a criminal punishment unless he or she has committed an act, which the law in force at the time of commission provides to be an offence and imposes a punishment therefor, and the punishment to be inflicted on such person shall not be heavier than that provided by the law in force at the time of commission of the offence.
- 3 The suspect or the accused in a criminal case shall be presumed innocent. Unless convicted under the final judgment, the person shall not be treated as a convict.

The criminal justice system and law reforms are imperative under the new constitution.

In Thailand, advocates for social, economic and political reforms have played vital role in law and social change. Constitution and criminal justice reformed would be impossible without preceding stages of social and economic developments, and in fact, the economic crisis in 1997 has accelerated the reform. The constitution, as an instrument, that has set a stage for political change had enormous impact in Thailand, (see Vago, *Law and Society*, 1994:223-51).

The belief system based on the new popular constitution to humanize the criminal justice system that has envisaged by academic community, progressive practitioners, non-governmental organizations, the press, interest groups and members of the National Assembly, (the House of Representatives and the Senate) shall prevail. Recently, they have influenced the government and lawmakers to embark on a positive change in several areas,

notably freedom of information, election law reform and a stronger National Counter Corruption Commission. Nevertheless, public opinion, stages of social and economic development were full-fledged for change. Public participation in crime prevention, rights of the accused, victim and the victim-witness assistant programs are underlying issues of the constitution.

In addition, other political institutions were set up to check and balance the executive branch from undue exercise the powers of state official in order to protect the right of the people. These important independent institutions are as follows.

- 1 **Ombudsmen.** The duty of the ombudsmen is to inquire into a complaint made by the people concerning a state official's failure to perform his statutory duty or refrain from such duty. The ombudsmen shall submit a report on their findings to the National Assembly for deliberation. As a constitutional institution, the ombudsmen may submit a complaint on the question of constitutionality of law to be heard in the constitution court.
- 2 **National Human Rights Commission.** The commission has duty to investigate and prepare a report on the act that violates human rights, and makes a recommendation to the National Assembly and the cabinet regarding promotion and protection of human rights. The underlying problems of human rights violation shall focus on the legal framework; public policy, social and cultural context, including international covenants acceded by the Thai Government, with consideration to the interest of the country.
- 3 **National Counter Corruption Commission.** The commission is entrusted with the power of investigation and inquiry into corruption, abuse of power, malfeasance and unusual acquired wealth of state officials. The requirement is aimed for high ranking government officials in the Civil Service, Judiciary, Prosecution Service, Independent Institutions under the constitution, the Armed Forces and the National Police Agency, etc, and Prime Minister, Minister, members of the House of Representatives, Senators, political officials, local government officials and members of local assembly as provided by the organic law.
- 4 **The Constitution Court.** The court was established as a special constitutional body to examine and deliberate the constitutionality of laws, or a draft bill submitted in the National Assembly. The court has functions to promote and safeguard fundamental rights and liberties of the people.

This paper will explore status of women, issues, strategies and measures on the elimination of violence against women in crime prevention and criminal justice in the context of Thai legal and social settings.

### **International Action against Trafficking in Women and Children**

The first UN Treaty is Convention on the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others adopted in 1949, (the Trafficking Convention). The member nations agreed to prevention and punishment the traffickers and illegal brothel-owners or their accomplices, including protection and safely repatriation of trafficking victims.

The second UN Convention on the Elimination of All Forms of Discrimination Against Women adopted in 1979 has reinforced international cooperation and effort to combat violence against women and violation of human rights.

Under the United Nations System, International Labor Organization, (ILO); UN Children Fund, (UNICEF); UN Development Fund for Women, (UNIFEM); and World Health Organization, (WHO) have concurrently worked and implemented programmes against sexual exploitation, trafficking and prostitution worldwide.

Thailand has acceded to the Convention on the Elimination of All Discrimination Against Women (CEDAW), with seven reservations, in 1985. All reservations, except, article 16 in respect of equality in the family law on family relations, marriage and divorce; article 29 in respect of dispute settlement by the International Court of Justice. There have been negative views of feminist advocates who saw the development of women's rights otherwise. I quoted, "to the author, Thailand has not only been unable to amend discriminatory legal provisions and remove the reservation to article 16 dealing with (a), (b), (c), (d) and (g), but also the rest of article (c), (f), and (h), or all sub- articles thereof," (Somsawasdi, 1979).

Recently, the Government of Thailand with cooperation of International organizations has embarked on concurrent efforts to deal with the problem of trafficking in women and



children. These concerted law enforcement efforts were mobilized by the initiative of the Office of the Prime Minister to tackle the serious and inhumane trade on persons. \*

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**\*The Sub-Committee Instituting for Elimination of the Trafficking in Women and Children, Office of National Commission on Women Affairs, Office of the Prime Minister, National Police Agency, Public Welfare Department, Ministry of Labor and Social Welfare, the Alien Children Coordination Commission, and Network on Prevention and Elimination of Trafficking in Women and Children; other state agencies participating are the Ministry of Education, Ministry of Interior Ministry of Foreign Affairs, Office of Attorney General; 68 Non-Governmental Organizations throughout the country, and International Organizations, namely IOM, UNICEF, ILO, IPEC and ECPAT.**

The memorandum of agreement between state agencies, non-governmental organizations and International organizations to combat trafficking in women and children has become effective since 1999, (The Memorandum Agreement on the Guideline between Agencies relating to the operation in the case of trafficking in Women and Children, 1999).

The rationale of the memorandum was derived from international and national cooperation as consequences of the gravity of human rights violation. Thailand has encountered with transnational organized crimes that used the Kingdom as operation based in the trafficking of human beings with widespread activities and huge financial gains throughout the region. Hence, Thailand faced with three dilemmas as importing, exporting and transitional state for trafficking in persons within and without the region. The first national meeting of state agencies, non-governments and international organizations has deliberated legal and social measures.

A number of laws and legislation involving the prevention and suppression of trafficking in women and children to work with are:

- The Criminal Code;
- Prevention and Suppression of Trafficking in Women and Children Act, 1997;
- Prevention and Suppression of Prostitution Act, 1996;

- Immigration Act, 1979; and
- Other related legislation's.

Under the trafficking act, the victims of trafficking in persons are defined as women and children who are procured, bought, sold, distributed, taken in or out, received, detained or confined, concealed by a person, group of person or organization. The law includes commission of deceit, threat, employing violence means, unjust influence or any coercion within or without the Kingdom for consent, to do anything, or submission to anything unlawfully, for example, commercialized prostitution, psychological coercion, labor slavery, being a beggar or to do other immoral act.

In case of an offence committed against a person under eighteen years of age, with or without his/her consent, knowledge of the said offence, it shall be deemed the person is victim of trafficking. The nature of trafficking in women and children is so complicated that the Thai authorities have classified victims in four groups as follows:

- 1 Thai women and children's victims;
- 2 Illegal alien women and children's victims;
- 3 Legal alien women and children's victims;
- 4 The women and children's victims living in the country, but not Thai national.

In general, the victims of trafficking will be first rescued and saved, including given services and assistance accordingly. The inquiry police officer in collaboration with the public prosecutor and social worker shall be jointly and separately undertaken to resolve the case and referral as well as providing welfare services as the case may be.

## **Sex Offenses**

The scope of offenses relating to sexuality in criminal law encompasses forcible rape, statutory rape, seduction, indecent exposure, child molesting, sexual assault, voyeurism, (Criminal Code, Offenses Relating to Sexuality). A number of sexual conducts, such as bigamy, adultery, sodomy; lewdness and fornication are not offenses under the Thai

Criminal law. Other legislation is pornography, obscenity prostitution, trafficking in women and children.

The criminal provisions on sex offenses are summarized in the followings:

**Forcible Rape.** To commit sexual intercourse with a women, who is not wife, against her will, by threatening by any means whatever, by doing any act of violence, by taking advantage of the women being in the condition of inability to resist, or by causing the women to mistake him for other persons shall be punished with imprisonment of four to twenty years and fine of eight thousand to forty Baht, or both.

To have sexual intercourse with a girl not yet over fifteen years of age and not being his own wife with or without girl's consent, the penalty is severer.

**Indecent Act.** To commit an indecent act on a person over fifteen years of age by threatening by any means whatever, by doing any act of violence, by taking advantage of the women being in the condition of inability to resist, or by causing the women to mistake him for other persons shall be punished with imprisonment not exceeding ten years or fine not exceeding twenty thousand Baht, or both.

If committing an indecent act on a child not yet over fifteen years with or without the child consent the punishment is severer.

**Procurement.** To gratify the sexual desire of another person (1) procures, seduces or takes away for indecent act the man or woman not yet over eighteen years of age with his or her consent whether the various acts constituting the offence are committed in different countries or not, shall be punished with imprisonment of three to fifteen years and fine of six thousand to thirty thousand Baht; (2) procures, seduces or takes away for indecent act the man or women by using deceitful means, threat, employing violence, unjust influence or coercion by other means, whether the various acts constituting the offence are committed in different countries or not, shall be punished with imprisonment of five to twenty years and fine of ten thousand to forty thousand Baht.

If the offense commits to the child under fifteen years of age, the punishment is severer

**Subsist on the Earning of the Prostitute.** A man being sixteen years of age, subsists on the earning of a prostitute, even if in part of her income, is an offence.

**Trade or by Trade of Pornography in Public.** For public distribution, or exhibition trade or by trade, anyone makes, produces, brings or causes to be brought into the Kingdom, sends or causes to be sent out of the Kingdom, takes away or causes to be taken away, or circulates by any means whatever, any document, drawing, print, painting, printed matter, picture, poster, symbol, photograph, cinematography, film, noise, tape, picture tape or any other thing which is obscene.

Rape is considered a serious offense and the sanction to the offender is severe. However, prostitution is prevalent and more visible in various forms. The prostitution is illegal under the revised Prevention and Suppression of Prostitution Act of 1996, a person who communicates, invites, introduces, follows or pursues another person on the street or public places or committing the act in any place for the purpose of commercialized prostitution in flagrant and shameful manner, or causing public nuisance. This provision is relegated to petty offense punishable by fine of not exceeding thousand Baht, (Prostitution Act, 1996). However, procurement and seduction of a person, or under legal age are the offenses severely punished.

### **Criminal Law Amendment**

The National Commission on Women Affairs and other women's rights advocates made a proposal to revise a number of criminal provisions, especially in sexual offenses. A forcible rape commits against wife; under certain conditions shall become an offense. The Criminal Law Commission has adopted the proposal in conformity with the context of the code, principle and scope of criminal sanction.

A draft of the section on marital rape provides. "If the commission of an offense, in the first paragraph of Section 276, is committed to a woman who is his wife and committing at the

time, he has seriously infected disease to endanger the other, or committing at the time, there is voluntary separation by both parties for irreconcilability, or there is a court order separation, shall be punished with imprisonment of three to fifteen years and fine of six thousand to three hundred thousand Baht.

The cabinet has adopted the new criminal law amendments and will submit to the National Assembly for deliberation.

## **Prostitution**

Commercialized prostitution has given notorious reputation to Bangkok and other big cities. Prostitution has multitudinous problems concerning human rights, women's dignity, public health, law, social and economic dimensions. Most studies and researches in Thailand as elsewhere have attributed prostitution to economic, social and cultural causation. Multiple factors approach are widely explicable to the problems, that focus on the role of women, education, discrimination and so on toward the women. The prevention and rehabilitation of prostitution's seem to be an alternative to sanction and punishment. Social welfare intervention is emphasized in women's protection and occupational development that target on individual prostitute, as victim or offender. The measures provide by the Prostitution law section four deal primarily with education, rehabilitation, medical care, training, occupational development and enhancing quality of life. This social casework approach is undertaken by welfare institution as a social service for client. There are two kinds of welfare approaches for prostitute's behavior modification, under eighteen years of age and eighteen years or over. A prostitute, male or female who enters the criminal justice system and the case is settled with or without punishment shall be sent to Welfare Service Institution, if in Bangkok by the instruction of the Director-General of Department of Public Welfare, or governor of a province who has territorial jurisdiction over the case. On the other hand, the protection and occupational development concentrate mainly on the prostitute under 18 years of age. The person under the age is compulsory committed to the institution. Meanwhile the prostitute whose age is eighteen years or over shall be committed to the institution on a voluntary basis. Interestingly enough, no prostitute is willing to receive the services, (Kosirin On the Protection and Occupational Development Facility, 1999).

Recently, a number of clients in the institution have significantly decreased due to the de-penalized prostitution policy, and under-enforcement of the law and non-compulsory commitment. Another perplexing question for welfare workers concerning prostitution is that child prostitutes are actually declining or the relaxing laws enforcement. In the past few years, there have been heatedly debates the validity and reliability on the figure of prostitutes and child prostitutes based on many surveys. Statistics that compiled by NGO's, academic researchers and reports of government agencies widely differed ranging from 75,183.00 reported by Communicable Disease Control agency, Ministry of Public Health to 2,820,000.00 collected and revealed by the Children Foundation. In between, there were the figures given by the National Police Agency at around 500,000.00 and a researcher of the Thai Red Cross estimated at 150,000.000 to 200,000.00. However, recent reviews and verification by reliable sources, such as population growth, census and population in each age group concluded that in 1992 the figure was feasible between 75,000.00 to 150,000.000 and the child prostitutes comprised 19.8 percent of the total, (Chokewivat, Siam Rath August 26, 1993).

**Table 1: Selected Crimes known to the police throughout the Country in 1995-1997(January-December)**

Crime	1995		1996		1997	
	Known	Arrest	Known	Arrest	Known	Arrest
Rape	3,756	2,649	3,569	2,566	3,756	2,565
Rape-Murder	19	14	21	17	15	10
Drugs	149,452	156,906	168,641	178,994	175,978	188,866
Prostitution	7,833	8,375	5,784	6,085	4,853	4,961
Pornography	795	816	1,506	1,516	1,083	1,102

Sources: Annual Reports, The National Police Agency 1995-1997. Note: Cases known to the police and number of persons arrested.

The police statistics on crimes against sex had usually low or under report. A number of offenses, including rape may settle with consent by the parties, if not committed to a person under the age that specified by law.

### **Public Opinion on the Image of Thai Criminal Justice System**

The most recent surveys conducted between September 1- October 5, 2000 in 16 provinces throughout the country questioning on the people's trust, want, expectation and satisfaction of the performance of state official in the criminal justice agencies. The researcher employed stratified cluster sampling to select respondents in geographical areas and a probability proportionate to size sampling of the population in the regions. The sampling size was 1,455 and the data were collected by questionnaires and interviewing. The margin of error was at +/- 4.0 percent with the level of reliability at 95 percent. The respondents were drawn from dwellers inside and outside cities; 51 percent male, 48.1 female and the samples had different age groups and levels of education. The respondent who had experienced with or got in touch with the criminal justice system were strikingly not satisfied with the performance of the police at 72.5%, satisfied with 22.7% and no opinion 4.8%. The justification for disapproval is drawn in order from many factors, corruption, abuse of power, injustice, delay, inefficiency and incapable of keeping law and order and inclining to use force. Other agencies, the court, public prosecution, probation services, except correction received satisfactory rating, but all were below 50 percentage point. The highest mark was the court at 44.4%. This survey has reflected two significant points. First, the people have paid more attention to and participated with the criminal justice system, in the performance of state officials, whether positively or negatively more than before. Second, criminal justice system has not provided satisfactory services to its clients as usually criticized by the mass media, (ABAC-KSC Internet Poll, October 2000).

### **International Perspectives on Rights of Offenders and Victims**

The offenders' rights are protected by constitution, the criminal law and criminal procedure.

The criminal justice system in most countries, including Thailand provide the following rights, among others, to offenders:

- 1 The right not to be subject to arbitrary arrest, detention, search and seizure;
- 2 The right to counsel;
- 3 The presumption of innocence;
- 4 The standard of proof (proven beyond reasonable doubt);
- 5 The right to public trial by an independent court and impartial judge;
- 6 The right to verify the prosecution evidence, (to present and cross examination of witness);
- 7 The right to submit and call evidence;
- 8 The right to appeal.

In contrary, advocates for victims' rights claimed that the victims are not allowed to participate in the criminal justice process. Moreover, the victims' rights are not protected by the constitution. In 1985, the United Nations General Assembly has adopted Basic Principles of Justice for Victims of Crime and Abuse of Power. The basic principles of victims' rights are as follows:

- 1 The right to be treated with respect and recognition;
- 2 The right to be referred to adequate support services;
- 3 The right to receive information about the progress of the case;
- 4 The right to be present and give his input to the decision making;
- 5 The right to counsel;
- 6 The right to protection of physical safety and privacy;
- 7 The right of compensation from both the offender and the state.

In Thailand, the offenders enjoy fully fundamental rights under the new constitution and other rights provide in the administration of criminal justice. On the other hand, rights of the victim and witness in criminal case are given in three articles.

- The witness has the right to protection, proper treatment and necessary and appropriate remuneration from the state, as provided by law.



- The victim has the right to protection, proper treatment and necessary and appropriate remuneration, as provided by law.

The victim who suffers an injury to life, body or mind because of the crime committed by other person without participating in such crime. He or his heir has the right to receive assistance from the state under the condition and in the manner provided by law.

- A person who has become an accused in a criminal case and has been detained during the trial shall, if it appears from the final judgment in that case that the accused did not commit the offence, or the act of the accused does not constitute an offence, be entitled to appropriate compensation, expenses, including the recovery of any right lost, because of that incident, upon the conditions and in the manner provided by law.

The major victim and witness assistant programs have usually provided in three categories.

- 1 Provide services to victim and witness who need aid or crisis counsels, medical care, therapy and legal assistance. The programs may refer client to other agency, such as welfare and rehabilitation center.
- 2 Assist the victim and witness in the cause of criminal proceedings in order to save time and cost of client, such as accompanying the victim and witness to appear in the court.
- 3 Protect the victim and witness from intimidation and encourage them to report the crime and testify in the court. The victim and witness who are reluctant and unwilling to appear in court become widespread problems for the police and public prosecutor to carry out their works.

Currently, certain programs have partially implemented by state agency and services provided by non-governmental organizations. In 1998, the government has proposed the first state sponsored victim compensation and witness protection legislation. However, the drafted law has limited scope of coverage to only some violent crime against life and body and the compensation pay scale had similar schedule on damage and loss provided by insurance policy, or offense-based reparation.

## **Special Provisions in the Revised Criminal Procedure Dealing with Persons under Eighteen Years of Age**

One of the directive principles of state fundamental policy provides, "the state shall protect and develop children, youth, promote equality between women and men, and create, reinforce and develop family integrity and the strength of communities.

In addition, a provision applicable to the National Assembly provides; "in scrutinizing a bill on the substance of which decides by the President of the House of Representatives concerned with children, women the elderly, the disable or handicapped, if the House does not consider it by its full committee; the House shall appoint an ad hoc committee consisting of representatives, from private organizations relating to respective types of persons, of not less than one-third of the total members of the committee.

A recent development of criminal justice system in protecting persons under 18 years of age-male and female- below eighteen years old has been implemented in conformity with the constitution and UN Convention on the Rights of the Child. The persons in the age group are given extraordinary protection in the investigation and trial phases:

- 1 A multidisciplinary team approach consists of inquiry police officer; public prosecutor, psychologist or social worker shall participate in handling the case.
- 2 An interagency approach consists of coordination and cooperation shall gather evidence, interviewing, rendering welfare service and assistance.

The significant amendments of several provisions of the criminal procedural law on investigation, prosecution and trial are applicable to both young offenders and victims, as provided throughout the criminal justice process. Investigation and trial in case of the juvenile are required:

- 1 The criminal justice process commences with investigation; pre-trial hearing and trial shall consist of psychologist or social worker, as provided by law on the specified qualification of such persons;

- 2 In an offense punishable of over three years, or less than three years and the victim or witness is a child under eighteen requests, or in case of child assaulted, the interrogation of the victim or witness shall be conducted in appropriate place for the child. The psychologist, or social worker, or the person requests by the victim shall be required to attend the inquiry. Documents drawn up by the inquiry official shall comprise, in addition to notes of the proceeding, by picture and voice recordings (usually video camera) that may transmit continually as evidence in the trial proceedings;
- 3 The police officer is required to provide suitable protection facility for the child victim or witness to identify the offender, and the public prosecutor, psychologist or social worker together with the person requests by the victim/witness attending;
- 4 In case the alleged offender is under eighteen years old on the criminal charged date, the inquiry police officer is required to give advice whether the accused has an attorney, if not the state shall provide for him/her;
- 5 In taking evidence of the witness, under eighteen years in the trial court, the judge in his/her discretion shall (a) interview the witness himself on the issues of law and of fact in the testimony, or communicate through psychologist or social worker; or (b) allow the parties to question, examine, cross-examine, or re-examine through the psychologist or social worker.

The practice has become effective in August 2000 all over the country.

### **Women in Criminal Justice System**

The criminal justice system treats or does not treat all people equally. A recent survey conducted by a newspaper in Bangkok showed that a number of respondents did not trust the police on the fairness in handling complaints to investigation and decision to file charge against the offender. The issue has not been race or gender socio-economic status of the offender and the victim. This mistrust is also derived from law enforcement practice corruption and abuse of power. Does gender matter that the offender is male or female?

Criminologist and member of criminal justice system are interested in particular characteristics of the offenders and victims. How gender does matter that the offender is

male or female. \* The reason to study the characteristics of both groups is practical and idealistic findings. The concept of justice is partly fairness, equality and impartiality. Therefore, the criminal justice will not treat people differently based on sex and other differences. In this concept, the United States has enacted the act provided that all persons shall have the right to be free from crimes of violence motivated by gender. However, prejudice, greed, lust or passion against particular type of person drives some crimes. An available statistics revealed that in general, women commit fewer crimes than men do and women are victims of certain crimes. Regarding the victim of domestic violence, the husband is usually a culprit. If the husband beats his wife out of anger or dispute in the family and she intentionally stabs him dead in self-defense.

The case may happen in any society or anywhere. In a case of the wife who suffered from battered women's syndrome (BWS), a psychological state a person descends into following a lengthy period of battering, she shot and killed her husband while he was sleeping, (cited from Gains, Kaune and Miller, Criminal Justice, 2000: 638). May the wife raise question of self-defense or necessity and the defense is justified in any country.

\*This year the Mass Transit Authority of Bangkok initiated a bus service for women, known as lady bus, in Bangkok, as an experiment to protect harassment, indecent advance and improper sexual conduct against women in the public bus. The public bus and train are usually overcrowded on rush hours.

In the latter case, an act of the wife was justifiable homicide in the criminal law and BWS has raised as a defense. Such a crime has appeared in the Thai court of justice and a defense lawyer has successfully defended the offending/victimized wife for mitigating or extenuating circumstances at the time of grave or unjust maltreatment for less punishment or leniency. This example is not to implicate that a wife shall use violence lawfully in retaliation against her immoral husband. In light of domestic violence, the court has considered the fact and circumstances, involving marital relationship as well as state of mind and elements of an offense.

### **Criminal Justice and the Victim of Crime**

The criminal justice system as a whole is blamed for neglecting the victim, or the victim has

insignificant role in the justice process. In Thailand, the victim is entitled to institute a prosecution of offender by his own means without assistance, or approval of the state. However, a small numbers of victim seek their own justice in the court. Most find their avenues in the formal criminal justice system by lodging their complaints with the police. They subsequently act as witnesses or assistants of the authority in the judicial discharge of the cases.

The Thai legal system has adopted the civil law tradition of Western Europe and influenced by the English law and legal education. In fact, the Thai social setting has rooted in agriculture and agrarian way of life since the past centuries. Social and economic developments, especially urbanization, migration and industrialization have transformed the society into modernization. However, a number of development plans have succeeded in industrialization and urbanization and, in contrary, the rural developments were left further behind.

In agrarian society, the people are interdependent and depending on relatives, kinship and neighborhood. Buddhism has played significant role in the living, belief, custom and social values. The ruler in the old days adopted a paternalistic approach to govern at all levels, village, community, district, province and the central government. The rulers, especially in the province have paid more attention to collective well being and feeling of the people as well as peacekeeping in the community. In the old days, the victim usually lodged his/her complaint to the ruler, or may institute his/her own criminal prosecution.

Currently, this legacy is adopted in a dual criminal prosecution under the Criminal Procedure Code, section 28. The public prosecutor, with exception in certain offenses, and the victim (injured person) are entitled to institute criminal charge. (The continental European as well as English laws have influences in the Thai criminal procedural law.) In addition, the public prosecutor and the victim may mutually be involved and cooperated in the prosecution of the offender as joint partners. An alternative to criminal prosecution may resolve in the formal and informal justice process.

## **Criminal Mediation and Settlement under the Criminal Procedural Law**

A number of criminal law offenses, usually lesser, non-aggravating, or compoundable offenses, the victim and offender are entitled to settle their own disputes, or resolving by negotiation and mediation. The practices may conduct under the supervision and conciliation process by the inquiry police officer or judicial authorities in any stages of criminal justice. The victim and offender usually negotiate for settlement of their conflicts under the supervision of facilitators or legal officers together with restitution payable to the victim. Community-based mediation for dispute settlement has implemented since the local administration act of 1914 came into force. Currently, the law entrusted the power and authority to village-based mediation committee to settle disputes all civil and certain criminal offenses within the village by means of conciliation and mediation program. The practice has widely expanded nationwide as alternatives to seek justice in the law court.

Informal justice or the new concept of restorative justice should expand and incorporate into, or put into practice concurrently in the criminal justice system. The restorative justice in modern paradigm is relative recent approach to solving crime and punishment. The restorative model however is different from the justice or just deserts models. The original of restorative model developed on restitution and community service sentence in the 1970's. The philosophical underlying of restorative program is restoration and reparation for the victim.

Restorative justice, as defined by Tony Marshall, is a process whereby all the parties with a stake in a particular offense come together to resolve it collectively, and consider on how to deal with the aftermath of the offense and its implications for the future. In summary, five essential principles of restorative justices are formulated as follows, (cited from Van Ness, 2000:3).

- 1 To give full participation and consensus between the parties.
- 2 To try settling differences and heal the broken ties and relations.
- 3 To find full responsibility and direct accountability.
- 4 To reunite the divided and broken social order in the community.
- 5 To strengthen the solidarity in community to prevent additional harms.

In conclusion of the formulation, the UN draft elements of a declaration of basic principles on the use of restorative programmes in criminal matters defines restorative process as any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. The examples of restorative justice include mediation, conferencing and sentencing circles.

The basic principles provide that restorative justice programmes are encouraged at all stages of criminal justice process. All process should be voluntary and the parties themselves shall reach for the agreement with reasonable and proportionate obligation. While the restorative process that safeguarding the right of parties engage in the case, the agreement reached or outcome is recognized and binding the parties similar to judicial discharge. However, failure to the restorative justice process and mediation shall refer back to the formal criminal justice system.

The values and assumption of restorative justice are emphasized on the victim needs, involvement, right and role in the restorative process. The emergence of victim rights movement has derived from the reaction to law and unrecognized status of victim in the criminal justice system. Restorative justice has come of age and been effective in solving violence against women that need public participation as well as the parties.

## **Victimization**

In fact, crime statistics also revealed that a number of women have fallen prey to violent crime and would be a victim of other crimes. Is Thailand needed violence against women act as in the United States? Some crimes commit against women, or sexual orientation is questionable and judged by many feminists as contrary to equal protection under the law.

Victimology, as a discipline, has developed and the progress was considerably accomplished in the past decades. Fattah, a well-known victimologist, has tried to integrate models for plausible explanations of the variation of victimization risks, including victimized areas or groups. He has chosen relevant factors and classified into ten possible

classification or groups, (Fattah, Victimology, Past, Present and Future, Criminologie, 2000: vol. 33, no 1). In his last, but not least group, structural/cultural proneness explained a positive correlation between powerlessness, deprivation and frequency of women criminal victimization. In addition, cultural stigmatization and marginalization put these people at risks and potential victimization. These people are children, women, elderly, the poor and handicap. For women's crime victims, these are sex offenses, domestic violence, and prostitution, trafficking in women and children and sexual harassment.

Victim services programs that provide special assistance to this group are for example victims of rape, women and children victims of assault, domestic violence. Rape crisis center and shelters for battered women are currently operating in many places. There are two of the most needed services, if any, in any country. An information and moral support are important to help crime victims to survive the traumatization and reintegration into society.

### **Social Welfare Intervention**

The Department of Public Welfare has entrusted with significant role in providing services and protection to the weak and the poor, or appropriate fund into non-governmental organizations in order to carry out its mission in the protection of vulnerable groups, such as children, women, elderly, handicapped and so on. The DPW has been instrumental in implementing policy, measures and programs for the people in need of assistance concurrently with other government and criminal justice agencies in the field of children and women.

There were 51 state welfare institutions in the country out of 284 dealing with the protection of women and children. Of these 17 were facilities dealt with reception, protection and center for women, (Statistics on social and public welfare, 1999). However, in 1999 there were 2867 non-governmental organizations registered with DPW in the country. Eighty - three organizations have activities on women's development and welfare. Only fourteen received partial funding for their activities at 4,380,000 Baht or fifteen percent of their total budget. They actually provided services to 25,400 clients. In 1999, the government funding



to non-governmental welfare organizations had appropriated at 39,060,000 Baht, about a million US\$), or averaging 9.45 percent of all these organization expenditures at 413,290,000 Baht. The shortage of government funding in human resources development for non-government organizations has turned independent NGO's and advocates of women's rights to seek funding elsewhere and abroad. Most of them have organized and legally registered as foundations with specific objects and mission. They are, among others, as follows.

- 1 The Council of Social Welfare (CWS) has established in 1960's as a private organization under the auspices of DPW. The CSW has provided welfare services and acting as coordinator of other non-governmental welfare agencies. A service program for crime victim is part of the work undertaken in the division of welfare for family and children. The activities are concentrated on assistance, protection and prevention young women from coercion and seduction into prostitution and commercialized sex.
- 2 The public interest foundations that are undertaken explicit mission has played important role in advocating children and women's rights, including alleviation and elimination of violence against children and women. These are, among others, Children Foundation, Children Right's Protection Foundation, Women Foundation and Woman Lawyers' Association of Thailand.
- 3 Rape Crisis Center has established in October 1982 under the auspices of the People and Community Development Association. The center has the main objective in helping the victim of rape. The program has initiated by a feminist movement that coincided with the increasing recognition of the role of women in society and advocates of women's right in the 1980's.

It is worth mentioning that foreign technical cooperation in the development of women that channeled through Department of Technical and Economic Cooperation (DETEC) were granted at 70,000,000 Baht each year, (DETEC report, 1993). The aggregation number of assistance for women was 1.36 percent of total assistance in monetary value. However, during the period assistance for women 's development in terms of monetary had not changed whereby the total assistance was decreasing. The projects on women 's development have concentrated on the development of women 's potentialities and quality of life. The report noted that there were a few projects in law, mass media and research.

Most projects were small size activities, which provided short terms services in alleviating women in difficulties. They had not caused substantial sustainable development because certain root causes of women 's problems were not solved. Finally, under the aforementioned shortcomings and realization of multidimensional women 's resolution, the government has adopted a national long-term development plan for women of 1992-2011. The development is divided into seven master plans: (1) development on potentialities and quality of life; (2) promotion of legal equality and protection of safety and welfare for women; (3) women 's participation in society; (4) improvement and eradication of women's problems (sex business); (5) Improvement on functional development for women; (6) campaign and dissemination of women 's information; (7) research and data based resource on women. This long-term plan in concert with the National Declaration on women adopted by the National Assembly on Women Development in the Year of Thai Women of 1992 had significant impact. They have proclaimed direction in women 's development and obligation of the government social institutions, non-governmental organization, people's organization, business enterprise and the mass media.

Consequently, the women's issues are national development agenda that recognize by the constitution and social and economic development plan.

**Table 2: Projection of the People Eligible for Social Welfare and Social Work Benefits in 1999.**

<b>Target Group</b>	<b>(unit: person)</b>
	<b>Number</b>
<b>1. Children and young person</b>	<b>4,000,000</b>
(Impooverished)	
<b>2. Women</b>	
-Needy persons.	<b>173,227</b>
-Prostitutes.	<b>69,139</b>
-Young women completing grades 6 without further education.	<b>173,914</b>
<b>3. Elderly persons</b>	
-All elders.	<b>5,734,000</b>

-Indigent elders/no income.	579,000
4. Vagrants/Beggars.	18,620
5. Handicapped persons.	4,825,681
-All handicaps	361,200
-Registered handicaps	774,316
6. Hill tribesmen	1,134,725
7. Members of land reservation for settlement	
8. HIV and aids patients	135,950
9. Chronic illness	56,953
10. Poor families.	2.1*

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**Source:** Task force on development of data resources, Department of Public Welfare.

**Note:** \* 2.1 million families.

### **Women in Prison**

In Thailand, current prison statistics revealed that women's inmates are risen from the previous decade of five percent to fifteen percent of the total prison population. In the past seven years, a number of female prisoners have grown significantly five fold since 1992 compared with two fold for male. The ratio of convicted male-female prisoners was 1: 12 closed to 1: 5. There are six female prisons in the country, two in Bangkok and four in the provinces. Other female facilities are located in the segregated quarters of male provincial prisons. The woman's central prison in Bangkok has a full capacity of 2,067 inmates. The most offenses committed by the women's inmates in order are drugs, property, life and body, sex and others.

A report in correction newsletter predicted, if the trend continued, the number of male-female inmates should be equal in ten years, (Newsletter vol. 2, no 2, October 2000).

**Table 3: Statistics of prisoners in each category throughout the country at the end of fiscal year, (September) 1997-2000.**

Category	1997		1998		1999		2000	
	M	F	M	F	M	F	M	F
Convict	66,465	8,855	84,219	12,708	106,023	19,235	107,919	24,418
Awaiting trial	27,842	4,855	37,120	7,105	42,507	9,155	8,878	10,495
Detained person	15,578	2,360	19,792	3,407	19,004	3,749	22,046	3,941
Confinement	4,456	536	5,480	517	5,053	580	5,161	521
Relegation	48	2	40	2	33	1	27	-
Total	114,389	16,608	146,651	23,839	172,620	32,720	184,031	39,375

Source: Department of Correction, November 2000

Note: Detained person means alleged offenders under police investigation, mental deficiency offenders, children and others.

**Table 4: Statistics of prisoners in each category throughout the Country at the end of the year, (September) 2000.**

Category	Male	Female	Total	%
Inmate*	178,843	38,854	217,697	97.4
Detainee**	5,161	521	5,682	2.54

<b>Relegated*** person</b>	<b>27</b>	<b>-</b>	<b>27</b>	<b>0.01</b>
<b>Total</b>	<b>184,031</b>	<b>39,375</b>	<b>223,406</b>	<b>100</b>

**Source: Department of Correction, Ministry of Interior November 2000.**

**Note: \* Inmate includes convicts, detained persons and awaiting trials.**

**\*\*Detainee means offenders in confinement for short-term sentence at 3 months or below.**

**\*\*\*Relegated person means habitual criminal offenders keeping in custody within a specified area for the purposes of reformation and vocational training.**

### **Female Offenders and Paternalism**

The criminologists have observed that female offenders and prisoners have increased considerably. The study in subject of disparate treatment of female offender has undertaken more closely. In discussing sex discrimination in criminal justice, criminologists raised three hypotheses, (Gaines, Kaune and Miller, Criminal Justice, 2000: 649).

1. The equal treatment approach holds that men and women are treated equally.
2. The paternalism approach holds that women are treated more leniently than men are.
3. The evil women approach holds that women are treated more harshly than men are in the same offense.

In legal sense, equal treatment is predominant in the administration of criminal justice. Under the prevention and suppression of prostitution act of 1996 and the repealed law of 1960, the laws applied to women and men equally. In general, criminal law and procedure do not differentiate between male and female offenders. In the operation of criminal justice system, however, the discretionary power of the policeman, public prosecutor and judge may affect the gender of offender as well as victim. In practice, female offenders are likely to be treated more lenient than male. This tendency shall attribute to custom, ways of life

and attitude toward women as weaker and less threatening to the society. The most significant questions respecting gender is whether there exist discrimination in criminal justice system. The people who advocate women rights usually cite individual case or cases in micro level analysis, such as investigation in a rape case or trial that is inhumane, degrading or prejudicial against the victim. This scenario is usually reflected the actual practice and attitude of male inquiry police officer or judge who is responsible for the case. The debate underlying the existence of sex discrimination in cases of wife battering, abuse, forcible rape or other sexual offenses are subject to the handling of the case.

In addition, there were a number of studies and reports that cited negative attitudes and improper practices of the member of criminal justice to female prostitutes and victims regarding sex offenses. In debating the issue, one must distinguish between micro and macro levels explanation, and case studies.

### **Female Drug Offenders**

A significant study on crime and drug trafficking in selected prisons between 1992-1993, the researchers found that about 60 percent female inmates incarcerated in narcotic drugs' offenses were couriers. The inmates in this study were divided into major drug dealer, minor drug dealer and courier. Most drug offenders however were male between 26 to 35 years. However, the age of female offenders was between 26-40 years with compulsory education (grade 4-6), earning low wages, unemployment, unskilled workers, or housewives, (Chavalit Yodmani, 1991).

### **Prison Environment**

In October, the prison statistics revealed an alarming numbers that in three years, at the end of June 2000, the prison population has grown threefold to 215,370. The rapid growth rate has derived from increasing drug offenders comprising 63 percent, compared with offenses against property and life and body at 20 and 6 percent respectively. The trend has created the unbearable and inhumane prisons' conditions, especially female 's inmates

whose numbers have grown from 5 in the past decade up to 15 percent while the prison housing capacities were almost the same. The overcrowding female prisons were detrimental to health, environmental deterioration and stress in prison.

The Department of Correction and Mental Health Department jointly made a survey on the mental health condition of prisoners. The result of the survey portrayed in the followings.

**Table 6: Survey of Prisoners in Stress**

<b>Prisoner</b>	<b>Number</b>	<b>%</b>
<b>Total Prisoners</b>	<b>219,176</b>	<b>100</b>
<b>Total Prisoners in Stress</b>	<b>166,574</b>	<b>76</b>

**Table 7: Average Mark of Prisoners in Stress by Sex. (p=.031)**

<b>Sex</b>	<b>Number</b>	<b>Average</b>
<b>Male</b>	<b>1,665</b>	<b>36.24</b>
<b>Female</b>	<b>251</b>	<b>36.98</b>
<b>Total</b>	<b>1916</b>	<b>36.33</b>

**Source: Joint surveys conducted by Department of Correction, Ministry of Interior and Mental Health Department, Ministry of Public Health, July 31, 2000.**

The result of this survey has been supported by a previous study in the prison that found female prisoners who were incarcerated in prison for a number of years have become neurotic known as prisonization. The female inmates may experience imprisonment's humiliating and the highly discipline women prison has affected these prisoners when the prisoners' population were growing and overcrowding. Lack of privacy has aggravated female inmate more than male, due to prior experience of victimization, (Long, 1998: 346-7).

The analysis of 1916 inmates in Minburi Prison, in Bangkok found the stress in the group averaged at 36.3 mark; the standard deviation was 5.1 mark. The highest and the lowest scores were 56 and 22 marks respectively. The averaged age of the prisoner was 29.1; the highest was 74 and the lowest was 18. Female prisoner had stress slightly above group average. However, the higher age had the higher stress as found in the 55 years and over.

Since 1962, the women prison has segregated from male. The staffs that operate women prison are all female officials and employees. The Correction Act of 1936, Ministerial Regulation and prison rules have governed the prison administration. Female and male prisons are similar in its structure and organizations, unless disparity provided by law.

In principle, women sentenced to prison are placed in the prison that intended for only women, or separated housing for female prisoners. A number of principles that should take into accounts are women needs and issues, such as safety, trusting and supportive environment. Housing and programs should design on the special needs of women prisoners. Suitable hospital and psychiatric facility should be provided as well as program activities by taking into account the women's sensitivity and mental health in the prison environment. Last but not least, the prison staff should be trained to deal with crime from the women's perspective.

## **Conclusion**

The Thai constitution has adopted an equal rights provision and protection irrespective of sexes. Independent institutions have, among others, function to protect and safeguard the right of men and women. National organizations dealing with women's affairs have significant roles in promoting women welfare. Government and non-governmental organizations have provided support and encouragement in the launch of long-term development plan for women since 1992, in seven major areas in order to enhance women quality of life, legal status and participation equally in society. However, major women's rights, issues and problems that have addressed and dealt with by feminists for remedies; some have accomplished, improved, or setbacks. These frequently addresses are abortion rights, sexual subordination and exploitation and prevalent sexism in all walks of life. Many



problems arising are disparity between men and women rather than sex discrimination. In certain careers, for example, military services, enrollment in the military and police academies, including a member of government agencies that are predominantly male or restricted to women accessibility. This practice and restriction shall be challenged and clarified in light of disparity or discrimination under the equality or inequality contextual framework of the constitution.

The criminal justice system has been accused of unfairness and partiality in dealing with women in case of rape, domestic violence and other sexual inclination. The question of fairness and impartiality of law and criminal justice administration in dealing with women currently has not been substantial in systematic nor institutionalized discrimination rather contextual and individual acts of discrimination (see, Walker, 2000: 15-21). These problems are multi-facets and may attribute to attitude, prejudice, maltreatment, and abuse of power among members of the criminal justice system. The people who experience and encounter such inhumane treatment are men as well as women. The structural constraints that prevent equality should be correct in the context of cultural, social and economic developments.

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## **How the Immigration Bureau deals with Protection of Foreigners as Women Victims of Crime**

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### **1. An Outline of Immigration administration of Japan**

#### **(1) Changing Pattern of foreigners who enter into Japan**

Recently, along with the trend of globalization, numbers of foreigners who come to Japan are rapidly increasing. According to the statistics of last year (1999), the number of entrants reached the record of around 4900,000. In the year when immigration statistics started to be compiled, the number was only 20,000. The recent increase of international attributes to the development of transportation and communication, as well as strengthening of international relationship economically, socially and culturally. This trend will continue in the future and international migration will further be expanded and become more global. As more foreigners come to Japan and engage in various activities, their relationship with Japanese and Japanese society in many areas becomes closer. That is, the presence of foreigners in this society has been increasingly noticeable.

Meanwhile, it is undeniable fact that some foreigners who enter and stay in Japan are a part of organized crime and commit vicious, atrocious crime, threatening peace and order of our society.

#### **(2) The purpose and role of immigration control administration**

The basic policy of immigration administration in Japan is twofold: "To receive foreigners smoothly and to deal with foreigners who cause problems harshly." Thus, it is important to keep balance between these two roles. The concept was presented in the basic program for immigration control announced in 1988, and in the second basic program for immigration

control publicized in March, 2000 also adopted the same policy. Through appropriate measures and policies, the program aims "to actively receive foreigners in response to the needs of our society through maintaining safety and order, respecting human rights so that our society could become what it should be. At the same time, it promote the society where both Japanese and foreigners can live together comfortably."

Meanwhile, in many countries, immigration control is carried out by police department with judicial- police powers. However, in Japan it is in charge of the Immigration Bureau under the Ministry of Justice, with only administrative authority.

Therefore, we may not be called "expert" suitable for today's conference, entitled "Expert Meeting on Women and Justice"

### **(3) Criminal Procedures and Deportation Procedures**

Criminal Procedures aims to apply Penal Code appropriately and promptly through investigation of each case, maintaining public welfare and respecting individual human rights. On the other hand, Deportation Procedures as a part of immigration control is to deport unfavorable foreigners who are subject to administrative disposition for fair control of immigration. The foreigners who are under the criminal procedures that could be a reason for deportation will be deported after the criminal procedures are over. However, while the case of deportation is heard, human rights of the foreigner concerned should be respected through complaining, having interviews accompanied with the third party.

## **2. Protection of Women Victims in the Deportation Procedures**

It is acknowledged that in recent years some foreign women who enter the country in an attempt to get illegal job, or stay here illegally are victimized of forced prostitution to repay huge amount of debt involving transnational organized crime such as recruiters. There are cases that women are exploited without any remuneration. When the Immigration Bureau find the case of trafficking in persons or forced prostitution, the case is reported and file a complaint to the police, for the Immigration Bureau does not have judicial authority. In

cooperation with the law enforcement agencies, the Immigration Bureau tries to find out the syndicate of smuggling as well as to rescue victimized women.

It should be noted that in 1989, the Immigration Control Law was amended in order to deal with the syndicate of smuggling. Under the revised law, vicious brokers and employers who encourage foreigners to do illegal works, control foreign workers, or procure them shall be severely punished.

The foreigners who are subjected to deportation under the immigration law should go through the prescribed procedures for deportation. However, during the process, if it is found out that the person have not been paid or suffered accident at work, the Immigration Bureau takes measures such as negotiating with employers for appropriate compensation or reporting the case to the labor standard agency. If the women concerned brings a suit for compensation, she will be given the chance of access to the judiciary.

Furthermore, increasing rapidly number of women who stay in Japan illegally gets married or has children with Japanese men and wishes to stay here long. Such cases are investigated carefully and if the Minister of Justice finds enough reasons for giving special permission to stay, a resident visa will be granted on the humanitarian grounds.

### **3. Treatment of Women Detainee at Immigration Detention Facilities**

#### **(1) What is the Immigration Detention facilities**

The Detention facilities under the Immigration Bureau aims to take a person who is subjected to deportation into custody until he/she is sent back to home. It is different from prison or jail which purpose is to correct and rehabilitate inmates.

If a foreigner is ordered deportation, the person has to be deported immediately. However, in some cases, it takes time for those who smuggled or used forged passport to be issued necessary travel document. Sometimes, it takes time to recover unpaid wages for foreigners to be deported. Recently, it is noticeable that some governments delay

issuance of travel document for return of its citizens or reject to receive them. This is detrimental to international collaboration and co-operation.

## **(2) Treatment of women detainee**

Regarding the treatment of detainee at the Immigration Detention facilities, the detainees can enjoy freedom as long as security is maintained under the Immigration Law. Also, the Rule of Treatment of Detainees based on the Immigration Law aims to treat detainees appropriately by respecting their human rights. After the Rule was revised in 1998, new system was introduced so that opinions of detainees regarding treatment can be heard directly by the director of Detention Facilities. Special Rule was also adopted to appoint women staff for treatment of women detainees. This amendment is part of the effort to carry out appropriate treatment at the Detention Facilities.

The use of force in the Detention facilities in an attempt to maintain order or protect detainees' life and body is severely restricted to the minimum necessity. If any staff member goes too far in the work, or commits improper conduct to woman detainee, the staff shall be punished severely including disciplinary dismissal. Staff training is conducted in terms of strengthening supervision toward staff members at the Detention facilities and training of human rights issues.

## **4. Response to Victimized Women of Trafficking**

### **(1) The Current Situation of Women Victims of Trafficking in Japan**

Today, combat against trafficking is the international issue. Globalization also encourages transnational organized crime, against which international cooperation is most urgent. In response to this international trend, the problems of trafficking and illegal immigration are widely discussed and Japan actively participates in international efforts to deal with this issue. It should be noted that UN ad-hoc committee adopted two protocols regarding trafficking in persons and smuggling of immigrants on October 28, 2000 as supplements of the UN Convention Against Transnational Organized Crime.



The Protocol regarding trafficking is to prevent and suppress trafficking in persons, especially women and children who are transported, sold and received to be placed in exploitative situations as forced prostitution or labor by use of force, threat or fraud. The Protocol regarding illegal immigrant is to prevent and suppress such conduct as helping those who wish to emigrate enter other country illegally for profit. It is significant that these international treaties have adopted in terms of protecting dignity of women and children suffering sexual exploitation. Each government should address to the issue so that this kind of crime would be eliminated.

It is quite difficult to find the actual situation of trafficking in Japan. However, according to the report of illegal entry and other cases, most illegal aliens come to Japan in an attempt to get job with the help of transnational organized crime voluntarily or indirectly for arrangement of travel including forged passport or finding jobs. In other words, most of them are classified as illegal immigrants rather than victims of trafficking. Thus, trafficking in our country does not account large percentage.

## (2) How the Immigration Bureau has addressed to the issue

According to estimate of the Immigration Bureau, there are around 252,000 illegal foreigners staying in Japan as of January 2000. The number has been slightly decreasing since May 1993 when the number reached around 300,000. Meanwhile, smuggling as a group by ship or illegal entry with forged passport by air has increased since 1996. In 1999 around 10,000 foreigners were deported as illegal entry.

Regardless whether these illegal foreigners are the victims of trafficking or smuggling of migrants, it should be admitted that they are most likely to be exploited by recruiters or to be deprived of the right to compensation and medical care if they have some accident at work. The Immigration Bureau is concerned with human rights issues when it deals with illegal employment and illegal stay.

Concrete measures include:

- \* To collect and analyze information of trafficking and strengthening inspection of

entry formalities as well as resident status severely and effectively. ( For example, the Immigration Bureau charged against a Singaporean recruiter who brought Thai women.)

- \* To reinforce suppression of illegal employees and illegal residents through intensive disclose. (Nation-wide intensive disclose, or Metropolitan-area intensive disclose)
- \* Launching special campaign within and without Japan. (Monthly Campaign is held in June every year.)
- \* To promote international cooperation such as organizing international seminar by the Immigration Bureau. (Southeast Asia Immigration Control Seminar, Investigation Technology Seminar for Forged Documents)

In addition, legal framework has been improved including such offenses as to help and promote smuggling as a group (1997), and to reside illegally following illegal entry or illegal landing (1999).

### (3) Further Consideration

Basically in the long term, the problems trafficking in persons and smuggling of migrants must be solved between countries of origin and destination through reducing economic gap. However, in practice, various measures such as reinforcing control should be taken to improve the situation. While opening the border for legal immigrants in response to the needs of our society and forming public consensus, it is important to continue to take strict measures such as intensive disclose, severe inspection of entry and resident status to deal with illegal employment and illegal foreigners.

International collaboration and co-operation is most needed to combat against these problems. At the Southeast Asia Immigration Control Seminar organized by the Immigration Bureau, the issue of trafficking in persons and smuggling of migrants was discussed extensively. The efforts should be more developed so that both countries of origin and destination could deal with the problem effectively and promote a sound international exchange.

## Overview of Situation of the Dignity of Women in Japanese Judicial System

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### Introduction

Laws and ordinances effective in Japanese Courts related to the rights of women are the Article 14 providing for gender equality, Convention on the Elimination of All Forms of Discrimination against Women, International Covenant on Civil and Political Rights, other international instruments (optional protocols providing individual communication are not included), and national laws, which are literally sexually neutral on their bases even with a few positive discriminations. With the legal texts above, it seems that women are provided with powerful recourses, though the verification and detailed research of the reality shows somewhat different pictures. There are some parts of the laws and ordinances, and implementations of the texts, though themselves are neutral, which infringe the rights of women in the justice system in reality. The international human rights materials are hardly paid attentions in actual court cases at present, which resulted in the concluding observations of the Human Rights Committee in 1998 to address concerns about the absence of legal frame work to provide human rights education on judges, etc. and the recommendation to provide one. Without comprehensive anti-discrimination laws, or the monitoring bodies of implementation of human rights texts such as human rights commission and ombudsperson, narrow and limited interpretation of the existing national legal materials results in the infringements of dignity of women without remedies.

It could also be pointed out that women if automatically treated in the same way as men, may psychologically hurt because of the biological, social, and emotional differences from that of men. This delicate nature of the issue is not paid full attention yet.

## **Women detainees**

The national laws concerned are Law of Criminal Procedure, Rule of Criminal Procedure, Rule of Custody of Suspect, Prison law, Immigration-Control Law, and others.

### ● *Police Detention Room*

The situation and environment for the detainees are criticized for long nationally and internationally, and is changing slowly but positively for this 5 years, because of the pressures from general public out of a series of recent corruption, which resulted in the police reformation based on the proposal of the police reformation committee. An increased monitoring detention condition by newly adopted duty attorney system of Bar Associations has also made positive effects.

Police authority explains that they are trying to its best to supply women police for the daily care and control of female detainees, and to meet the needs of particular demand from women detainees. Recently, policemen accompanying female detainees to prosecutor's offices and courts include at least one female police. Each of the police office of local municipality recruits around 10% of female police mainly to supply them to the needed positions. Each prefectural police established sexual crime investigation advisor and sexual crime investigation section at each of its headquarter. The police prepare sexual crime evidence collection kit to streamline the management of investigation.

There are 6 women prisons in Japan, as Article 3 paragraph 1 of Prison Law provides. Prisons are located differently for men and women, or the inner parts of detention centers are separated according to the sex, but police detention rooms, known as substitute prison, are normally not with special consideration on sex.

The percentage of women detainees is increasing but still small ( women acknowledged as breaching criminal law in 1999; 20.6 %, see figure 3 , women reported to prosecutor's office as breach of special law in 1999; 16.6 %, woman prisoners in 1999; 4.9 % ), and inflexible prison rules of the daily conducts, made for the majority, can result sexually humiliating for women detainees. Most of the prison guards are men, and there is no detention centers to

detain women only. During the restriction, she is 24 hours observed by male guards, has to report loudly before and after using lavatory to him, has to get a sanitary napkin from him for each time, and male detainees pass in front of female cells for times a day. Some lavatories are fully exposed to view of others.

In the detention rooms, together with the problems of substitute prison, women detainees may face sexual misconduct by police.

The Law of Criminal Procedure contains some sections for the protections of the dignity of detainees including some positive discrimination for women. The Article 218 paragraph 2 provides that taking finger prints of the suspect under arrest, measuring the height or weight thereof, or taking the picture thereof may be made without the warrant as mention in the preceding paragraph unless the suspect is naked. This paragraph means warrant is needed to make suspect naked. The Article 115 provides that in case a warrant for search is to be executed on the body of woman, an adult woman shall be caused to be present thereat: Provided, that this shall not apply in such cases as urgency is required, and the Article 131 paragraph 2 provides that in case the inspection of a woman's body has been conducted, a doctor or an adult woman shall be caused to be present.

In reality, body search and inspection are conducted not only in front of woman or doctor but in front of male police, in such a manner to infringe the integrity and privacy of woman as to make naked woman to bend and stretch. Some cases are reported that only women were forced to be naked during the house search. Even though the criminal procedure does not give the power to the police to make woman naked without warrant by judge, the police insists the limited interpretation of the criminal procedure to apply only to investigation affairs not to detention affairs. In 1990, women's group against police sexual harassment made parade in central Tokyo.

#### ● *Immigration Detention House*

Although the environment of the detention houses and the violence of some immigration officers are said to be terrible and merciless, the actual situation is not yet clear, because of the limited access to information, racism, and foreigners being deported to their home countries with no chance to make complaints.

The reality is still imaginable from the limited information, that in 1994 one Iranian was killed in the detention house, many complaints such as violence by the immigration officers to fracture of bones, arbitrary sanctions such as solitary confinement with handcuffs on, suicide of immigrant officer, etc. Among the complaints, are the sexual harassment and violence by the immigration officers to female foreigners.

One allegation is that she was needlessly made naked during the investigation and was raped in a private room by 6 immigration officers, and rape is daily occurrence in the detention house. Another woman alleges that during shower time, male immigrant officers open the curtain, and frequently bring away some pretty young women to private rooms. Another woman reports that whenever one is lucky enough to be allowed to make telephone call, she has to put up with having her breasts touched by immigrant officer. In 1988, newspapers reported that female detainees went through hunger strike against acts of obscenity by immigration officers.

These allegations of misconduct are only the tip of the iceberg of total invasion of human rights of women in detention room, prison, and detention house.

Independent monitoring body is needed desperately.

## **Court**

### ● *Preparation for the Criminal Procedure*

The obligation to lodge complaint by victim of obscenity crimes in the period of 6 months was provided in the Law of Criminal Procedure. Victims had to overcome the concerns such as; the case might be public, the investigation can be traumatic, etc in 6 months' time, that it was not unusual the 6 months period had already passed before victim recovered from the horrible trauma to regain sufficient energy to make complaint. The Law to Amend a Part of Law of Criminal Procedure and Law of Examination Committee of Prosecution abolished the complaint lodging period in 2000.

Male police and male prosecutors mostly make inquiry of the victim without any special

program with psychological consideration of women victims. One attorney points out that the written statement is sometimes made arbitrary without the intention of the victim, especially when proceedings close with penalty of fine without public trial. If prosecutor accepts the defender's claim that there existed mutual consent, fine penalty without public trial is likely to be inflicted in spite of imprisonment after public trial. Japanese prosecutors, for whom the decision of not guilty is said to be the most shameful, frequently reduce charge from rape to indecent assault and indecent assault to breach of municipal ordinance, ignoring the victim's intention.

The written statement is sometimes pornographic and improper that attorney may have to correct all the improper words and phrases in civil proceeding. For example one case of school girl rape (closed with fine penalty by charge reduction), the written statements contained tens of improper entirely untrue phrases such as she had had sexual intercourse with many men, to show her a hussy young girl to give consent to sexual intercourse with the defender so that the charge could be reduced to fine penalty.

On-the-spot investigation and offensive act review carried out mostly by male police recall victim the disgusting memory of the crime. Victim has to repeat through the experience of criminal act, for example by performing the posture she was compelled to take in the crime. After all these traumatic investigations, even final disposition by prosecutor was not reported to the victim until 3 years ago. In 1997, the Notification of the Metropolitan Police Department provided that victim report system shall be established. In 1999, handbook of the sexual offence victims was compiled by the Metropolitan Police Department in the recent social movement to protect the rights of victims, but in reality not yet implemented sufficiently.

### ● *Reconciliation Procedure*

According to Japanese court procedure, conciliation process has to be gone through before launching lawsuit of divorce. The conciliation committee consists of volunteers prominent in the local communities, which inevitably make it a salon of conservative and gender biased elder gentlemen.

The conciliator sometimes is the first gender barrier to break through for woman who wants to get liberty from husband and unfair family bondage. Advises to obey husband, to endure

violence, not to be too self assertive, etc. are not unusual.

● *Civil Court*

Although the laws concerned are basically and literally gender neutral and the percentage of female judges is increasing recently, the court still seems to be dominated by gender bias. Some examples are below;

- *Cases regarding family law*

Court admitted the practice of municipality to reject the registration of marriage with separate family names, noting that the system of same surname enhances the sense of family unity (1989/06/23, Gihu family court).

Court admitted the discrimination of illegitimate child in inheritance rights to be rational (.1995/07/05, Supreme Court)

Court admitted Municipal ordinances to be constitutional which provides that anybody who has sexual misconduct with child under 18 years old are criminally punished even the child make consent with his/her free will. The court notes that sexual intercourse with marriage in view is legal (married person under 17 shall be deemed legal majority) if not, illegal (1985/10/23, Supreme Court).

Court did not allow a wife to divorce, admitting she is a victim of domestic violence by husband resulting from morbid dependence on alcohol, such as throwing radio, breaking windows, etc (1994/10/06, Tokyo District Court, Hachioji Branch).

Civil Code provides that husband or wife can bring an action for divorce only in the following cases. (1) If the other spouse has committed an act of unchastity; (2) If he or she has been deserted maliciously by the other spouse; (3) If it is unknown for three years or more if whether the other spouse is alive or dead; (4) If there exists any other grave reason for which it is difficult for him or her to continue the marriage.

There is no special reference to DV or marital rape. Marital rape and DV must be admitted by the court as 'grave reason for which it is difficult for him or her to continue the marriage' to be a cause of divorce in courts.



- *Cases regarding labor law*

Court allowed sexual harassment of male boss to be legal since woman did not physically resist or escape (1995/03/24 Yokohama District Court).

Court allowed the disciplinary dismissal based on the fact that she resisted against sexual harassment of her boss (1994/05/26, Kanazawa District Court).

● *Criminal Court*

The number of rape cases acknowledged by police is steadily increasing (figure 1). The number of the victims aged from 13 to 19 is rapidly increasing from 1998 to 1999 and accounts for 43.8 % of the victims in 1999. The victim age recently tends to be lower.

Firstly, according to criminal act, rape victim is only woman, which may root in the double sexual moral standards. The chastity of woman has been deemed more valuable than man's in consequence of the double standards. After the World War Second, according to the equality clause of the new Constitution, the Penal Code was reviewed. The adultery clause, which only criminalized the adultery of woman, was deleted, but the rape clause was not amended.

It is often the case with obscenity crimes that the sole evidence is the testimony of the victim because of the nature of the crimes. Lack of the judge special training on sexual crimes enable the misunderstood rape mythology to survive, and facts finding of courts are often too severe and rigid against women especially whose perpetrators were their acquaintances. For example, in a case of high school girl rape in a car, court of first instance required the victim to predict and tackle against the coming harm before commencement of the commission of the crime, and to escape on foot from the perpetrator with car, who had threatened her with knife. The case resulted in the verdict of not guilty, which asserts the victim had put the blame on the innocent defender since she could not have made the actual perpetrator public. Although defender was convicted after four years of severe words battle in the court of appeal, in consideration of conviction rate in Japan, the extraordinality and unjustness of the verdict of the court of first instance can be understood with ease. Training of judges, prosecutors, and policemen is highly needed to make them understand the particular emotion, feeling, and behavior of the women victims.

In addition, marital rape is usually not recognized as rape in court from the precedent to admit husband to have right to require intercourse.

According to the Law of Criminal Procedure, court can decide to examine witness outside of courts, or in closed courtroom. These sections are not for female victims but are general clauses to consider the importance, age, health, profession, and others of witnesses. This has been used for the convenience of busy medical doctors, etc., but recently, court comes to use this section for the interest of women victims. Even in the public courtroom of a well-known sexual harassment case, court used partitions so that the victim is out of the audience's view.

The Law to Amend a Part of Law of Criminal Procedure and Law of Examination Committee of Prosecution enacted in 2000 has lessened the psychological burden of witness by allowing accompanying witness's family, volunteer victim supporters, who are mainly ex-police and prosecutors, etc, to the next of the witness chair in the court, by putting partitions between witness and defender, by giving opportunity to victim to directly state its opinion in front of court, by easing to make complaints to the committee of examination of prosecution, and by easing to using the criminal records by victim for the lawsuit for civil compensation caused by the crime.

Court has just started to make consideration on the rights of women, but there is a long way to go.

### ● *Domestic Violence (DV)*

The acknowledged number to police of domestic violence against wife (the public figure includes only homicide, bodily injury, and assault from husband against wife) has steadily decreased before 10 years but reversed to increase from 1992 (figure 2).

Police principle of no interference to civil matters prevented DV to be recognized as crime for long time. Recent social movement of women groups, shelters, etc. dramatically changed the social awareness and the attitude of the police to state in its white paper in 2000 that domestic violence can be a crime even inside family life. Although there have been no special prescriptions against DV, the bill on prevention of domestic violence is prepared by the none-partisan parliamentarians. But the reaction of police is still criticized as dull.

### ● *Stalking crime*

The law to regulate the stalking crimes was enacted in May 2000 and put into operation from November 2000, which provides for the warning, provisional prohibition order, prohibition order etc., issued by the chief of the headquarter of prefectural police, punishment of the crime itself and the breach of the prohibition orders, and some forms of assistance.

### ● *Constituent members of court proceedings*

The percentage of female judges is 10.9 % (2000), 10.4% (1999), 8.2% (1995), 5.0% (1990), and 2.8% (1980). The percentage of female prosecutors is 6.1 % (2000), 4.1% (1995), 2.1% (1990), and 1.3% (1985). The percentage of female attorneys-at-law is 8.9 % (2000), 6.6% (1995), 5.5% (1990), 4.8% (1985), and 3.8% (1980).

Although the rate is slightly higher in court, it still often the case that court consists only of men, the most fortunate is the most junior (associate judge) of the three judges (Japan adopt carrier system) is woman. Although the associate judge has legally equal power with others, in practice she has to obey the unwritten rule of court hierarchy. At the same time, wide generation gap exists in Japan regarding the norm of woman behaviors. I have heard a male judge in his 40's to complain about the tendency of senior judges to admit the fault and negligence of women too easily.

The female representation in court and prosecutor's office is restricted in the recruitment process. The recruitment of judges and prosecutors is done mostly by elder men recruiters in the supreme court legal training and research institute, which is one and half years compulsory governmental law school after passing the bar exam. In the process, apparent women limitation exists for prosecutors and unappellant and indirect restriction exists in the recruitment of judges. Legal trainees in the class of 2000 started movement against this sexual discrimination in the law school, and went through collective negotiation with authorities and petition to the minister of justice to abolish the rule, even though ministry of justice denies the existence of the discrimination itself.

Gender bias in the legal proceeding has one of its roots in the discrimination against the women constituent in its own body. Women lawyers are discriminated at its beginning of

carriers and have to accept and reconcile with the bias. How a woman who accepts discrimination can struggle to protect and extend the rights of minorities?

### **Trafficked women**

Trafficked women come from Thailand, Philippine, China, Korea, etc, within the context of large-scale migration in Asia, which has increased dramatically over the last two decades with the peak in the former half of 1990's. Although there exists the high demand for foreign workers, Japan accepts only a very limited number of legal foreigners.

Women are typically deceived in her home country about work terms and conditions until she arrives in Japan to experience slavery-like abuses during the course of travel and job placement. Agent in home country helps the woman in obtaining passports etc., then hired escort accompanies her during the travel, and Yakuza in Japan receive, sell and hand over the woman to Japanese snack bars. Most of the trafficked women are in the debt bondage of three million to four million yen after all the trafficking circulation from the home country agent to Japanese snack bar owner. While in debt, women works under highly abusive labor conditions, they do not receive any compensation for their labor and had to accept all customers and all customers' requests in the fear of violence in case of disobedience. They are without adequate health care and often physically and psychologically in critical situation. In the end of slavery-like abuses without compensation, they are arrested, investigated and prosecuted in breach of immigration control law and be deported at their own expense. There are some none-governmental shelters to escape but confiscation of passports and other travel documents and fear of violence in case of failure make escape difficult.

Although Japanese government is fully aware about the critical situation of the women trafficking, they have been never ready to confront with it. Penal Code article 226 forbids kidnapping, buying or selling of person to transport outside of Japan, but not applicable to buying to bring inside Japan. The Prostitution Prevention Law does not clearly forbid the use of coercive tactics in job. The labor Standards Law and the Employment Security Law do not prohibit nor penalize the confiscation of employee's passport and other travel documents by employer.

From my experience, investigating and prosecuting trafficked women is simple for the authority but suing snack bar owners and Yakuza behind is not easy without sufficient evidences. As the result, only women victims are punished and masterminds behind are never punished.

The Law to Punish Child Sexual Exploitation, Child Pornography, etc., and to Protect Child was enacted in May 2000 and came into force in November 2000 after the extensive activities of NGOs including ECPAT. This law enabled the Japanese perpetrators who committed sexual crimes in foreign countries to the victims under 17 to be punished under Japanese law. This law criminalize buying child, which supplements the lack of the Law to Prohibit Prostitution without the clause to criminalize buying women. This is hoped to be an effective tool to combat the notorious Japanese sex tours in Asia and provision of pornographic sites on Internet.

## **Conclusions**

The governmental Committee of equal social participation finalized its proposal to the government in September 2000, which shows comprehensive gender policy in 21st century. This proposal includes the viewpoints of women victims of sexual crimes and trafficking. Although there remains a lot to be done, there has been significant progress of the women rights in these decades in 20<sup>th</sup> century. But the discussion of the question of women dignity in justice system is not yet matured in Japanese society.

Some of the Local Bar Associations have started study and research on this area for some years and AWF has just started its activities. The acceleration of the discussion of this question is strongly desired in Japan, since the infringement of the woman dignity is hidden but actual, and victims are facing difficulties today at this moment.

## **Human Rights Perspective to be secured in Anti - Trafficking Regime**

Yuriko Moto

International Movement Against All Forms of Discrimination and Racism

(Note : The opinions expressed herein are those of the author)

### **I. Introduction**

Trafficking in persons is one of the worst, and most brazen, abuses of human rights. Human beings, temporarily or even permanently reduced to commodities, are transported, sold, and/or bought and placed in exploitative and abusive situations such as forced prostitution, labour in slavery-like conditions, bonded labour, etc. The consequences of trafficking on the victims are quite often serious, involving psychological trauma, depression, sexually transmitted disease, AIDS, unwanted pregnancy, abortion and other physical damage.

Trafficking in persons is, at the same time, a spreading and worsening global phenomenon that criminal justice system, whether national or international, has not been successful in suppressing. Nowadays, millions persons, mostly women and children, are trafficked often across borders and exploited each year. The global trade of persons conducted through transnational crime syndicates mainly for the operation of the global sex industry is estimated to generate gross earning of billions of U.S. dollars annually.

Reflecting these aspects of the phenomenon, two different approaches have emerged and developed in the national and international reaction to it; one based on human rights perspective and the other on crime control perspective. Problem is that the two perspectives have hardly been integrated in the policies and strategies for establishing a comprehensive and effective anti-trafficking regime at national, regional and international levels. Actions taken by the governments to date suggest that many of them have an inclination to prioritize crime prevention and control rather than human rights considerations.

## II. UN Protocol on Trafficking

It is regretful that that a new international legal instrument to address trafficking, a draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the United Nations Convention Against Transnational Organized Crime, does not obligate governments to provide assistance and protection for the victims of trafficking. As a result of advocacy efforts persistently made by a number of human rights NGOs and strong concerns jointly expressed by the Office of the UN High Commissioner for Human Rights, UNICEF, and the International Organization for Migration (IOM), some amendments have been made in such a way that human rights perspective could be incorporated in the Protocol. However, most of the suggested provisions that would be beneficial to victims, such as those for shelter, medical or psychological care, legal counseling, safe and voluntary return, have faced with reluctance or opposition of governments.

Article 4 of the Protocol on "Assistance for and protection of victims of trafficking in persons" remains qualified by the phrase "in appropriate cases and to the extent possible under domestic law". The qualification has not been lifted despite the articulate criticism made by the UN agencies on the basis of international human rights law, which clearly provides that victims of human rights violations such as trafficking should be provided with access to adequate and appropriate remedies.

The Protocol that contains strong law enforcement provisions may be viewed as a significant step forward in establishing an international anti-trafficking regime. However, the omission of mandatory government commitments to protect human rights of victims and the absence of relevant provisions in the new international legislation are feared to discourage states from including obligatory human rights protections in their domestic anti-trafficking laws. It is also argued that a lack of sufficient protection and care for the victims whose cooperation is critically important in prosecuting the perpetrators could impede the execution of criminal justice in fighting against transnational organized crime. Strengthened border and immigration controls for the purpose of detecting and preventing trafficking, if implemented without due regard to the rights and freedoms of individuals, could also be detrimental in human rights perspective.

Similar concerns have been reiterated by the NGOs in the member countries of South Asian Association for Regional Cooperation (SAARC) with regard to the draft SAARC Convention on Combating the Crime of Trafficking in Women and Children for Prostitution. The SAARC member states' initiative in drafting the first regional instrument of this sort deserves praises, but it shows a resemblance to the UN Protocol in its defect.

### III. Multiple Discrimination against Victims of Trafficking

Victims of trafficking, particularly women and girls, often face discriminations based not only on their gender but also other grounds such as illegal entry into the country of transit and/or destination, unlawful stay in the country, irregularity of their employment, their national or ethnic origin, caste or descent, prostitution (even if forced), work and so forth. It is the major concern of International Movement Against All Forms of Discrimination and Racism (IMDAR) in taking up the issue of trafficking in women and girls. The problem, despite of its severity, is not addressed either in the UN Protocol on Trafficking or the SAARC Convention.

Members of economically and socially marginalized communities in many societies, particularly women and children of ethnic minorities, are the target of the recruiters for trafficking obviously because of their vulnerability to job offers, even if deceptive ones. It is to our knowledge that the global sex industry operates under a racist application of the different regimes. Women and girls trafficked from poor countries, especially from ethnic minorities in rural areas, are treated in a discriminatory way in the sex industry in order to maximize the profit. Even after being rescued from brothels, they are too often faced with multi-layered discrimination and stigmatization practiced by police and other law enforcement officers, which result in their revictimization.

I believe that trafficked women, regardless of earlier experience of prostitution or consent to the transfer abroad, should be treated as victims rather than criminals. Nobody deserves degrading treatment or insult. Sometimes, stigmatization prevents a victim from being reintegrated in her own community. In view of the reality of such multi-faceted and intertwined discrimination, integration of gender perspective in anti-trafficking regime is hardly sufficient. A comprehensive plan of action including concrete measures for the



elimination of all forms of discrimination is required.

The principle of "all human rights for all", which the international community committed itself to on the occasion of the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights, has to be reaffirmed over and over. All people, no matter where they are and how and why they got there, are entitled to the same protection of their human rights and respect for their dignity. (Note: Cited from the joint statement delivered by the NGO participants of the seminar of experts in the Asia-Pacific region held in Bangkok in September 2000 in preparation for the 2001 UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.)

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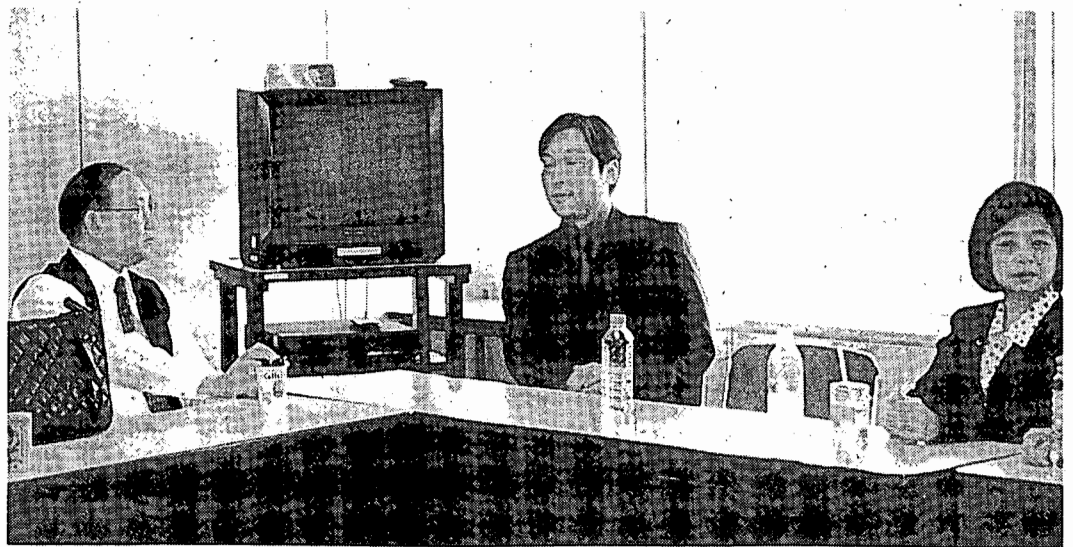
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## ***Asian Women's Fund***

The Asian Women's Fund was established in July 1995 by prominent citizens who were concerned about continued suffering of the former "comfort women", victims by Japanese military during the World War Second, with the support of the Government of Japan. The primary aim of the Fund is to extend atonement and support to those victimized women. The victims have suffered in silence for so long and are now of an advanced age, and it is therefore the Fund's sincere wish to act urgently, in accordance with their needs, to alleviate their pain in whatever small way it can. At the same time, recognizing that prevailing attitudes of discrimination and violence against women is a part of the background to the suffering inflicted on the "comfort women". The second pillar of the work of the Fund is to actively address contemporary issues of violations against the dignity and rights of women.

The Fund's activities include:

- hosting international forums on contemporary issues on women;
- financial support to NGO projects addressing contemporary women's human issues;
- research and analysis into the causes and prevention of violence against women, and other contemporary women's human rights violations, and;
- training and development of new counseling approaches for women victims of violence and human rights violations.

For further information, or a list of publications, please contact the Fund at the address below, or visit its site on the world wide web.

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