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**March 2002**

**2nd Expert Meeting on  
Women & Justice**

**January 19-22, 2002  
Kyoto, Japan**

**Asian Women's Fund**

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## **SUMMARY REPORT OF THE EXPERT'S MEETING ON WOMEN IN JUSTICE SYSTEM**

January 19-23, 2002, Kyoto

The Asian Women's Fund had convened an Asia-Pacific regional meeting of experts in Kyoto to share, discuss and learn from each other information about the situations of women in judicial systems. The focus of the meeting was to highlight the situation of women both as victims and as accused under the legal system. The participants brought with them the wide-ranging experience both from the civil and criminal court proceedings from their countries. The participants shared the best practices followed in their countries in order to ensure that the legal system is made accessible to women. On an average women are found to be poor, less informed and vulnerable. The participants drafted a declaration requesting the State authorities to take certain steps in order to provide better protection to women through the legal and justice system.

### **Proceedings**

#### ***Opening Remark* Prof Yozo Yokota**

He welcomed the participants and explained the theme of the series of meetings that have been held under the broad spectrum of 'Women and Justice'. He explained that the main topic for discussion for the current meeting is 'Women in Civil and Criminal Court Proceedings'. This topic was to be approached under following sub-headings.

- a. women as victims
- b. women as suspects
- c. women under the court proceedings

#### ***Session One***

##### **Ms Leila Zerrougui**

**Presented her paper on ' Women Victims in criminal cases and court proceedings'**

She emphasised that the weaker social status, ancestral disadvantages and the structural disadvantages contribute for the victimisation of women and weakens their position under the criminal legal system. She highlighted the incapacity of the Algerian Criminal Justice System to assure a fair treatment and effective protection to women in the penal process.

She also suggested some recommendations to improve the judicial treatment of women under the criminal justice system.

She particularly mentioned the incidences of 'Protective custody of women', which has been a concern for both the Special rapporteurs on Violence Against Women and on Migrants. This is a phenomenon under which women are placed under protective custody and placed in jails and mixed with other criminals. This was primarily done to protect them from being trafficked. Also in some Muslim countries, women after completing their prison term are not in fact released, because a male family member does not come forward to take their custody. This further aggravates the sufferings of women. During discussions the participants shared the hurdles faced by women while accessing the legal justice.

An experiment has been carried out in the Philippines where, while a woman victim is narrating her experience in the court the accused is not present (physically) in the same room. But she knows that he is present elsewhere and is also watching her while she is narrating. This arrangement helps in reducing the traumatic experience of the court proceedings. In Sri Lanka, the testimonies of women victims are video recorded and the same are used in the court proceedings. Generally the experience of a cross-examination can be very unsettling for a woman. It is therefore essential that the lawyers and judges are sensitised towards the experiences of women and also understand how best they can help women victims in protecting their rights

In civil law countries, the victim and her lawyer can take part in the proceedings both in the civil and criminal matters and not participate only on being invited by a judge unlike in the adversarial court system. However in Malaysia, a woman may not even be authorised to take the matter in the appeal. In fact she is not a full participant in the court proceedings.

In Japan the prosecution for rape or sexual abuse can take place only if the woman approves and gives consent for the prosecution. Sometimes other members of the woman victim's family can also object for such prosecution. However if the victim were physically hurt then a prosecution, irrespective of the victim's permission, would follow the complaint. In cases of eve teasing, the police in the past did not take cognisance of such complaints. But now the police are taking this matter seriously. It is brought to the courts and the court then decides the case on merits.

The police can arrest the accused for a period of one month before trial. In Algeria no such consent for the prosecution is required from the victim. Since rape is the crime and hence will be prosecuted. But such agreement is needed in the case of adultery. NGOs helping the victim can assist her during the prosecution. In order to protect rape victims, the rape case could be reported by the victim within 5 years since the incidence. If the victim is a minor then the permission of the parents is expected. In Malaysia, no permission is required in case of rape cases since it is considered as a crime. However the situation in cases of incest could be even trickier. Where the parents do not believe the victim's narration how

would the minor victim seek permission of the parents? Further a minor victim may be traumatised if pressurised within the family to withdraw the prosecution.

In Hong Kong every crime is a wrong against all the society, it does not require the permission of the victim. But if the victim does not cooperate then the success of proving the case in the court would be difficult. The attempt is to remove as many unnecessary hurdles in giving evidence as possible. The police must take cognisance of the complaint once it is made cogently. However the success of the case and punishment to the accused will depends on the offence being actually reported. In many communities such offences may not even get reported due to fear of being ostracised by the community or may hurt the family pride.

In some countries, extra-territorial jurisdiction is upheld in cases of trafficking matter.

In Algeria it is possible but not practised. Any citizen committing any offence anywhere can be tried in Algeria provided the offence is not tried in any other country. The principle of double jeopardy or any other agreement between the different countries may prevail against the extra-territorial application of Algerian law. Most of the Common law countries do not encourage extra territorial operations particularly when their enforcement is difficult. In Japan, particularly in cases of sexual exploitation of children the NGOs are pushing for the extra territorial operations. But the police are not too eager to extend their operative areas.

## **Session Two**

**Ms Zarizana Abdul Aziz**

**Presented her paper on ' Women Victims in Criminal Cases and Court Proceedings'**

She emphasised that it is important to look at the woman's perspective as a reasonable person's approach and rather than a reasonable man's perspective. Since the man's perspective is proved to be different than that of the woman's.

In Malaysia, in case of a married woman, she can sue her husband only for trespassing her property and not her person. He can continue to harass her with physical abuses.

Further a woman is made to carry the burden of the family and community honour even if she is victimised in the process and is attacked by men. In case of a rape, the law requires that there is a forced intercourse. However many times when the rape is not for intercourse and is carried out with many different intentions, it is still experienced by woman as rape. Further the law does not recognise repetitive crime, which is a common factor in most of the domestic violence cases.

In Hong Kong, the question of marital rape poses some difficulties particularly when the rape is regarded as a non-consensual or unlawful sexual intercourse. In a marriage, the woman is expected to have given non-revocable permission for intercourse to the husband. Without amending the law, the court has already established the point of law on it.

Unfortunately, the police have not heard of this legal interpretation. And it is important for the police to understand the law so as to enforce it. In Sri Lanka, marital rape is not recognised, and recognised only if the husband and wife are legally separated.

While in Algeria, unlawful intercourse is the ground for rape but the point of reference is whether there is any violence. Abnormal sexual intercourse is regarded as marital rape if the husband forces it on his wife. In some situations a repetitive action is essential for proving the offence. The concept of marital rape is incorporated in the Philippines law irrespective of the judicially separated.

In Japan a new law has been passed to address the matter of domestic violence. However in another case the court has given a decision upholding the married woman's duty to give consent to her husband for sexual intercourse. If for the reason of violence she leaves the home and seeks shelter else where she is asked by the court to go back to the home and discuss the matter with her husband and later proceed for the divorce. Marital rape is yet not a recognised crime in Japan. The Domestic violence Act can make it possible to include such acts under the notion of spousal violence.

**Ms Saama Rajakaruna**

**Presented her paper on 'Honour crimes and Honourable Justice'**

In cases of honour killing the concept is being widened to include marrying a person of one's choice by the woman, having a boy friend, request a song on radio etc. Here generally a woman is killed and sometimes the male member is made to compensate the girl's family in lieu of his life. Sometimes family members instigate or pressurise the girl or the boy to commit suicide. Honour killing is found to be not restricted to Muslim countries alone. Women do not enjoy the option for seeking justice, their life is taken away and there is no remedy. The family members get a very minor punishment for being engaged in honour killing. There is absence of any support systems in order to protect the victims of honour killing. International law needs to be developed to respond to this violation, particularly when the State fails to take cognisance of such actions, which were taken in private.

Honour killing is a serious crime but not much is being done to address this issue. The surprise element seems to be working in favour of men who are engaged in honour killing. This crime is looked at as a crime against society and family and not against the woman victim. Therefore in the process of protecting the society or a family, the individual victim is forgotten. The State must realise its responsibility in addressing this crime and it needs to be condemned. There is need to educate people. In many such cases the provocation is not grave and sudden and the actors were aware of the situation. Honour killing is a premeditated act.

In Philippines, a practise of *destierro* is applied by the courts, where, a person is restricted to a specific area as a punishment for having killed his wife when found to have had intercourse with another man. Many times if the woman reacts violently to the abuser, then the courts do not necessarily look at them leniently and were sentenced to imprisonment.

Some times women may find the need to seek refuge in an other country in order to save themselves from persecution from domestic violence or honour killing. The burden of proving this killing as an honour killing may be difficult. There is an urgent need to sensitise judges and the community towards this practise. This practice is believed to be based on a strong patriarchal value, It further perpetuates through religious fundamentalism, which sanctifies the process and makes it difficult to be eradicated.

**Ms. Mayumi Taniguchi**

**She presented the paper on 'Situation of Japanese Women in Criminal Courts in relation to Sexual Offence'.**

She reiterated that the police, judges and the society have several prejudices regarding the rights of women. Many times the sexual history of the victim is taken into consideration while deciding the case and later while declaring punishment. Further, the decisions of the court indicate that they do not believe in the statements made by women during the court proceedings, either as victim or as suspect. There is special need to understand women. In Japan the concept of marital rape is not yet recognised. However recently a gender sensitisation programme has been undertaken in judicial trainings.

Gender sensitisation needs to be made an integral part of the normal educational system at all levels. It should be brought to the notice of all that the attitude, which is based on gender discrimination, is a wrong attitude. However most of us get indoctrinated from the very beginning and therefore the need is to focus on respect for all. The media must be encouraged to serve proactively. The problem becomes acute when the crime is that of incest, when the girl does not understand that the act is wrong and does not realise that it was wrong till she is grown up.

### **Session Three**

**Judge Lita T. Genilo**

**Presented the paper on 'Civil Cases and Women in Courts'**

The Philippines does not have law for divorce due to the strong influence of the Catholic Church and tradition bound society. However there are many cases of annulment of marriages by women, under the broad framework of incapacity (physical and mental) of the husband to fulfill marital responsibilities. The woman has to support herself after separation and annulment. Sometimes the courts declare a marriage void. All court declarations can



be issued through the expensive court proceedings. However there is a practise among the spouses to enter into some informal agreement in order to ascertain definitive relationship regarding the property acquired during the marriage. Presently the practise is well established to regard that all the property acquired during the marriage belongs to the spouses equally.

The major impact of annulment of marriage is that the children born in that relationship are regarded illegitimate. However in cases of adulterous relationships, the protection on property and custody of children is determined on the basis of the best interest of the child. Under Muslim law, the adulterous relationships are all illegal and the existence of the children is not recognised. Generally, an illegitimate child gets half the share in the father's property but that is being changed in Japan. In the Philippines they get half share in the property but may use the father's name unlike the practise of the earlier time when such a child was to use only the mother's name. In India all children are deemed legitimate but the marriage may be illegal. In cases of adoption a woman can adopt a child but if she is seeking husband's name for the child, the family has to consent for giving the name.

**Dr. Nirmala Pandit**

**She presented a paper on ' Women and Justice: Indian Experiment with Family Court'**

She shared information about the Indian experiment with the family courts. These courts were introduced to protect and preserve the family as an institution. One of the objectives of these courts is to emphasise on conciliation as a tool for settlement of disputes. In matters of divorce, maintenance and custody of children, women are disproportionately affected to their disadvantage. And it was expected that these courts would give necessary confidence and support to women. There was a move that the lawyers could be prevented from operating in these courts and the matter could be carried out without the intermediary of the lawyers. However it soon proved to be a difficult task, particularly when the large number of women are still illiterate in India and understanding and grasping the legal language is far too technical even for the literate litigants to manage court proceedings in the absence of lawyers. This court requires that the counsellors and social workers handle all matters before any legal action is taken before the judicial officials. Some times this stands out as a hurdle and a delaying mechanism, particularly when the parties have reached a stage of 'irrevocable breakdown' of marriage. Further the counsellors too are not very sensitive towards the interpersonal relations and the impact of the dispute on members of the family, including children. Even in these courts not all the judges are sensitive towards the sufferings of women. It was felt that the judges, lawyers and counsellors need to be sensitised in order to give the true interpretation of the letter and spirit of the law.

The family court in Hong Kong is very encouraging since conciliation provided the most needed time for the parties to re think and reconcile between themselves. There was a thought that the counsellors role be reduced, however it proved to be beneficial and hence continued.

In Japan the divorce is granted when the parties mutually agree to do so. However in reality the parties are not equal in decision-making process. Women are weaker in the family matters including decision-making activities. The law has been outdated particularly in regard maintenance and custody of children. Generally the burden of preserving the marriage lies on the woman. Mother gets the custody of their children. Most of the times even during the marriage, the property of wife and husband are kept separate. But she does not get equitable share in the pension of her husband after the divorce.

In Algeria separate ownership does not exist since the woman is not generally the earning member. Her contribution to the matrimonial property and home is not recognised. Under Muslim law it is difficult for a woman to get a divorce. Under this vulnerable situation she continues to stay in the abusive marriage.

**Ms, Margaret Ng**

**She presented a paper on 'Legal Protection for Vulnerable Groups of Women in Hong Kong'**

She emphasised that the women are not only discriminated but they suffer disproportionately due to their vulnerable position in the society. Large proportion of foreign domestic help that comes to Hong Kong is proved to be most vulnerable. Many of them are in Hong Kong for a long period of time, and are protected by labour laws, e.g., they are covered by minimum wage, which is a protectionist move. This minimum wage is not necessarily a living wage. Such workers cannot take the matter to the court till they resign from the work. But if she resigns then she cannot work during that phase of the pendency of the case. This further adds to her misery.

#### **Session Four**

The participants deliberated and adopted a declaration.



# **KYOTO DECLARATION ON WOMEN IN JUSTICE SYSTEM**

## **LEGAL STRATEGIES**

### **A. Substantive Law**

1. Protective Custody – Women should not be detained against their wishes in the name of protection from trafficking and similar abuses.
2. Concept of men as guardians of women – Adult women should not be released from detention only into the custody of their male guardians.
3. Personal Laws – Same grounds should be available to both husband and wife in seeking divorce and annulment of marriage.
4. Victims' consent to prosecution as practised in certain countries should be discouraged.
5. Laws which affect women must recognise and respect women's perspective.
6. Honour should not be a justification or a mitigating factor in crime against women.
7. Marital rape should be recognised as an offence.
8. In case of custodial rape there is a presumption that the person responsible for her custody is accountable.
9. Victims of violence against women in particular women victims of socio-religious offences should be granted asylum.
10. Domestic violence should be recognised as separate criminal offence.
11. Spousal violence should be broadly interpreted.
12. There should not be any distinction between legitimate and illegitimate children. They should all be entitled to the same rights whether they are born within or outside the wedlock.
13. Concept of matrimonial property and matrimonial home should be evolved in matters of divorce and maintenance.
14. Function of family court should include the protection of individuals constituting the family and not merely preserving the family as an institution and encouraging reconciliation of the parties in familial disputes.

15. Impediments to vulnerable people including women in accessing justice should be removed e.g. court and legal fees, linguistic barriers, delays in proceedings, systemic biases, etc.
16. Responsibility in protecting family should lie equally with men and women.
17. Laws must be promulgated to give effect to government's international obligations under the United Nations Human Right instruments and in particular to remove discriminatory laws against women.
18. Special provisions should be made to protect women victims of violence particularly against intimidation, reprisals.

## **B. Procedural Law**

1. Evidence – Women should be encouraged to come forward to report and give evidence against perpetrators of crimes against women by ensuring protection and freedom from fear of reprisals, before, during and after the trial e.g. presentation of evidence through video recording, in camera, non-disclosure of identity, absence of perpetrator during testimony.
2. Evidence – Sexual history of victims of rape and other sexual crimes should not be relevant in establishing the crime by the perpetrator.
3. Corroboration – Corroborative evidence of violence should not be required to prove rape and other sexual offences.
4. Victim and her counsel should be allowed to participate in criminal trial.
5. Extra-territorial jurisdiction – States should be encouraged to extend jurisdiction of domestic courts beyond territorial limits in cases of crimes committed against women by citizens outside their country provided it does not breach rule against double jeopardy.

## **C. Enforcement**

1. Police and enforcement officers should be sensitised and encourage to take immediate action in cases of violence against women.

## **NON-LEGAL STRATEGIES**

1. Sensitising the community particularly the men to accept legal responsibility of maintaining wife and children.

2. Encouraging sense of respect for men and women equally.
3. Sensitising lawyers, prosecutors, judges, law enforcement officials, medical officers, and members of society on the need of special protection to women as vulnerable group.
4. Sensitise and encourage media to take a pro-active stance in protecting women and against negative portrayal of stereotypes.
5. Encourage partnership between government and NGO's to make justice more accessible e.g. shelters, legal aid, accessible and timely legal advise support for victims and witnesses.
6. Encourage research and collection of data in order to evaluate support for vulnerable groups of women and appropriate legal reforms.



## **Women Victims in Criminal Cases and Court Proceedings**

Leila Zerrougui

Magistrate, Member of the UN Sub Commission and of the Working Group on  
Arbitrary Detention, Algeria

### **Introduction:**

The question of criminal victimization of women and their status in the criminal justice system and more particularly in the penal process cannot be dealt with efficiently without taking into account some fundamental problems which weaken women more than any other victims when they are confronted to the complexity of the criminal proceeding.

These problems are related to the weakness of women's position due to the precariousness of their social status, the ancestral disadvantage and to the structural discrimination that they are subjected to within the family and the society and which the administration of justice reproduces in its normal operating. This inferior treatment of women and its consequent fragility engender a specific criminality that targets women and little girls. The criminal justice system badly apprehends or ignores this sexospecific criminality because of the historical and worldwide dimension of violence endured by women and of both the sociological and psychological erroneous perception, which does not always recognize the criminal aspect of some gender specific forms of violence targeting women.<sup>1</sup>

To this erroneous perception of criminal victimization of women, are added some structural problems related to the organization, the operation of the criminal justice system and to the status of the victim in general in the penal process, especially when the victim belongs to a vulnerable or underprivileged social category.

In order to apprehend efficiently the problem of women's victimization and suggest concrete measures which can help to improve the judiciary treatment of criminality especially

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<sup>1</sup> See, in this regard, the publication of the opinions of Women's Status Council in Quebec: In order that the unacceptable cease: "Pour que cesse l'inacceptable". Bibliothèque Nationale du Québec ISBN. 1993.

the one directed against both women and little girls and to assure then an effective protection in the field of crime prevention and criminal justice, we will tackle the subject as follows:

We will devote the first part to the position and status of the victim in the national criminal justice systems.

In the second part, we will highlight the incapacity of the national criminal justice systems to assure a fair treatment and effective protection to the vulnerable people focusing on specific problems women meet in the penal process.

To conclude, we will undertake recommendations of concrete measures to improve the judiciary treatment of women's criminal victimization.

### **The victim's status in the Penal Process.**

The victim has long been considered as a third party in the penal process in practically all-legal systems, sometimes she does not even constitute a part in a trial. Three systems appear in the national legal framework.

- In some laws, the victim cannot perform the civil action to sue for damages before penal jurisdictions, even after the prosecution has already submits the case to the Court. She is even considered to be an ordinary witness in the trial and consequently, she has to take oath once she will testify. It is the case for example, in English, Canadian and American laws. Meanwhile, she cannot take part in the hearing debate. It is hardly, and even an exception if the judge sometimes grants her satisfaction.

- A second legislation group recognizes the right of the victim to sue for damages before the penal jurisdictions only if the public prosecutor has already instituted the prosecution. Such a legal system is adopted in Italy, Switzerland, Germany and the Netherlands. These systems are in general assorted with a suitable particularity to the victim who, in cases of pending without any further follow up by the prosecution, can submit the matter to the appeal court so that the latter could order the public prosecutor to prosecute.

- We can furthermore re-attach to this second group the systems in force in the Eastern European countries in which the victim can fulfil several functions. The victim can be a personal prosecutor when the proceeding cannot be undertaken without her intervention.

She can be a subsidiary prosecutor acting at the sides of the public prosecutor, but who can be allowed by the court to pursue the proceedings in case of prosecution's withdrawal.

Finally, the victim can adhere to the trial by performing the civil action after the public prosecutor has instituted the prosecution. She may obtain damages afterwards.

In short, in some criminal justice systems (France, Spain, Belgium and Arabic laws) the victim can act at the same time by action meaning that she can compensate the non-action or the deficiency of the public prosecutor and brings the case to the court or she can act by intervening, that in to say, she adheres to the trial after it has already commenced by the public prosecutor.<sup>2</sup>

As for the Arab countries and separately from the strong influence of the French system, one as to focus that in the Charia'a law, the victim and her family play a very important traditional role in the criminal proceeding. The survivals of this traditional role are often used nowadays, against women's interest when they are victims of domestic violence or of "honour crimes".

We should therefore, precise that the fact of recognizing to the victim the right to open a criminal process does not mean that she is considered as a prosecutor, since its intervention is designed not to avoid the impunity to criminals, but only to permit her to act as a plaintiff before a criminal court and claim damages for a prejudice caused by an offence. This precision is great, as far as the victim's rights in the penal process are limited to guarantee her this finality. The victim is not allowed to oppose or to contest a release, a lenient sentence or all other measures of clemency granted by the court to the accused.

As a consequence, even in the most favourable judicial systems, the position of the victim in the penal process stays seconds, the thing that obviously influence on her rights and on her perception of justice. It is proved, therefore, throughout the opinion poll and the researches that very often the victims are not satisfied with the perception of their complaints by justice and the way they are dealt with in the criminal justice system. The victims often describe the penal process as a traumatic experience.

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<sup>2</sup> See Jean PRADEL : Procédure pénale comparée dans les systèmes modernes: Rapports de synthèse des colloques de l'ISISC, sous la direction de Chérif BASSIOUNI. Editions Erès France, 1998.



Meanwhile, and at the instigation of the international law, the rights of the defendant continue to be consolidated to lead to a real instability in the penal process, between the protection of the rights recognized to the victim and those devoted to the rights of the defendant. This is how and unlike the violations of the defendant's rights, which often lead to the nullity of the proceeding, the non-observation of the victim's rights does not compromise at all the exit of the proceedings. It neither involves the inadmissibility of elements of evidence nor prevents an acquittal. The penal proceeding as such does not provide for any system of sanction in cases of non-observation of the victim's rights.

The status of the victim in the criminal justice process began to be consolidated in 1985 with the adoption by the United Nations General Assembly of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. This Declaration guarantees to the victim the right to attend the trial, to be assisted by counsel and informed of the progress of the proceedings, and to participate in the decision-making process.

The case law of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and the Statute of the International Criminal Court have introduced new guarantees for victims of the most serious crimes.<sup>3</sup> Some other binding international instruments have come to strengthen the rights of certain vulnerable victims including women. These are notably the United Nations Convention against Transnational Organized Crime and its two additional protocols, namely the Protocol to Prevent, Suppress and to Punish Trafficking in Persons, Especially Women and Children, and the Protocol against Smuggling of Migrants adopted in November 2000 by the General Assembly. These instruments have not entered into force yet.

This positive evolution has brought the majority of the countries to start identifying and defining, in their criminal justice procedure, the rights of the victims and to establish mechanisms and legal framework, which take into account the fundamental elements of equal treatment with regard to the victims as enshrined by the international standards.

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<sup>3</sup> The many decisions taken thus far, especially by the International Criminal Tribunal for former Yugoslavia, have given the international courts the opportunity to develop a constructive case law that reflects the will to ensure effectiveness and may constitute a model for the national criminal procedure. The contribution of this case law includes the protection of the victims and witnesses by the non-disclosure of their identity. See articles 69 and 75 of the Rule of Procedure and Evidence of International Criminal Tribunal for the former Yugoslavia.

However, as in the case of other norms and provisions, it is in terms of application and practice that the deficiencies and the difficulties appear especially when it is a matter of protecting vulnerable or underprivileged people.

### **The precariousness of the rights and the protection of women as vulnerable victims in the penal process.**

As for all the people belonging to vulnerable disadvantaged social categories, the women's rights are precarious and their protection stipulated in the legal standards, is often theoretical and ineffective. When they are victims of criminality and when this criminality derives from an ancestral and structural inferior treatment, of women, it produces a gender specific criminality, which makes of women and little girls targets. This criminality appears through different forms of violence directed against women: in the family: domestic violence, marital rape, honour crime, incest... in society and at work: war against women in armed conflicts, aggressions, verbal, physical and psychological abuse, sexual harassment, trafficking, pornography and the exploitation of prostitution and misery.

This criminality is often badly dealt with by the criminal justice system because of the historical and worldwide dimension of violence undergone by women and of both its erroneous sociological and psychological perception, which do not always recognize the criminal aspects of certain forms of violence targeting women such as marital rape, sexual harassments and domestic violence. This fragility of the status of women is worsened by the complexity of the penal process, the vulnerability of the victim's status in general as mentioned above and the discrimination in the criminal justice towards vulnerable people.

This discrimination as known is often closely linked to the pattern of injustice, structural inequalities and the inferior status of some social categories. The potential victims of discrimination are well known and the ineffectiveness of a criminal justice, whether passive, colluding or incapable because of a lack of legal and/or materials resources, has often been

denounced by experts, treaty bodies and other mechanisms set up by the United Nations system to report on the human rights situations worldwide.<sup>4</sup>

This trend may be explained partly by the fact that in most countries, the criminal justice system does not have the necessary legal and material resources to enable it to avoid reproducing the discriminatory practices based on socio-economic, cultural, ethnic, national, political or material characteristics that exist in all societies to an extent or another. Sometimes the discrimination is institutionalised in criminal statutes, rules of procedure and penal policies.

Concerning women, the criminal justice system is often criticized because it is incapable of protecting them from violence and of securing them from repeated violations of their rights. The insufficiency as well as blanks in the legal framework is numerous. It concerns mainly the non-criminalization, in certain countries, of certain gender specific forms of violence, of discriminatory charges or penalties, of mitigations or extenuating circumstances based on discriminatory grounds with regard to women and some of conditions applied always in discriminatory manner, for receiving certain complaints or for establishing certain facts.

To these grievances are added attitudes often marked by sexism of policemen, prosecutors and judges. In many cases, women victims denounce the fact that they are not heard, not believed, not understood. The unavailability or ineffectiveness of the recourse procedures and remedies related to the fragility of the social status of women, the ignorance of their rights and their lack of confidence in justice that discourage women from taking legal action against perpetrators.

Amongst other barriers, the threats of reprisals when they are victims of domestic violence in all its forms or when they have to face the powerful ring of transnational and organized crime.

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<sup>4</sup> See the various reports of the Special Rapporteur on violence against women, its causes and consequences, Mme Radhika Coomaraswamy and in particular, the report on violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000) (E/CN.4/2001/73) and the report on the Special Rapporteur's mission to Bangladesh, Nepal and India. (28 October-15 November 2000) (E/CN.4/2001/73 et add.2)

This organized and transnational criminality, which makes women as a target, has now reached worldwide proportions. This phenomenon affects countries in different ways and leads vulnerable women to sexual exploitation and delinquency. These victims suffer from various forms of ill treatments such as rape, aggressions and a restriction to their freedom, handled and manipulated by traffickers and procurers. To crow all, the authorities of the countries in which they are brought, treat them frequently as delinquents.

When the trafficked women are in an illegal situation in the host country and they apprehend the return to their native country, the risk of being expelled immure them in silence. The insignificant number of lawsuits brought against traffickers is instructive, when compared to the reality of the phenomenon. Very often, it is the victims who are arrested and deported, while the traffickers continue to operate with impunity.

The national practices show that in all these cases and even when remedies are exercised, the slowness of the judicial system discourages women. The recourses are uncertain and have little chance of being successful either because justice tends to consider certain forms of violence against women (domestic and marital violence) as psychological problems, the thing which is conveyed by a reduction of their criminal character and the adoption of a lenient attitude towards their perpetrators, or either, because of the fact of the permanent stereotypes concerning deliberate provocation or responsibility of victims in the sexual abuses and the exploitations of prostitution. Sometimes the victim refrains from reporting to justice because she is unable to establish the veracity of the facts alleged, or because she frightened.

It is true that it is not easy to confront ones husband, father, boss or powerful ring of organized crime, notably when the victim cannot afford the service of a good lawyer, as is often the case. In certain criminal justice procedure, the apparent marks of violence and the medical certificates are not sufficient. The level of proof is often very high, sometimes requiring eyewitness, police conviction, caution or court order, that is to say, impossibility to demonstrate the truth of the alleged facts, notably, in marital violence or sexual abuse.

Experts who have dealt with these questions are unanimous; they say that in all the countries of the world, criminal justice is often incapable of protecting women against these

forms of criminality. In certain situations, the victims may be reluctant to report violence for fear of being stigmatised or punished, because in some countries, the plaintiff for rape who is unable to bring eyewitnesses risk to be sued for adultery. In other countries, they recourse to drastic measures and prejudicial practices to the women's rights to composite the incapacity of criminal justice to combat certain forms of male criminality. It concerns, notably, the so-called "protective custody" to rescue women at risk of being victim of honour crime, prostitution or trafficking.<sup>5</sup>

This is why, and to improve criminal justice system efficiency in dealing with criminality that takes women as targets and guarantee them a fair treatment and an effective protection of their rights as stipulated by the international standards, concrete measures must be taken at both national and international levels.

### **Conclusion:**

To improve the judicial treatment of women's victimization, many actions can be taken. These actions need affirmative actions, which are essential to eliminate progressively the historical injustices and structural discriminations that women continue to suffer from. Among the means to take into consideration we will mention:

- Abrogation of all discriminatory laws towards women and the criminalization of all violence acts directed against them;
- Governments must promulgate specific laws which assure an effective protection to victims taking into account their weak position;
- The legal framework has to assure victims an effective legal aid and an appropriate support during all the penal process in which the women's rights protection associations and groups are authorized to join the suit laws and to assist the victims in the pre-trial and trial process;

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<sup>5</sup> This practice sometimes used against the willingness of the victims, has been denounced by M<sup>rs</sup> Radhika Coomaraswamy, the Special Rapporteur on violence against women, its causes and consequences (E.CN.4/2001/73 et add.2) and by M<sup>rs</sup> Gabriela Rodriguez, Special Rapporteur on the rights of migrants (E.CN.4/2000/82) in their last respective report to the Commission on human rights. They have also ask the Working Group on Arbitrary Detention, to consider this problematic question, they discovered when they visited certain territories and countries under their respective mandate.

- With regard to the under consideration measures in the victims interest, the national criminal justice system and the regional and bilateral cooperation policies, which often penalize the vulnerable victims and ensure the impunity to criminals, must be reconsidered. In this effect, it is necessary that the recourse to "Protective custody" as means to protect the victims themselves must be voluntary and utilized as an ultimate recourse. Moreover, in any way it must be supervised by a judicial authority and submitted to appeals. The burden and level of proof to demonstrate certain facts must be reconsidered too, by the contribution and assistance of both the prosecutors and police;
- The right to restitution, compensation and rehabilitation for victims of gender specific offences must be predicted in the penal process in order to allow victims to institute themselves as plaintiffs and avoid the costly and aleatory proceedings before the civil courts;
- The criminal justice system has an important role to play to ensure the safety of violence's victims and those who are at risk during and after summoned in justice. The protection against intimidation acts and reprisals, information of the victims at the time and the conditions of release of their aggressors, and the establishment of tight controls of probation for men found guilty of violence against women and little girls must be envisaged and granted by the law.



## **Women Victims in Criminal Cases and Court Proceedings**

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### **The Law's Experience**

Women's encounter with the law and its court is probably as old as law itself.

As victims in criminal cases, women have often had to face the wrath of cross-examination not only over the relevant incident for which accused perpetrators are charged but also intimate and at times offensive probing of their integrity values and lives. Indeed women's liability to exposure of this nature is unparalleled particularly in sexual crimes.

As perpetrators of crime, women criminals have always had an unfair share of media publicity. The media and society at large appear to be fascinated that women are even capable of criminal acts as if somehow women as criminal contradicts the role circumscribed by society to women.

Thus, although women have had close encounters with the law, yet the same cannot be said of women's participation in lawmaking. This paper seeks to discuss the absence of this participation which has brought detrimental effects on women and their treatment under the law and in its courts.

### **Before Law?**

Law invariably grows from what was that regulated society, namely custom and beliefs. As what is customarily practiced extends over generations, it creates a value system which becomes hallowed as tradition.

During women's long encounter with the law and its court system, there has grown a tremendous body of presumptions and myths surrounding women that have seeped either formally or informally into the law.

In any lawmaker's quest to bring order to society, a lawmaker can only understand his function from the sum of his experiences. That understanding in turn is shaped by tradition, values, and their regulation of society. If a person's experience is carved from gender

biased perceptions and discrimination, it is almost certain that such experience will be brought to bear in the lawmaking processes.

The role of experience in shaping a person's understanding cannot be underestimated, be it in holding arguments, interpreting facts, reading religious verses or assessing another person's character.

Yet the law has failed to recognise that its perception of what is right and wrong, good and bad is coloured by the experiences of its participants in the lawmaking process, whether they be legislators, judges or lawyers, all of whom were in the past wholly and are now still predominantly male.

Thus loaded with gender bias and traditional perceptions of women, neither justice nor the conventional and accepted means of achieving justice can be said to be blind.

### **"Reasonable Man"**

In setting acceptable standards of behaviour, the law is peppered with references to a fictitious person known as "the reasonable man". What would a reasonable man have done in that instance? How would a reasonable man have reacted? Who is this "reasonable man"? Generally speaking it is that fictitious man riding the Clapham omnibus. Although it is arguable that a "reasonable man" would include a "reasonable woman", the differences between the sexes either due to biological or environmental factors ensures that a "reasonable man" cannot be both "man" and "woman".

Standards of equality cannot be construed on men as a frame of reference but must incorporate the differences between men and women<sup>1</sup>. For example, in a sexual harassment case, the issue may be whether the conduct of the accused was offensive or could reasonably be said to be offensive. What a confident male lawyer or judge considers to be offensive or threatening may not necessarily apply to a female victim who is a subordinate working late alone with her superior who have made similar remarks.

Thus, when a lawyer says, "You are a reasonable man, Judge. What would you have done?" is he inviting the judge to step into the shoes of this fictitious reasonable person or is he inviting the judge to deny the female victim's reality?

### **Public and Private Spheres**

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<sup>1</sup> This has been the source of debate on the issue of equality and sameness



As tradition emphasised that women's primary role is as mother and wife, women have traditionally been relegated to the private realm. The private realm is where no eyes should spy and into which no person should pry. It is wholly regulated by heads of the household who are generally patriarchs.

Crime on the other hand are matters of state and thus public concern. When a crime is committed, the state intervenes in the interest of maintaining security and justice for its citizens. It is in the public interest that crime be eradicated.

This dichotomy between public and personal spheres has created difficulties in relation to the treatment of women under the law. For example, when a crime occurs in the home, the law and its officers may sometimes discreetly look the other way.

For this reason, for a long time in Malaysia, women were denied meaningful remedy for domestic violence; when crime (a matter of public interest) occurs at home (a private sphere). In order to obtain an order to restrain the aggressor, a woman has to dismantle the "private sphere" and reposition herself in the "public sphere". By this, if the aggressor is her husband, she has to divorce him or at least undertake with the court so to do in order to be eligible to receive its protection<sup>2</sup>.

### **Family and Honour**

Secondly, it is argued that the functionality of society is determined by its ability to keep its most basic unit, namely the family intact. The family is thus invested with values that are created and enforced to maintain the status quo. A family's honour depends on its ability to keep such values. As the role of the patriarch is to protect women and the family, women gradually become the repository of these family values and honour. Whilst women are expected to be chaste and pure such values are not rigorously imposed on men.

Thus women who transgress family values or tarnish the family honour, whether real or imagined or whether with or without their participation (as in the case of rape) are stigmatised and often subjected to violence. This has resulted in women and girls being blamed (and blaming themselves)<sup>3</sup> even when they are raped.

In a twist of logic, by focusing on women and honour, it is the victim and not the perpetrator of violence who is made to assume responsibility for the offence committed against her.

It is thus obvious that honour and chastity are key factors in keeping a woman:-

<sup>2</sup> See *Law Reform (Marriage and Divorce) Act 1975* where a restraining order is only awarded during divorce proceedings or upon undertaking to institute divorce

<sup>3</sup> Extracted from case studies from the Women's Crisis Centre, Penang

- ignorant and therefore attractively naïve ("my parents never told me about sex");
- in fear due to society's tendency to blame women for violence against them;
- ashamed of having been a victim of violence ("no man will marry me now");
- silent in order to conform to society's rigorous demand that a woman be "pure"; and
- without access to justice.

## Rape

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.

Prior to the 1989 amendments to the rape laws<sup>4</sup>, a rape complainant's evidence in court may be disregarded if defence counsel can prove that the complainant is a sexually immoral person. The *Evidence Act* allowed counsel to bring in evidence of the complainant's "loose and immoral character" in order to impeach her evidence. In the confusion created over chastity, honour and truth, women who were sexually promiscuous were deemed incapable of telling the truth.

Traditionally lawmakers view rape as forced sexual intercourse by a man on a woman. This deeply ingrained equation of rape to sex is brought out during an appeal in 1998 by a man against his sentence for raping his step-daughter. In setting aside the sentence of five strokes of the cane imposed by a lower court, a High Court Judge observed that there was no evidence of violence or threats involved thus immediately deconstructing the concept of rape as violence against women.

This link of rape to sex similarly denied the campaign in Malaysia<sup>5</sup> to widen the definition of rape to include insertion of any object into the vagina in the 1980's. In refusing to widen the definition of rape, women's experience and understanding of rape is yet again ignored. For women, rape is not made any less by the use of other objects.

## Women Accessing Justice

Dispensation of justice is heavily dependent on truth. The pursuit of truth is a serious occupation. It is also generally assumed that people will be encouraged or persuaded to tell

<sup>4</sup> supra n 1

<sup>5</sup> The campaign by the Joint Action Group (JAG) i.e a loose platform consisting of several women's and other groups against violence against women (VAW) and Citizens Against Rape (CAR) launched on 1<sup>st</sup> October 1985 resulted in some amendments to the rape laws in 1989.

the truth if the gravity of the occupation is made clear to them. This is thought to be best achieved if the court atmosphere is made as solemn as possible.

In an adversarial system, the lawyers role in court is to examine and cross-examine witnesses in pursuit of this truth. The State and participants in the court process have often equated the solemn atmosphere, intimidating demeanour of counsels and judges and the technical and eloquent court language with truth. Dressed in black suits, lawyers make articulate examiners who cajole, lead and compel witness to tell the truth in their quest to prove that the truth will provide the facts to support their legal theories and analysis.

On the other hand, many women find the courts particularly intimidating, masculine formal and alienating. For example, in order to access the court system and bring the aggressor to justice, the complainant must face and accuse the aggressor in an open and public trial. Yet family honour demands secrecy and silence. Thus while the law calls for a public trial, social stigma and family honour warrants that the public be excluded or that the identity of the victim not be disclosed.

This creates a situation where the demands of the court system and women's experiences are diametrically opposed. In reality, violence against women is relegated to a dark silent and private world ridden with guilt and fear.

It is important therefore to challenge not only the systemic bias in the content of the law but as well, the court process.

## **Change**

From the introduction of common law into Malaysia, the colonial masters agreed to exempt personal laws which was left within the purview of the traditional rulers. This was on the basis that the colonisers were not versed in the local people's customary and religious practices, which in any event is a matter within the private sphere. Consequently, personal laws were made subject to the jurisdiction of traditional rulers, namely the Sultans and intricately bound with traditions.

The continued applicability of tradition and religious values is idiosyncratic to personal laws. Whilst legislators and the courts readily concede that the dynamism in economy industry and globalisation and its accompanying stresses require the creation of a whole body of law divorced from traditional concepts, they are reluctant to accord the same flexibility in personal laws consequently denying the changes experienced by women and the dynamism in the family.

Still, laws relating to violence against women were gradually and painfully amended mainly due to campaigns and lobby. This has however resulted in a haphazard treatment of the issue of violence against women.

For example, whilst the *Domestic Violence Act 1994* ensures that a woman is protected from violence like assault, causing hurt, false imprisonment, a woman is still without remedy if her husband rapes her. In essence, in spousal rape, a man can be charged for assault committed on his wife and a woman can in turn obtain protection from such assault up to the point before rape and thence, after rape but not for rape itself.

Due to the peculiarities of the common law, a dynamic Judiciary and enlightened Bar however, have it within themselves to influencing societal perceptions and correct gender biases.

Lord Keith of Kinkel<sup>6</sup> in quoting Lord Emslie<sup>7</sup> said, "Whether Hume meant to encompass in the concept of a wife's 'surrender of her person' to her husband 'in that sort' the concept is to be understood against the background of the status of women and the position of a married woman at the time he wrote. ... By the second half of the 20<sup>th</sup> century, however, the status of women, and the status of a married woman, in our law have changed quite dramatically. A husband and wife are now for all practical purposes equal partners in a marriage ... A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule."

Take also for example the Singapore decision of *Public Prosecutor v N<sup>8</sup>* by his Lordship Yong Pung How CJ who said, "At this junction, I would like to deal briefly with the prosecution's submission that the trial judge had placed undue weight on the fact that the offences had occurred as a result of a domestic dispute. Although he district judge made a passing reference in his judgment to the fact that the offences happened consequent to a 'domestic dispute' it was not entirely clear as to the weight he had placed on this factor in deciding on the sentence. In my view, it would be wrong to regard this as a mitigating factor. An offence committed against one's spouse should not be treated any less seriously than an offence committed against a complete stranger."

In another paragraph, his Lordship continued, "The respondent had behaved like an uncivilised savage who had no qualms about mistreating his estranged wife. It would certainly be sending out the wrong signal to the public if such a person who physically abused and threatened to kill his wife got away with a mere fine. In a marital relationship, it is inevitable that there will be differences and disagreements between the spouses.

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<sup>6</sup> *Regina v. R* [1993] 1 CLJ 1 at 3

<sup>7</sup> *S. v. H.M. Advocate* (1989) SLT 469

<sup>8</sup> [1999] 4 SLR 619 at 624

However, the parties should not resort to violence to resolve such conflicts. Spousal violence should not and will not be tolerated as a normal part of marital life.”

Compare this to a decision by a Session Court Judge in Penang involving acid throwing<sup>9</sup>. In translation, the learned judge said, “the specific facts of a case and mitigating factors cannot be disregarded. Firstly, the accused has a clean record throughout his long life and is not a common criminal ... Secondly it is clear that the unfortunate acts of the accused were a result of a critical domestic crisis faced by the accused at the relevant time due to the victim’s involvement with another man and her demands for a divorce from the accused.”<sup>10</sup>

Fortunately on appeal, His Lordship Jeffrey Tan J in enhancing the sentence, was critical of the matters taken into consideration by the trial judge, “First, the offence was downplayed – it was only categorised as one of ‘excessive violence’. Next it was not appreciated that acid-throwing is not only a serious offence, but also a heinous and barbaric act as well. ... Unfortunately, what played upon the trial court, as if there was this bee in its bonnet, were the personal factors:- (i) the respondent’s clean record ... (ii) that the offence originated from a ‘family crisis’.”

Court arguments and decisions that strongly condemn violence and removes justification for such violence are capable of leading society to review and reassess its gender biases and discriminatory practices.

## **Function of Law**

The law sets a standard and establishes the boundaries for what is acceptable behaviour and what is unacceptable conduct.

Effective laws must address two fundamental points. Firstly it must have a deterrent effect in order to prevent unacceptable behaviour. Secondly, it must provide victims with meaningful access to legal redress.

Whilst on the one hand, a strategy of prevention promises to be a more effective and economical remedy than after-the-fact legal redress, court procedures must be designed to encourage victims to come forward, protect the victim, bring out the facts and where appropriate, punish the perpetrator when such preventive strategy fails.

The examples above has shown that the law and its processes often do not recognise women’s reality particularly in its handling of women victims. If accessing the justice system

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<sup>9</sup> The victim approached the WCC for emotional support which proved crucial.

<sup>10</sup> Translation by author. The grounds of decision was delivered in Malay.

means that women are liable to be stigmatised or have their characters unreasonably questioned and scrutinised in court or by the media / society when they appear in court, then women will not access the courts.

## Reform

The tried and true method of approaching law reform in Malaysia by groups is by campaigning and lobbying the state to reform particular laws or policies. This was the basis for the amendments to the rape laws in 1989, the *Domestic Violence Act 1994* and the *Code of Conduct on the Prevention and Eradication of Sexual Harassment at the Workplace*<sup>11</sup>.

Yet, this process has proved to be painfully slow with much negotiations and compromises sometimes resulting in laws that are either diluted or dissimilar from that lobbied for.

Malaysia's ratification of the *Convention on the Elimination of All Forms of Discrimination Against Women* has resulted in little if any statutory changes led by the state<sup>12</sup>.

Noting that in the common law system, legislators are not the sole participants in lawmaking processes, it is time we balance the emphasis on legislation as a tool for changing the law and social perception with strategies to bring the same effect through arguments and pronouncements in court<sup>13</sup>.

It is said that the law may lead or the law may follow. With regards women, the law has followed in society's footsteps and confirmed societal biases and discrimination for a long time. Now is the time to harness the potential and dynamism of the law towards eradicating gender violence and bias.

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<sup>11</sup> This Code of Conduct whilst not having the force of law was the first definitive step taken by the Government to combat sexual harassment at the workplace. A draft sexual harassment bill was submitted to the Ministry of Human Resources by JAG in Mac 2001.

<sup>12</sup> In an attempt to bring about greater recognition and adoption of CEDAW, the draft *Sexual Harassment Bill*<sup>12</sup> refers to CEDAW in its preamble.

<sup>13</sup> This can be done through the training of lawyers and court challenges through intervention (if possible) or amicus curiae briefs.

## Honour Crimes and Honourable Justice

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### The reality

In March 1999 a 16-year-old mentally challenged girl, Lal Jamilla Mandokhel, was reportedly raped several times by a junior clerk of the local government department of agriculture in a hotel in Parachinar, North West Frontier Province, Pakistan. The girl's uncle filed a complaint about the incident with the police who took the accused into protective custody but handed over the girl to her tribe, the Mazuzai in the Kurram Agency. A tribal council decided that she had brought shame to her tribe and that honour could only be restored by her death. She was shot dead in front of a tribal gathering. (Amnesty1,1999,8)

Honour crimes take place in Pakistan (originally a Baloch and Pashtun tribal custom, honour crimes are now reported not only in Balochistan, the North West Frontier Province and Upper Sindh but also in Punjab province as well), Turkey (Eastern and South-eastern but also Istanbul and Izmir in Western Turkey), Jordan, Syria, Egypt, Lebanon, Iran, Yemen, Morocco and other Mediterranean and Gulf countries. It also takes place in countries such as Germany, France and the United Kingdom within the migrant communities.<sup>1</sup>

Honour crimes are usually practised husbands, fathers, brothers, uncles or tribal councils. The killing is mainly carried out by under-aged males of the family to reduce the punishment. They are then treated as heroes. The action is further endorsed by their inmates in prison if they are sent there. The inmates wash these young boys' feet and tell them that they are

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<sup>1</sup> The Nottingham crown court in the United Kingdom in May 1999 sentenced a Pakistani woman and her grown-up son to life imprisonment for murdering the woman's daughter, Rukhsana Naz, a pregnant mother of two children. Rukhsana was perceived to have brought shame on the family by having a sexual relationship outside marriage. Her brother reportedly strangled Rukhsana, while her mother held her down. (Amnesty1,1999,4) There is also the case of Zena Briggs who had married an English man against her parents' decision to marry her to a cousin in Pakistan. To this day, a death sentence is hanging over the couple as Zena's parents have employed people to kill them. (Amnesty2,1999,8)

now 'complete' men. The act is regarded as a rite of passage into manhood. But it is not unheard of for female relatives to either carry out the murder or be an accomplice to it.

It should be stated here that it is extremely difficult to collect accurate statistical data on honour killings in any given community. As honour killings often remain a private family affair there are no official statistics on practice or frequency and the real number of such killings is vastly greater than those reported. Every year more than 1000 women are killed in the name of honour in Pakistan alone. During the summer of 1997, Khaled Al-Qudra, then Attorney General in the Palestinian National Authority stated that he suspects that 70 percent of all murders in Gaza and the West Bank are honour killings. They are usually attributed to natural causes. (Ruggi,S) In Lebanon 36 honour crimes were reported between 1996 and 1998, 20 honour killings in Jordan in 1998, 52 similar crimes in Egypt in 1997 and in Iraq more than 4000 women have been killed since 1991. (Washington Post Foreign Service, May 8, 2000): The same report stated that between 1996 and 1998 in Bangladesh, about 200 women were attacked with acid by husbands or close relatives for honour related incidents, but the number of deaths is unknown.

### **Honour as a concept**

Cleansing one's honour of shame is typically handled by shedding the blood of a loved one; the person being murdered is typically a female, the murderer is typically a male relative, and the punishment of the male is typically minimal. Most significantly, the murderer is revered and respected as a true man.

Honour is a magic word, which can be used to cloak the most heinous of crimes.<sup>2</sup> The concept of honour is especially powerful because it exists beyond reason and beyond analysis. But, what masquerades as 'honour' is really men's need to control women.

Honour killings emerged in the pre-Islamic era to control women. These murders are not based on religious beliefs but rather, deeply rooted cultural ones. Family status depends on honour. In a patriarchal and patrilineal society maintaining the honour of the family is a

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<sup>2</sup> In the English language honour means high esteem, respect, recognition, distinction, privilege, reputation or a woman's chastity or purity.



woman's responsibility. In these societies, the concept of women as commodity and not as human beings endowed with dignity and rights equal to those of men is deeply embedded. Women are seen as the property of men and they have to be obedient and passive, not assertive and active. Their assertion is considered as an element, which would imbalance the power-relations in the parameters of the family unit.

Women are seen to embody the honour of the men to whom they 'belong', as such they must guard their virginity and chastity. Honour killings have its roots in the crude Arabic expression 'a man's honour lies between the legs of a woman'. By controlling women's sexuality and reproduction, they become the custodians of cultural and ethnic purity. But, male control extends not just to a woman's body and her sexual behaviour, but also to all of her behaviour, including her movements and language. In any one of these areas, defiance by women translates into undermining male honour. (Amnesty1,1999,5) The woman's body is considered to be the 'repository of family honour'. Alarming, the number of honour killings is on the rise as the perception of what constitutes honour and what damages it widens.

### **'Justice' meted out**

Women are both perpetrators and victims depending on from what side one looks at them. They have violated the 'laws' that govern their communities but they are victims in the eyes of human rights activists. The concept of honour and its translation in different societies has brought about many forms of violence against women.

In Sindh, Pakistan it takes the form of Karo-Kari killings. Karo literally means a 'black man' and a Kari means a 'black woman'. They are people who have brought 'dishonour' to their families through various forms of behaviour. There is no other punishment for a Kari but death. They are more often ritualistically killed and hacked to pieces usually with the explicit or implicit sanction of the community. In cities and towns, such killings usually take place by shooting, mostly in private, based more on individual decisions. In Karo-Kari killings, a man's honour is only partly restored by killing the Kari. He must also kill the man allegedly involved. But, in reality, as it is the Kari who is first killed, the Karo hears of the killing and

flees. In order to settle the issue, an agreement can be made if both the Karo and the man whose honour is defiled agree. But, justice is not sought by finding out the truth and punishing the culprit. It is done by restoring the balance by compensating for damage. The Karo has to pay compensation to the family of the Kari in order for his life to be spared. Not surprisingly, the compensation can be in the form of money or the transfer of a woman or both. (Amnesty1,1999,5) This practice has now even become an industry. Fake honour killings are committed in order to get compensation or conceal other crimes. Men kill other men in murders, which are not connected with honour issues and then kill a woman of their own family as alleged Kari to camouflage the initial murder as an honour killing. He may even go as far as killing a woman in his family to lend weight to his allegation.<sup>3</sup>

Another form of violence that is inflicted on women because of honour comes as a result of 'Satta-watta' or 'addo baddo' marriages as it is known in Pakistan or 'Berdel' as it is referred to in Turkey. This involves a tradition of marriage, which involves the exchange of siblings. As it is an exchange of unmarried young girls for a lesser dowry between families, it puts an additional burden on women to abide by their father's marriage arrangements. If one of the couples that got married in this way decides to divorce, the other couple has to separate as well.<sup>4</sup> Many advocates of honour crimes believe that the more brutal the murder is, the more honour the family will receive.<sup>5</sup>

It is not only women's right to life that is violated because of honour. Their right to liberty and movement is also restricted if they are endangered women. The predicament of women of the 'golden cage' is another form of violence towards women. These are the women who are being kept in jail in protective custody because their families had either vowed to kill them or tried and failed to kill them. According to Jordanian law, a woman cannot be released from prison unless a male relative comes to sign for her. Since these women's male relatives had rejected them in the first place, they are left to languish for years in jail.

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<sup>3</sup> The case of Amanullah illustrates this point. Amanullah married a woman who had earlier been fond of her cousin Nazir, a married man with eight children. As Nazir was unable to obtain consent from her family to marry her, Nazir murdered Amanullah and then killed his own innocent sister and declared the two of them as Karo and Kari. After a brief prison term, Nazir was given Amanullah's wife in compensation for the supposed infringement of his honour. (Amnesty,1999,9)

<sup>4</sup> In the case of Shaheen, she was allegedly set on fire by her husband in December 1998 in a 'Satta- watta' context. Their marriage had run into trouble and Anwar, her husband, wanted to send her home. But, Shaheen's brother, married to Anwar's sister, refused to send his wife home as well. Anwar found no other way to remove his shame than to kill his wife. (Amnesty1,1999,6)

<sup>5</sup> A Jordanian case tells of a man who killed his sister and then decapitated her and paraded her head for all the villagers to see. The 18-year-old sister had brought 'shame' to her family because she kept running away from an abusive husband. (Sati,N)

Some women even believe that they deserve such punishment. Some families sign a pledge not to harm the woman but they kill her nevertheless.<sup>6</sup>

Many women resort to suicide due to reasons of honour. This could be voluntary or involuntary suicide. They may commit suicide because of the social implications of dishonour to one's self or to one's family. They may also be invited to commit suicide by the family and in most cases, they do commit suicide.

Honour crimes are not confined to Muslim communities only. It occurs in various parts of the world. In Brazil, men who kill their spouses after the wife's alleged adultery are able to obtain an acquittal based on the theory that the killing was justified to defend the man's 'honour'. Wife murder cases soon came to be defended as crimes of passion. The emphasis in such cases was placed not on the nature of the crime itself, but on the degree to which the husband intended to commit it. But, the present Penal Code explicitly states that, emotion or passion does not exclude criminal responsibility. In order to overcome this hurdle, the defence lawyers devised the defence of honour as a new exculpatory strategy. This brings about the idea that the wife is the property of the husband. In Brazil, there have been contradictory decisions of honour defence.<sup>7</sup> Not surprisingly, this defence is rarely used when women are the murderers. This stereotypes men as impulsive while women are not. One of the most well-known cases that deal with the concept of the honour defence is the case of Joao Lopes. Lopes stabbed to death his wife and lover after catching them together in a hotel room. The highest court of appeal in Brazil overturned the lower and appellate court decisions of acquitting Lopes of the double homicide by saying that homicide on the grounds of defending one's honour is legitimate. But, when the case was re-tried, the lower court ignored the high court's ruling and again acquitted Lopes. (Turgut, P) Such defences, partial or complete, are found in the Penal Codes of Peru, Bangladesh, Argentina, Ecuador, Egypt, Guatemala, Iran, Israel, Jordan, Syria, Lebanon, Turkey, West Bank and Venezuela. The attitude that a man's right to kill when faced with adultery has not disappeared even in Texas. In October 1999 Jimmy Watkins was sentenced to only 4

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<sup>6</sup> Sirhan, a 35-year-old Jordanian is proud of killing his sister by shooting her four times in the head. Her crime was to report to the police that she had been raped. Sirhan signed a pledge not to harm her. According to him, his sister committed a mistake even if it was against her will. He considers it better to have one-person die rather than to have the whole family die from shame. Sirhan served only six months in jail. (Beyer, L)

<sup>7</sup> A couple were married for sixteen years and all was well until the wife got a job and started to come home late and refused to 'pay her conjugal debt'. The husband killed her and was acquitted on the legitimate defence of honour. The decision was upheld on appeal. (Turgut, P)

months in prison for murdering his wife and wounding her long time lover in front of their 10-year-old son.

Many reasons have been put forward by the perpetrators for these honour killings. They could vary from supposed 'illicit' relationships, for marrying men of their choice as expressing a desire to choose a spouse and marrying a partner of one's choice are seen as major acts of defiance in a society where most marriages are arranged by the family, for divorcing abusive husbands or even if they are raped as they are deemed to have brought shame on their family. Not surprisingly, men often go unpunished for such crimes. Mere allegation is enough. The truth of the suspicion does not matter as what impacts on the man's honour is the public perception. Even if the crime is dreamt by the perpetrator, it is enough. But, even when a woman is proven 'guilty', neither the domestic law nor the various international human rights conventions the states are party to would tolerate the kind of extra judicial executions meted to them. In a frequently cited case, a teenager's throat was slit in the town square because a love ballad was dedicated to her over the radio. (Turgut,P) This case shows that any reason is good enough to kill a woman.

Other reasons include bringing food late, for answering back, for undertaking forbidden family visits etc. These women's lives are circumscribed by traditions, which enforce extreme seclusion and submission to men. Male relatives virtually own them and punish contraventions of their proprietary control with violence. It is not necessarily for love, shame, jealousy or social pressure that these crimes are committed. The economic benefits also play a major role in the decision to kill a woman. The Amnesty report claims that reasons such as progressive brutalisation of society, the increased access to heavy weapons, the economic decline that results in increased exploitation of the honour system for compensation and pervasive corruption have also impacted on the increase of honour killings. (Amnesty2,1999,31)

### **Inaccessibility of justice**

Honour crimes violate many of the human rights provisions found in international law. When the life of a woman is taken away arbitrarily, the right to life is violated. Freedom from torture

and ill treatment is violated when women are forced to commit suicide, left in cells indefinitely and when various punishments are given for dishonouring the family. The perpetrators of honour crimes blatantly violate standards of equality before the law, equal protection of the law and non-discrimination. The right to marry is also denied to these women. The lack of an appropriate remedy is a violation in itself.

Although many of the countries, in which honour crimes take place, are parties to one or many of the international human rights instruments, they continue to violate those standards. The situation is compounded by state indifference and complicity in women's oppression.

Even when there are domestic laws that make honour killings illegal, the practice continues. The perception of honour crimes as a violation of the family's honour and man's honour and not as a harm against the physical integrity of the woman reinforces her unwillingness to come forward and report the crime. In Pakistan, the Constitution in several articles guarantee gender equality.<sup>8</sup> But, there are laws that directly violate these fundamental rights and thereby condone the custom of honour killings. The law of Pakistan does not explicitly sanction honour killings but it does so implicitly. The Pakistani Law of Qisas and Diyat 1990 cover offences relating to physical injury, manslaughter and murder. The law re-conceptualised the offences in such a way that they are not directed against the legal order of the state but against the victim. There have been many cases where the sentence was reduced because the family of the victim dropped charges. It is common practice worldwide that public interest is the overriding factor in the investigation, prosecution and punishment for crimes whether they are committed within the family or outside of it. Under international norms, victims of crimes are not goods and chattels of their families whose rights can be dispensed with at the discretion of their immediate family. Therefore, it is incomprehensible how the punishment that is meted out on a criminal can be reduced to half merely because the family decides to forgive and forget. This gives out the signal that it is a family affair and judicial redress can be negotiated.

Another such legislation that violates the Pakistani Constitution is section 300 of the

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<sup>8</sup> Article 25 says, 'All citizens are equal before the law and are entitled to equal protection of law' and Article 27 states, 'there shall be no discrimination on the basis of sex alone.' Article 8 of the Constitution states, 'Any law or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.'

Pakistani Penal Code that deals with mitigating circumstances. Even though sudden provocation was formally removed as a mitigating circumstance, the courts have gradually reintroduced this provision in their interpretation of the law and have sentenced men charged with crimes of honour to lighter sentences even when the murderer did not claim to have been suddenly and severely provoked.

Under the 1979 Zina law men and women can be stoned to death or publicly whipped 100 times for committing zina (adultery or premarital sex) but such charges are brought almost exclusively against women. This violates the gender discrimination clause and treats women as second-class citizens by intimidating them and preventing from demanding their rights. This also encourages men to abuse women with impunity.

Article 98 of the Jordanian Penal Code states that, 'he who commits a crime in a fit of fury caused by wrongful and dangerous act on the part of the victim benefits from a reduction of penalty.' Article 341 considers murder a legitimate act of defence when, 'the act of killing another or harming another was committed as an act in defence of his life, or his honour, or somebody else's life or honour.' Rights activists argued that this article violated the Jordanian constitution where all Jordanians are equal. They wanted to eliminate the item altogether but now it has been amended so that the right to kill has been extended to women as well. This confirms the primacy of honour over life.

In Turkey, fornication, either by women or men, is not defined as a criminal offence. But, the custom of honour killings is in direct contrast to this where the 'fornicator' is given a 'death sentence'. Furthermore, killing a blood relative is punishable by death according to Turkish law. But, when it is an honour crime, committed on witnessing an adulterous act or suspicion of an illicit liaison and is caused by heavy provocation, the sentence is reduced to an eighth of its severity.<sup>9</sup> The Iranian Penal Code 'recognises the right' of a father or brother to murder a girl found guilty of pre-marital sex 'by subscribing a maximum sentence of only six months in jail or a fine', adding that 'in the case of a husband murdering an adulterous wife, there is of course no sentence.' The Iraqi Penal Code was also amended to effectively condone honour killings a few years ago.<sup>10</sup> The Moroccan Penal Code in Article 418 states

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<sup>9</sup> Article 462 of the Turkish Criminal Code.

<sup>10</sup> WLUML Newsheet Vol. XI No.1.

that, 'murder, injury and beating are' excusable if they are committed by a husband on his wife as well as the accomplice at the moment in which he surprises then in the act of adultery.' The Syrian Penal Code in Article 548 states the above and further says; 'he who catches his wife or one of his ascendants, descendants or sister in a suspicious state with another benefits from a reduction of penalty.' Any law, which provides a defence to a crime based on gender is a violation of human rights and also violates not only international agreements but also the equality provisions in the constitutions of the countries. These specific laws hamper redress as they discriminate against women. The question to be asked here is if the law does not set the death penalty for adultery, then why should it encourage the male relative to deliver the death penalty for the same thing?

An example of state inaction can be seen throughout the case of Samia Imran in Lahore, Pakistan, who was killed on 6 April 1999. She was murdered in the office of the AGHS legal cell in front of lawyer Hina Jilani when she came seeking help in securing a divorce from her first cousin husband who had thrown her down stairs when she was pregnant with a child. She was also subjected to high levels of domestic violence in her 10 years of marriage. Her mother, lady doctor, Sultana Sarwar, accompanied by Samia's father-in-law uncle Yunus, entered the office with a gunman who shot Samia through the temple. The gunman was shot by a police constable doing guard duty at the office while he was trying to escape. Samia's parents were opposed to her decision to seek divorce and had gone to the last extreme of eliminating her. (Friday Times, 3-9 Sep, 1999) Although a First Information Report (FIR) was lodged immediately against Samia's parents, Ghulam (president of the NWFP Chamber of Commerce and Industry) and Sultana at a Lahore police station and the press covered the murder and reported it objectively, the administration adopted a policy of delay and prevarication when dealing with this case. A counter FIR was allowed to be registered after a meeting with religious leaders. Here, Ghulam Sarwar accused Hina Jilani and Asma Jehangir (the UN Special Rapporteur on extra judicial, arbitrary and summary executions and then chairperson of the Human Rights Commission of Pakistan) of abducting his daughter while he was away on Haj and murdering her along with his driver. No one was arrested for the murder of Samia and her parents were able to get bail before arrest. The lawyer, Hina Jilani, was also forced to seek bail before arrest from the Lahore High Court. While allowing bail for a month, she was asked to seek a similar bail at the Peshawar High Court. This was an absurd charade of prosecuting the two human rights lawyers. The fact

that the killing was carried out in the presence of well-known lawyers indicates that the perpetrators were convinced they were doing the right thing, were not afraid of publicity and felt no need to hide their identity as they felt sure that the state would not hold them to account. (Amnesty1,1999,7) There is also some evidence that the investigating authority actually forced the security agency, which witnessed the escape of the killers, to change the testimony of the personnel. The police also forced the rickshaw driver in whose rickshaw the killers escaped to change his testimony. The police try to act or allow them-selves to be used as guardians of tradition and morality rather than impartial enforcers of the law. They become mediators or counsellors rather than registering complaints and taking necessary action. The killers are rarely prosecuted and lawyers are very often hired prior to the incident for the offender to get a lighter sentence. Financial corruption also seems to contribute to police inaction before such crimes. If the culprit is convicted, the judiciary ensures that they usually receive a light sentence, forcing the view that men can kill their female relatives with virtual impunity.<sup>11</sup>

This reinforces discriminatory customary norms rather than securing constitutionally secured gender equality. Parts of the judiciary and even other educated citizens hesitate to interfere in the patriarchal structure of society as they believe any such interference will disrupt society and betray their religion. Religious rulings were issued against the two lawyers and head money was promised to anyone who killed them. Asma Jahangir lodged a FIR with regards to this and also called the government to set up a judicial inquiry headed by a Supreme Court judge to investigate cases of honour killings. But, no action seems to have been taken on either issue except for declaring the act 'dishonourable'.

After the murder of Samia, 24 senators from the main political parties in the Senate signed a joint statement condemning the killing and expressed themselves against the hateful and primitive custom of killing women in the name of honour. The statement later developed into a draft resolution for passage through the Senate. But, the majority opposed the resolution saying that the Samia case was sub judice. The resolution was changed four times to accommodate the objections. The final draft asked the Senate to condemn the practice of

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<sup>11</sup> In a Jordanian case, a 38 year-old man was sentenced to only one year in prison after he killed his two sisters. The tribunal said that Mohammad Ahmad benefited from a reduction in penalty because he committed the crime in a fit of fury and because he killed his sisters, Kifaya 23 and Nadia 32, to cleanse his family's honour after finding a strange man in the house. (Jordan Times, June, 1, 1996)



honour killings as it was clearly in violation of the law of the land and the Islamic edicts. But when the resolution was put before the Senate, the ruling party senators and senators from the NWFP-based ANP objected to it being tabled. The Senate then voted 20 to 2 that the resolution should not be tabled at all.

The Pakistani representative at the UN Human Rights Commission at Geneva stated his government's position by saying that the government of Pakistan could not approve or support such hateful practices and promised that all efforts will be taken to protect Asma Jehangir and Hina Jilani. But, the above inaction simply shows that Pakistan is not able to stand by the commitments it makes to international organisations and institutions. In 1998 when the annual report of the HRCP was released, the Information Minister had reportedly said about allegations of violence against women and of child labour, 'these are a feature of Pakistan society, they are not part of any government policy or a consequence of any law...' But, when no action is taken to make women aware of their legal and constitutional rights or to give remedies when those rights are violated, it does become the responsibility of the state.

There are only a few support systems for victims of honour. NGOs and other women's organisations strive to provide practical services to protect and assist women in need. These provide services such as counselling, mediation, help with legal issues and correspondence with the police, an emergency hotline and rehabilitation shelters for abused women. But, lack of access to such services for most women, lack of resources and specially trained staff to deal with specific issues result in many problems. Women in these societies rarely know their way about in the outside world due to their strict upbringing. They are unused to public transport; they have no money of their own; and they are vulnerable to further abuse when they are moving around alone.

The concept and practice of honour crimes and the failure to punish the perpetrators has resulted in the violation of international, constitutional and legal guarantees of women's rights. A false value of honour and the customary domination of women have resulted in the guarantee of women's rights being conditional on many issues. The preservation of these values at the cost of women's lives is proudly claimed as the preservation of our culture.

## **State responsibility**

The UN Special Rapporteurs on Extra judicial, Arbitrary and Summary Executions, the Independence of Judges and Lawyers and Violence against Women have expressed their concern over honour killings and its result in violations of human rights. The state has a dual responsibility- it is not only required not to commit human rights violations, but also to prevent and respond to human rights abuses unlike in the past. Systematic failure by the state to prevent, investigate and to punish perpetrators leads to international responsibility of the state. This includes violence against women in the name of honour. Failure to take measures to prevent and end honour killings, failure to eradicate traditions, which prescribe honour killings, not attempting to end the impunity of perpetrators of such killings, failure to abolish discriminatory laws and the failure of the police and the judiciary to apply the law in an unbiased manner signalling official indifference if not approval of the system results in state responsibility.

Recently, the UN member states were forced to vote on a Netherlands sponsored revised draft resolution on honour crimes entitled, 'working towards the elimination of crimes against women committed in the name of honour'. It was adopted by the Third Committee on 3 November 2000. The text declares that, 'states have an obligation to exercise due diligence to prevent, investigate and punish the perpetrators of such crimes, and to provide protection to the victims and that the failure to do so constitutes a human rights violation'. The concept of state responsibility has expanded in the recent years to include violations by private actors.<sup>12</sup>

The Committee on the Elimination of Discrimination Against Women confirmed in the General Recommendation 19 that, 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.'<sup>13</sup> So, although in the international human rights arena honour crimes against women are understood as a form of domestic violence or violence against women in the family or community, it comes within the responsibility of the state.

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<sup>12</sup> See the Velasquez Rodriguez Case. (Inter American Court of Human Rights)

<sup>13</sup> See also the Human Rights Committee General Comment 20, CEDAW Article 2(e) and the Preamble of DEVAW.

## **Real justice**

The Criminal Court of Jordan sentenced a 40-year-old man to life in prison with hard labour after finding him guilty of killing his wife and four children in May 1997. According to the prosecution charge sheet, the defendant plotted to kill his wife and children after ten years of marriage because he suspected that the children were not his. Paternity tests performed on the child victims proved that they were his children. It was later revealed that it was financial reasons that were the actual reason for the murder of his family. (Jordan Times, Sep, 1998)

This case sends out the message that a woman's life is worthy of real justice.

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# **Situation of Japanese Women in Criminal Courts in relation to Sexual Offence**

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## **1. Introduction**

It is these some years of things that the care to face a criminal victim in the Japanese society is causing a trouble. The violence which a woman suffered even of that, especially, the crime (The following, "a sexual crime" are said.) of the sex violence. Even if a ratio is done to other criminal victims, it can be said that sexual victim's right was denied. It is understood that sex violence is the act of violence which generally the form of the sex behavior was taken in. In many cases, an act of violence is turned to the person in the weak position from the person in the position which predominance has socially economically again from the viewpoint of physical strength. Therefore, the thing of the mental ill-treatment is made of physical which takes the form of the sex behavior and to receive, and there is no room to doubt in being the denial of the sexual rights.

Sexual ill-treatment to the rape, compulsory obscenity, compulsory prostitution, FGM, Sexual Harassments, pornography, Domestic Violence, and so on are shown as the type. Most victims are a woman as to the type of other sexual crimes though the thing which makes a woman a victim, and a regulation (Japanese Criminal Law the 177th article) are being given as for the rape. The other side, an assailant have many acquaintances with the victim, too. The other side, an assailant are often acquaintances with the victim, too. However, there is present condition which must clear various prejudice because it has the qualification that these sexual crime victims are a victim as a victim recognized.

## **2. Lack of the understanding of the society**

Though it is the serious problem that woman's human rights are violated, it is shown that the understanding of the society lacks as the violence against the woman. It doesn't try to

show a tendency to appreciate the complicated mentality conditions of the woman who is a victim in the society. It thinks whether the recognition to say and which was mistaken is caught as a society common idea and it says as that reason with the superstition as well that it faces the sex violence which overflows at present.

The following tries to give those superstitions.

[1] 'It is a dark place, and it is attacked by a strange man suddenly.'

Actually, there are many cases that an assailant and a victim are acquaintances, and an assailant uses trust relations with the victim, too, and he is compelling sex relations. And, there are many insides in "the house", "the hotel", and so on in the place as well to suffer damage. (Tokyo rape relief center inquiry).

[2] 'It is because a victim, that is, a woman had a fault.'

There is a point of view because a victim (woman) had a fault (It was attractive, there was an unguarded moment, it was provoked), it is raped, is often done. But, a victim doesn't have a fault, and the fundamental way of thinking in the assailant is necessary at the case as well that it was making a temporarily gloomy night journey about the sexual crime. There is actually a thing made "It is clear that the woman who complained about it though that it was raped is a fact has a big fault, too." by the judgment in 1994 in Japan.

[3] 'If it is really unpleasant, it is supposed to resist it, and it is supposed to run away, and it is supposed to be able to be done'.

The matter whether a victim resisted how much is made a problem at the judgment when an assailant is accused of a charge of 'if it is really unpleasant, it be supposed to resist it, and it be supposed to run away, and it be supposed to be able to be done' rape. But, when it feels the fear that it may be killed if it resists it, it is natural it says, and it is, or a body shrinks and can't to move any more, and it is a mistake to ask it the degree of the resistance.

[4] 'A rape is man's instinct.', the 'It has the wish that it is raped by a woman.'

There are trust relations in that foundation, and it is really different from the rape even if it may hope for the violent sexual intercourse of 'A rape is man's instinct.', the 'It has the wish

that it is raped by a woman.' example, the woman. Though the rape seen by pornography, animated comics and AV is being drawn like one of the variations of the sexual intercourse, the woman who is actually hoping to have sexual intercourse compelled by the partner whom it dislikes by the thing completed by a man in power is not in woman's raped wish. If a rape isn't seen by an animal except for the human being, a good man's rape wish and woman's rape wish are prescribed due to the culture.

[5] A rape doesn't exist in the married couple.

As for the rape, it is just a recent thing to come finally to be recognized between the married couples. The answer according to "the investigation about the violence between the men and women" where a man and woman joint participation office carried it out in September, 2000, to face the question of "Though a partner dislikes it, a sexual act is compelled." between the married couples reaches 60.0%. A court doesn't always become illegal at all, and moreover doesn't always have the right which rejects this at the side of the wife just because "... followed in case of that and a husband faced a wife and sexual negotiation was compelled though there is a precedent that a request" for divorce from the wife is dismissed in 1985 in the Japanese judgment. "However, it illegal and there is case when a husband particularly compels this when it says ordinarily and it can think that a wife rejects sexual negotiation is more. For example, it can think about the case and so on that a wife is invalid when a husband has other women when the negotiation of the physique that a husband is unusual, or the unusual number of times is asked." A judgment is being given. As for being strange viewed from the point of view of gender, this judgment is needless to say.

It won't be an exaggeration even if the victim living in the society which believes "the above superstition" can't complain about it to the judgment and it is said that a sexual crime becomes latency all the more.

### 3. Victim in the due process

It is shown by the edition criminal white paper in the year of 2000, it feels a burden with the cooperation, that a rape and most of the victims of compulsory obscene face investigation

as a result of investigation in the judicial affair synthetic laboratory, and the witness appearance (the victim in the due process).

The problem that it couldn't be accused any more with can't recover from the shock that a victim is mental, because a sexually violent crime within 6 months of the identification of the perpetrator(s) of the incident, and an accusation period was decided with six months was pointed out to the Criminal Procedure Code revision in May, 2000.

After that, these voices are caught, "the Criminal Procedure Code" in May 2000, and "prosecution examination meeting law" are revised, a place except for the court is made to be the abolition of the accusation period of the sexual crime, a witness as to seat, it goes through the television monitor, the system of the examination of witness by the video link form that an examination of witness is done and so on is introduced. And, it proceeds with dealing for the consideration for the victim to the indication that the burden of the victim at the stage of the circumstance levy is big in such cases as the various policies based on "The outline of victim countermeasure" at the police, "the criminal investigation standard", and so on and the introduction of the victim support staff in the prosecution.

These dealings should be evaluated. However, as for the judicial place, it can be said that the following point is a problem.

(1) The existence of "violence or threat"

A charge of rape shows the existence of "the violence or the threat" as those formation necessary conditions in such cases as a charge of rape. The fact authorization that it was fully understood and it had "violence or a threat" is given, or it is a doubt with social, which affects woman's human rights deeply as for the violence which faces a woman by this as expected the structural problem. In other words, it is the thing of whether the police, prosecution and a court understood "the violence or the threat" of some form, forms-less. Lack of that understanding produces "Second rape".

Moreover, when it thinks about method good which protects a charge of rape with the woman's sexual rights, a victim agrees at that time, or that sex negotiation becomes a point whether to violate her sexual rights. Though there is no "agreement", a victim's character is

damaged remarkably, and it can be said that it makes right of the woman's sexual rights about the thing that the sex negotiation of the level which "the violence, threat which makes partner's resistance" remarkably difficult doesn't entail doesn't become a rape.

## (2) Lack of the understanding among judges

The judge that "the above superstition" exists as a society common idea, and it can be said that it is the same sense about it as soon as it isn't said. A woman agreed, or originally a woman side had a problem again, or a court made the matter whether both issues and a woman's her sexual history had relevance again a problem in a matter such as a rape. It is because there is some superstition that it will agree on the sexual relations as well with what kind of man if a woman agreed on the sexual relations with a certain man. Such superstition brings about the case that a victim's past her sexual history is adopted as a proof. It is a doubt greatly, it causes a trouble that these did sexual intercourse in agreement with other men in the past in the judgment, though it shamed many victims and the right of the victim's privacy was violated and a victim was actually brought to a trial and that woman was certainly raped. It will be able to be said that a past her sexual history and a rape case don't have relevance.

## 4. Countermeasure

Violence prohibition to the woman, who included the above contents with the revision of the existing law must grapple with method enactment to prevent to raise the social whole recognition though the training of gender education program must be carried out in the education judicial organization to the judge and the administrative organ.

## 5. Conclusion

There is not only the man who believes "the superstition" expressed by this, but also a woman exists in our society. But, a woman doesn't know when it becomes the victim of the sexual crime. Sex violence is a crime. When it is a crime, it must be judged properly. It is needless to say that that is indispensable to the victim's right and the recovery of the dignity.



In other words it sometimes becomes the side where the woman, who was the side which resorted was charged (a Court doesn't trust a woman). Then, a woman herself in the sex violence is troubled by "the above superstition". It is necessary to increase the woman's people concerned in a judiciary, too, and it can be said that education about the sexual crime to the people concerned in a judiciary, is indispensable about increasing the woman's people concerned in a judiciary to solve those. Moreover, the education enlightenment activities to face in the social whole are important at the same time, too, and it must support a victim in the social whole.

But, as for being more important, it is indispensable to change the society which recognizes discrimination against sex. Though, it thinks like the distance which is still far, we must change the society structure which the matter that a man controls a woman on the various sides of the daily life.



## Civil Cases and Women in Court

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This paper is based on Philippine Laws and experience with the hope that we can learn and draw some principles which will be of benefit to Filipino women and to the rest of women in Asia.

### I. Background of Filipina: Rights

During the early times, Filipina was pictured as naïve, demure, totally submissive to men, epitomized by Maria Clara in Rizal's novel, "Noli Me Tangere". In fact, they were not given rights in our laws until recent times. However, laws since the pre-Spanish times have included provisions affecting women but which shows their inequality to men. This is embodied in the Code of Maragtas and the Code of Kalantiyaw.

The Code of Maragtas promulgated by Datu Sumakwel of Panay between the 12<sup>th</sup> and 13<sup>th</sup> Century provides that: "if a man had a child by a woman and runs away from her, the parents of the woman shall disinherit her. Refusal to marry the woman shall not mean only death for the man but for their child as well".

In the Code of Kalantiyaw promulgated in the 14<sup>th</sup> century by the 3<sup>rd</sup> Chief of Panay states that: It is an obligation to every mother to teach matters pertaining to lust secretly to her daughters and prepare them for motherhood.

Although, provision in these laws require or oblige women to follow the law they were not provided with any rights until the 1935 Philippine Constitution. The "Association Feminista Filipina", an association exclusively for Filipino women doing work as early as Jan. 3, 1905 but was formally recognized only on Feb. 5, 1921. It played a great role in the fight of Filipina to have the right vote.

The right of suffrage was granted to women provided that: xxx in a plebiscite which shall be held for that purpose within tow years after adoption of this Constitution, not less than 300,000 women possessing the necessary qualification shall vote affirmatively on the question.

This was changed in the 1973 Philippine Constitution when the right to suffrage was given without any qualification as to the gender of the voter. In the advent if the 1986 Constitution several provisions were made for the protection of women such as:

Article 13 Section 4 – The State shall protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation.

Article 14 Section 6 – The State shall afford protection to labor especially to working women and minors, xxx.

## **II. Philippine Laws on Marriage:**

Philippines is one of the few countries where there is no divorce. In fact, among the countries represented in this forum, we are the only country where there is no divorce. Many attempts were made to have one but because of the heavy pressure of the Catholic Church and traditional attitude of the Filipinos, legislation to this effect has not yet been successful. It is not easy for the Filipino women to separate from her husband. This makes the Filipina in an inferior situation than her counterparts in Asia.

A) From my region, which is Quezon City, the most commonly filed civil case is nullity of marriage with 420 cases filed in a year, followed by annulment of marriage, 89, and legal separation, 27. Most of them were filed by women. The number of nullity cases increased when the Family Code took effect on August 3, 1988. Many rely on psychological incapacity as a ground. There are three instances when marriage could be

terminated, namely: (1) declaration of nullity or nullity of marriage (2) annulment of marriage and (3) legal separation.

The above-mentioned nullity of marriage has been proved in our laws as "a marriage contracted by any part who at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage shall likewise be void even if such incapacity becomes manifest only after solemnization".

During early implementation of the Code, cases on nullity of marriage were favourably acted upon by various courts on the ground of psychological incapacity. Mere alcoholism, failure to support the family, sexual infidelity, and abandonment were considered as psychological incapacity. However, recent decision of the Supreme Court put a certain degree of limitation. In *Lucila Estrella Hernandez V. CA and Mario Hernandez*, G.R. No. 126010, December 8, 1999, the Supreme Court laid down the basis when annulment could be granted based on psychological incapacity. It said: (a) the root cause of psychological incapacity. It said (a) the root cause of psychological incapacity must be medically and clinically identified (b) alleged in the complaint (c) sufficiently proven by experts and (d) Clearly explained in the decisions. Article 36 of the Family Code requires that the incapacity must be psychological – not physical, although its manifestation or symptoms may be physical. The evidence must convince the Court that the parties or one of them was mentally or physically ill such to an extent that the person could have not known the obligation he was assuming or knowing them, could have not given valid assumption thereof. Although no example of such incapacity need be given here so as not to limit the application of the provision under the principle of *eiusdem generis* nevertheless such root cause must be identified as psychological illness and its incapacitation nature fully explained. Expert evidence may be given by qualified psychiatrist and clinical psychologist.

The strict interpretation of psychological incapacity became a discouraging factor to some who intend to file nullity of marriage especially to those who belong to the lower and middle – lower income bracket of society as having an expert witness entails additional expense. Lawyers alone charge P100,000.00 to P200,000.00 for cases like this.

The above mentioned case is very interesting. A glimpse of which is as follows: Mario was ten years younger than Lucita when they got married in 1981. The latter was his college professor. They had 3 children. In 1992, Lucita filed a case for nullity of marriage on the ground of psychological incapacity. She alleged that during the period of their married life, Mario engaged himself in drinking spree, had illicit relation with another woman with whom he had an illegitimate child, then he took another woman until Lucita has sexually transmitted disease, he was out of job, when he was employed he availed of early retirement and spent everything to himself. All of these manifestations were interpreted by the Court as not grounds of psychological incapacity within contemplation of the Family Code. They say that they are manifestations of disordered personality which make him completely unable to discharge essential obligations of marital state not merely due to private respondent's youth and self-conscious feeling of being handsome. Furthermore, it is said that no evidence was presented to show that he was not cognizant of the basic marital obligation.

The Supreme Court was quite strict in interpreting psychological incapacity in this case. The petition of Lucita for declaration of nullity of marriage was denied.

- B) When marriage is declared void by the court, it is as if no marriage took place. However, there is a necessity to declare it so because of the provision in Article 40 of the Family Code which states that the absolute nullity of a previous marriage may be invoked for the purpose of remarriage on the basis solely of a final judgement declaring such previous marriage void.

Other grounds for nullity of marriage are:

1. Those contracted by any person below 18 years of age even with the consent of the parents or guardians;
2. Those solemnized by any person not legally authorized to perform unless such marriage were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so;

3. Those solemnized without license except those covered by the preceding chapter;
4. Those bigamous or polygamous;
5. Those contracted through mistake of one contracting party as to the identity of the other incestuous marriages like those between stepfather and stepdaughter.

Under Article 85 of the Civil Code, there are six grounds for annulment of marriage:

1. Lack of parental consent in cases where the parties needed the same
2. The existing prior marriage of a person who because of the absence of his or her spouse marries again
3. Insanity of one of the parties
4. Fraud vitiating the consent of one of the parties
5. Violence or intimidation that vitiated the consent of one of the parties
6. Impotency

Under the above article of the Family Code, however, the following changes have been made to Article 85 of the Civil Code:

1. The ground prior existing marriage (par. 2) has been eliminated because under Article 42 of the Family Code, there is no need to annul the second marriage of the present spouse upon the reappearance of the absent spouse, since said second marriage is automatically terminated by the reappearance of the absent spouse, through recording of the absent spouses reappearance in the office of the local civil registrar.
2. Undue influence has been added to par. 5 of the Article 85 of the Civil Code as a ground for annulment of marriage.
3. Par. 6 of Article 85 of the Civil Code has been amended by the Family Code by making absolute and relative impotency grounds for annulment of marriage.

4. And another ground for annulment of marriage has been added, If either party is afflicted with sexually transmitted disease found to be serious and appears to be incurable.

C) Legal Separation is the least resorted to by couples for the simple reason that if granted they could live separately but their marriage bond remains intact. Thence either of the couple cannot re-marry.

The Civil Code provides for two grounds for legal separation, namely:

1. Adultery of the wife and concubinage of the husband both as defined in the Revised Penal Code although criminal conviction is not necessary.
2. Attempt by one spouse against the life of the other and again criminal conviction is not necessary.

Adultery is committed by any married woman who shall have sexual intercourse with a man not her husband and by the man who has carnal knowledge of her to be married, even if the marriage be subsequently declared void.

The Family Code has broadened the ground in legal separation. It now includes the following:

1. Repeated physical violence or gross abusive conduct directed against the petitioner, a common child or a child of the petitioner;
2. Physical violence or moral pressure to compel the petitioner to change religious or political affiliation;
3. Attempt of respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner, to engage in prostitution, or connivance in such corruption or inducement.
4. Final judgement sentencing the respondent to imprisonment of more than six years, even if pardoned.
5. Drug addiction or habitual alcoholism of the respondent;
6. Lesbianism or homosexuality of the respondent;
7. Contracting by the respondent of subsequent bigamous marriage, whether in the Philippines or abroad;

8. Sexual infidelity or perversion;
9. Attempt by the respondent against life of the petitioner; or
10. Abandonment of petitioner by respondent without justifiable cause more than one year.

Topic on property used to be tabooed to would-be couples. Many marriages did not take place because of this. It is part of our culture that if you ask any question regarding the property to the would-be husband or wife, you are marrying him or her because of his or her property. This used to be the presumption

Philippine law used to provide for conjugal partnership of gains as the general rule that will govern the property relation between husband and wife. This simply means that the common property of the couple begins only on the date and time of the marriage. That which he or she brought to the marriage belongs to him or her exclusively during the marriage. However, recent legislation provided that the property relation of the husband and wife should be governed by the absolute community of property. All properties of the man and woman acquired before and during the marriage belong to the two of them. This provision paved the way to acceptance of pre-nuptial agreement. Filipino women are now active members of the community. They engage themselves in useful business and occupations. This is not true before, Filipino women were confined in their homes. They were completely dependent on their husbands. Since Filipino women have now more money and properties, they learn to protect what they have. They have learned to accept the pre-nuptial agreement, that there is nothing wrong with it. In fact, it is intended to protect her property no matter what happens to her marriage.

Support of the wife and children can be one of the prayers in nullity, annulment of marriage and legal separation. However, this could be filed simply as a support case by women who do not want to file cases on marriage. Even if granted, there is always the possibility that the woman has to go back to court when the husband stops giving support to the wife and children either because he has to support another family of which his income is not sufficient or he is out of job or simply he does not want, anyway the wife is already free of her marital obligation.



### **III. Women in Court:**

It was only in the later 1970's when a woman was appointed as associate justice of the Supreme Court. At present, there are three lady justices in the highest court. There are ten in our Court of Appeals. There are 125 RTC female judges while 635 salas are occupied by men. There are 127 lady judges in the Metropolitan/Municipal Courts while the male judges occupy 415 salas. Almost 50% of the law school population are women.

### **IV. Conclusion and Recommendation:**

Filipino women occupied a very low status in the society, almost to the level of slave during the early period. However, Western influence and recognition of the need of the community to the service of women raised their level of status. Women occupy high government position, even our President is a Filipina. They play an active role in the community, in their profession and family. They are almost equal status with men. However, there are still some situations where inequality is manifested. Women advocates say that there must be adultery of men which can be used as ground for legal separation. If a married woman has sexual intercourse with another man other than her husband, it is adultery. The same must be true of man. That is, whenever a married man has sexual intercourse with another woman other than his wife, it must be adultery of man and should likewise be ground for legal separation. There is no need to prove that the man knows that the woman is married.

There should be no distinction as to the penalty impossible between lost of life due to sex and lost of life for other reasons. It should be murder or homicide. There is this provision in our law which provides: any legally married person who having surprised his spouse in the act of committing sexual intercourse with another person, shall kill any of them or both of them in the act of immediately thereafter or shall inflict upon them any serious physical injury shall suffer the penalty of DESTIERRO.

Destierro simply means that the person shall not be permitted to enter the place or places designated in the sentence nor within the radius therein specified, which shall be not more than 250 and not less than 25 kilometers from the place designated.

It will be noticed that the criminal is not placed in jail. Is this not too soft a punishment for the lost of life?

Support of wife and children is always a problem in separation, hence the government and non-government organization should provide livelihood projects to lessen destitution after separation. Likewise, responsible parenthood should inculcated in the minds of boys and the girls as early as that period when they set foot in school.

Cases on marriage are decided after one, two, or more years of filing due to legal requirements and strict procedure. Procedural rules should be adopted to lessen the hardship with the least expense in getting the nullity, annulment of marriage and legal separation. Quasi-judicial bodies should be created to undertake marriage cases where the only requirement/s is/are documentary evidence/s. Like where the ground is: the marriage was contracted when one is below 18 years of age or lack of authority of the solemnizing officer.

Bigamous marriage could be avoided if Civil marriage would be required first before the couple could have a Church wedding. Likewise, this will give a more accurate statistics on marriage.

All laws involving marriage should be reviewed. Have a divorce law which will undertake all marriage problems. Separate the grounds which could be summarily be heard from those which should undergo regular procedure.

We have now mediation but their jurisdiction is limited to support and custody cases. The right to live with another person should be treated as the right to privacy. Hence, separation or divorce should be granted by the consent of the parties.

Filipina women share the same status as men in the law profession. Gender is never considered as a factor in admitting applicants in law schools. However, in practice, certain companies would prefer male lawyers than female. This is apparent in their ads.

Nirmala Pandit

Centre for Empowerment, India

### **1. Introduction**

To ensure justice to women has been a far cry in almost all parts of the world. Within each community, class and nationality, the burden of hardship falls disproportionately on women. It takes various forms and is reflected through gender inequality as experienced by women at different stages in their life. It starts with sex determination leading to abortion of female foetus. If she survives foeticide, she is met with neglect of her health and lack of access to education and therefore lesser opportunities for developing her personality and acquiring professional and social skills. Traditionally, historically and socially she is discriminated against and personal laws in India further reinforce this view.

### **2. Constitutional provisions for the protection of Women**

The Universal Declaration of Human Rights and many other UN instruments including the Convention on Elimination of all forms of Discrimination Against Women have influenced the domestic legal systems and legislative enactments. Discrimination has been forbidden under constitutional and statutory provisions. In India, Article 14 of the Constitution guarantees to all men and women, equal rights and opportunities in political, social and economic spheres. Further article 15 prohibits discrimination against citizens on the ground of religion, race, caste, sex, etc. Article 15 (3) makes a special provision enabling the state to make affirmative discrimination in favour of women. Similarly Article 16 provides for equality of opportunities in matters of public appointments for all citizens. Article 39 (a) lays down that the state shall direct its policy towards securing to all citizens, equally to men and women, the right to the means of livelihood, while article 39 (c) ensures equal pay for equal work. Article 42 directs the state to make provisions for ensuring just and humane conditions of work and maternity relief. The Constitution also imposes a fundamental duty

on every citizen through article 51 A (e) to renounce the practices derogatory to the dignity of women.

Under this legislative guideline, the Indian State has enacted many women-specific and women related laws to protect women against discrimination, violence and atrocities and also to eradicate social evils like child marriage, dowry, rape, practice of Sati, etc. The Equal Remuneration Act 1976 provides for equal pay to men and women for equal work. The Hindu marriage Act of 1955 as amended in 1976, provides that a girl can repudiate a child marriage before attaining maturity whether the marriage has been consummated or not. The Immoral Traffic (Prevention) Act which is amended in 1986 makes sexual exploitation of men and women a cognisable offence. An amendment to the Dowry Prohibition Act in 1986 punishes the husband or in-laws if a wife commits suicide within seven years of her marriage, on the presumption that she must have been subjected to cruelty. A new criminal offence to that effect has been included in the Indian Penal Code. The Child Marriage Restraint Act of 1976 raises the age of marriage of a girl to 18 years from 15 and that of a boy to 21 years and makes child marriage a cognisable offence. The Factories Act of 1948, as amended up to 1976, provides for the establishment of a crèche where 30 or more women are employed. The Medical Termination of Pregnancy Act of 1971 legalises abortion by a qualified professional on humanitarian and medical grounds. Amendments to the Criminal procedure code now provides for a punishment of seven years in ordinary cases of rape and ten years rigorous punishment in cases of custodial rape. The burden of proof has been shifted to the accused. The Indecent Representation of Women (Prohibition) Act, 1987 and Commission of Sati (Prevention) Act have been passed to protect the dignity of women and to prevent violence against them.

### **3. Living law as experienced by women**

In spite of these desirable provisions, women have not been able to enjoy the rights guaranteed by law and they continue to suffer from social inequity. The factual position is rather distressing. It was recently pointed out in a media report that in India, one case of rape takes place every 54 minutes; eve-teasing every 51 minutes; molestation in every 26 minutes; and dowry death every 1000 minutes. In 1999, crime against women has reported

an increase of 3.3 percent and 8.4 percent respectively over the years 1998 and 1997. In absolute numbers an increase of 4296 cases was reported in an All India report (vide Crimes In India 1999, National Crime Records Bureau, Ministry of Home Affairs). This number merely mentions the reported cases. It is well known that not every case of rape, kidnapping and abduction, torture and molestation, sexual harassment, importation of girls, and offences committed under the Dowry prohibition Act is reported. There is social stigma and a fear of being ostracised from the community holds people back from reporting such incidents. It of course leaves the perpetrators free and unrestricted to commit further atrocities against women.

According to the 1991 census, women constitute 48.1 per cent of the population of this country. 60 per cent of the female population is still illiterate. If under these circumstances we want to change the statutory law into a living law, we cannot afford to continue with the educational disparity between the men and women. This disparity also gets reflected in every other field and in every other place including the home. She is made to believe that she is capable of performing only the subordinate roles. She is expected to cater to the comforts of the family as a dutiful daughter, obedient daughter –in-law, loving mother, faithful and submissive wife. She is perhaps everything but the human being with dreams, aspirations, emotions and feelings.

To ensure gender equality, this has to be changed and the change cannot come merely by passing laws but by truly implementing the letter and spirit of the law and by changing the attitudes of people towards women.

Today, most women are not aware of their rights and hence they cannot assert them. A large majority of them is dependent on their parents, husbands, in-laws or children and therefore even if they know their rights and are aware of how to protect them, they cannot take recourse to the expensive court proceedings unless they seek financial and moral support from their relatives. If the perpetrators are the same relatives, then it is futile to think of their support in the court proceedings or even in lodging a complaint at the Police station. They are further looked down upon if they assert their rights. It is a vicious circle. The viciousness reaches its core when the matters under consideration are relating to familial issues. It is expected that a woman must get married and cannot choose to be single and

independent unless there is something grossly wrong with her, she should learn to find happiness in marriage even if the husband and in-laws are abusive and there is threat to her life and sanity.

#### **4. Injustice met in matrimonial matters**

In India, matrimonial matters are covered under the Personal laws. Specific laws based on religion govern the Hindus, Muslims, Parsis and Christians in regard to matrimonial matters. These are the Hindu Marriage Act 1955, the Special Marriages Act, 1954, the Hindu Adoption and Maintenance Act 1956, the Parsi Marriage and Succession Act 1936, the Indian Divorce Act, 1869, the Christian Marriage Act 1872, the Mahomedan Marriage and Divorce Dissolution of Muslim Marriage Act 1939, the Hindu Minority and Guardianship Act, 1956.

There are inherent discriminatory provisions in these laws. Under the Muslim law, the husband can unilaterally divorce his wife, while a woman cannot unilaterally divorce her husband. Women inherit lesser proportion of share in the property than their male counterparts, both under Muslim and Parsi laws. Hindu women do not form part of the Hindu coparcenary, unlike their male counterparts who by being born in the Hindu undivided family acquire equal right in the property with the rest of the male members.

A woman, who has made home and family the only reason for her existence, cannot gain the courage to break the fetters of an abusive marriage. She is uncertain of herself, insecure of her future, inexperienced in standing on her own and taking her own decisions. If she has been submissive and financially dependent on her husband, she further fears that she may be thrown out of the house, denied the custody of her children and left destitute without any shelter. She is uncertain how she would take responsibility for her children even though she is certain that their best interest require that she must have their custody. She has to seek maintenance from the husband, but most of the husbands are not ready to fulfil this responsibility. Even the lawyers assisting the parties mislead them and advise their clients to escape payment of maintenance for the wife and the child. It is the psyche of the world of men that she is challenging when she decides to take recourse to the outside help

through the police or the court machinery. Unfortunately these institutions too are part and parcel of the society in which she lives.... with all its weaknesses like corruption, apathy, lack of sensitivity, etc. Of course there have been stalwarts in the legal profession who have shaped the legal history of this country and who have taken additional care in giving effect to the true letter and spirit of law.

We are going to look at just a few areas of matrimonial disputes like divorce, maintenance and custody of children, which most adversely affect women...physically, emotionally and morally and tend to leave deep psychological scars on her.

### ***Divorce***

When there is an irretrievable breakdown of marriage, the husband and wife can put an end to the matrimonial relation between them. This can happen by mutual consent or by contesting the matter in the court and getting it confirmed by a decree of the court. There are certain grounds, which are prescribed by the personal laws for seeking divorce. These grounds and the manner in which the divorce is pronounced, vary in different laws and as between the husband and the wife. Most of the laws have the following grounds for seeking divorce; wife living in adultery, cruelty, continuous desertion for two years, conversion to different religion, affliction of venereal disease of a communicable kind, insanity, having renounced the world, whereabouts of the spouse being unknown for a period of 7 years, and living in bigamy. Divorce by and large is a traumatic experience for the parties involved and their children.

### ***Maintenance***

The first crisis the woman has to face after the breakdown of her marriage and even during the pendency of divorce proceedings is to maintain herself. Most of the matrimonial laws provide for the maintenance of a dependent spouse. The Hindu Marriage Act, 1955, even provides for an interim maintenance (s. 24). Under section 25, the court can pass orders for permanent alimony and maintenance. Similar provisions are also seen in the Special Marriages Act, 1954, the Parsi Marriage and Divorce Act 1936 and the Indian Divorce Act 1869. The Hindu Adoption and Maintenance Act 1956 allows the woman and her children to claim maintenance from the husband and failure to pay can result in attachment of property belonging to the husband and /or his family. In addition a woman can claim maintenance

under section 125 of the Criminal Procedure Code, 1908, by filing a suit against the husband. However for this action, the court fees are based on the value of the claim and therefore it can be prohibitive and defeat the purpose of this remedy, particularly for a person who has no means of subsistence.

Under Muslim Women (Protection on Divorce) Act 1986, a divorced wife can claim maintenance from her husband. However it is limited to a period of three months after the divorce.

The spouse, his family, society and the court do not have a very favourable attitude towards the maintenance of a divorced wife. The spouses are estranged and they are not prepared to take on the additional burden of maintaining a wife who is no longer performing any conjugal duties, who has brought bad name to the family by seeking a divorce and in all probabilities is also taking children with her. The society has developed a mindset that once the marriage has come to an end, the spouses have no responsibility towards each other. The general attitude is to argue that if the wife could not even maintain herself, she has no right to seek divorce and also claim custody of their children. Many times the maintenance *pendente lite* is not decreed by the court until the end of the divorce proceedings and thus adding to the wife's misery. Ordinarily, a wife has a personal right to be maintained against her husband and the husband has a legal obligation to maintain his wife.

In England it is well established that the wife has a right against her husband to stay in the matrimonial home. In India there is no statutory or judicial recognition of property rights from the jointness of the matrimonial home. Similarly the concept of matrimonial property has not developed as is developed in the United States. In the US, upon divorce, the property acquired during the marriage is equitably divided between the parties, based upon how much each gave to the marriage plus an array of other factors, like length of marriage, age and health of the parties, earning capacities, vocational skills and need of a custodial parent.

### ***Custody of children***

Under section 25 of the Guardianship and Wards Act, the father or the guardian has the absolute right of custody of the child. Traditionally, with the supremacy of the paternal rights, right to custody of a father superseded even the welfare of the child. If at any time the custody was removed from the father, the child was arrested and restored to the father.



Under the Hindu Minority and Guardianship Act the mother is entitled to the custody of her children below the age of 5 years only. This provision merely recognises a limited right of the mother. However the father can contest the question and prove unfitness of the mother and deprive her of this limited right.

It is well established by judicial declarations that it is natural for a mother to take care of the child. To deprive her of the right to custody of her child is traumatic, contrary to the nature and practical reality but also against the welfare of the child. Mere financial stability cannot be a ground in support of the custody of a child. If the mother was financially incapable of supporting both of them, it is the legal responsibility of the father to maintain them while the child is with the mother. A progressive interpretation has encouraged the courts to give custody of a child to a working mother, since the child could spend time with the mother after her work. It would be a retrograde step if the court were to ensure that the mother stays with the child and does nothing else and yet hope that the maintenance be not made in perpetuity and that the mother takes her own responsibility and be independent.

## **5. Family Courts**

The women's organisations demanded a one-stop service under the matrimonial remedies, and thus emerged the family courts to address all family issues under one umbrella. These courts were established in some of the cities with limited geographical jurisdiction. The main objectives of the family courts Act have been as follows;

- i. Preservation of the institution of Marriage
- ii. Settlement of family disputes with emphasis on conciliation rather than on the normal adversary proceedings

This Act has proved to be a double edged sword. At the individual level women will have to pursue their own case (with the desire to eliminate the intermediary lawyers from the family court proceedings), and the court would encourage conciliation among the parties in order to preserve the institution of marriage thus pressurising women to accept the stand presented by the other party. When the majority of women are not aware of their rights and legal procedures, presenting their own case proved to be a hindrance in seeking justice in matrimonial matters before the family courts. However

soon the judges in the family courts realised that they cannot prevent lawyers from attending these courts. Proper justice could not be done in the absence of a lawyer who could understand and explain to his client the legal intricacies involved in the court proceedings, even though this Act has simplified rules of procedure and evidence. The reason for removing the procedural technicalities was to deal quickly and in a humane way in matters before the court. The Act enables the courts to seek assistance of medical and welfare organisations and to hold proceedings in camera if so desired by the parties. Parties meet with the counsellors before the judges hear their case. It was believed that such a process would encourage conciliation between the parties who were engaged in matrimonial disputes. However it is observed in many cases that the counsellors were misleading the parties, threatening the weaker parties to give in to the wishes of the dominating party. In certain situations where the parties are estranged to such an extent that civil conversation is also not possible between them. Insistence that every party must be met by a counsellor and that sufficient time be given for encouraging conciliation between the parties, often shows that the time spent in bringing about this kind of conciliation in fact adds to the trauma resulting from a matrimonial dispute.

## **6. Suggestions to ensure justice through Family Courts system**

These courts have been established since 1989. The lawyers who practise in these courts and the parties who have to seek redress in these courts have experienced some advantages and some disadvantages of this system. So far no thorough and scientific study has been conducted as regards the achievements of this court system. Following are some of the suggestions to improve this court system and to ensure justice to the parties in matrimonial disputes.

### ***Right to matrimonial property***

The concept of matrimonial property needs to be thoroughly studied so as to make it most appropriate for the present time. Innovative means will have to be evolved in order to evaluate the contributions made by each of the parties to the subsistence of a marriage. A holistic and comprehensive approach would lead to a better understanding of the

contributions made by the spouses, whether it is in terms of bringing most needed finances to the family, or qualitative contribution in terms of spending time with children and bringing them up, or managing the household in a most economical way and helping in saving the most needed resources for the future. This particularly becomes a major concern in evaluating the extent of maintenance to a wife who was not engaged in gainful employment but has contributed to the family savings by managing the household activities single headedly. Quantification of such contribution may not be carried out with utmost accuracy, but it would no doubt help, to appreciate the contributions made to the family by the non-earning partner.

***Encourage participation of women in the political, judicial and administrative fields***

Women all over the world are victimised and oppressed, at home, at work place, at school and in wage entitlement. Barring a very few, women police officials, parliamentarians, judges, politicians, ministers, engineers and doctors, they are token participants in the state power, business and profession. Unless women participate in politics, judiciary and in administrative fields, all these fields will be dominated by men for the benefit of men, and women will get marginalized. In order to ensure that the laws cater to the needs and aspirations of women, they should come forward to become parliamentarians and pass laws that are best suited for preserving their dignity and protecting their rights.

It is well accepted that mere passing of laws is not sufficient to guarantee justice to women. They must be aware of their rights and must know how best to preserve these rights and protect them. The scope of laws is determined from the manner in which they are interpreted in the courts. Women should be encouraged to participate in the working of the judiciary, either as lawyers or judges.

Justice can be truly done when the laws that are enacted are implemented. Implementation of laws and the decisions and directives of the court are enforced by the administrative staff of the state including the police. It has been the experience that wherever women managed the police station, there has been a higher incidence of reporting of offences and crimes by women. The police officials are seen to be less brutal in the presence of women members of the staff. Women police give confidence to women victims to come forward and seek help.

A State should take initiative and encourage greater participation of women in political, judicial and other fields of public service. In India 30% seats are reserved for women in local bodies. However similar reservation in the parliament and legislative assemblies has not gained sufficient support from the male members of these bodies, irrespective of their political lineage. Women organisations need to consolidate their strength so as to build sufficient pressure on the elected representatives.

***Train and sensitise public officials to appreciate the hardships experienced by women.***

Till such time, when more women would be participating and working towards preserving their rights, the existing officials be trained and sensitised so as to appreciate the hardships suffered by women at home, at schools, and at the work places. The officials should be exposed to understand the incidences of subtle gender biases and discriminations. In-service training should have a component on gender perspective. The trainees should be exposed to the experiments carried out to protect women in other parts of the country and abroad.

***Review and amend laws so as to maintain equality between the sexes in all fields***

The state should in collaboration with the research institutions, academicians and NGOs undertake studies to review and amend the laws. Wide publicity should be given to such efforts and suggestions be sought from the public, both men and women.

***Encourage media to take a proactive stand and eliminate inequality between men and women and highlight the incidents where justice is done to women, both within and outside the country.***

The Media should be encouraged to take a proactive stand in order to do justice to women. They can spread awareness among the people and also educate them regarding the evils due to lack of justice. Media can bring transparency and accountability to the functioning of the public field. They may be encouraged to evolve innovative ways to ensure justice to all.

## Legal Protection for Vulnerable Groups of Women in Hong Kong

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### 1. Overview

To be meaningful to the individual, rights must be protected by law. This is especially so for vulnerable groups of individuals. This paper calls attention to four vulnerable groups of women in Hong Kong, namely: women workers, foreign domestic helpers ("FDH") as a special subset, women facing domestic violence, and women immigrants. In each of these groups, although women have rights, often the rights are not given enforceable protection; and even where they enjoy protection under Hong Kong's domestic law, the protection is often inadequate in practice. Hong Kong is under the rule of law. Human rights are protected in the Basic Law, Hong Kong's "mini constitution". Sexual discrimination is unlawful under its domestic legislation. It is therefore all the more pressing that the gap between principal and practice is minimized.

### 2. Women in Hong Kong

The results of the Population Census 2001 in Hong Kong show that women outnumber men at 51.02% against 48.97%. In a population of 6,708,389, this means there are 3,423,045 female persons (**Table 1**). 710,032 or 20.7% of them are 35 – 44 years of age. The largest group of female persons by age is 35 – 39.

On the basis of education, the largest group (26.7%) have upper secondary education. Another 10% have reached matriculation level, and a further 3.7% and 11.5% respectively have non-degree and degree tertiary education levels respectively. This is roughly comparable with male persons at 25.9%, 8.9%, 3.8% and 13.9% respectively in the

same categories. However, 12% of female persons have no schooling or only kindergarten education. This is substantially higher than male persons at 4.6% (**Table 2**).

Among the over-15 female population, 57.2% are married, 51.6% are working (compared with 71.9% for male), the largest group (18.8%) of them have monthly income of HK\$10,000 – 14,999 (USD1,282 – 1,923) from their main employment (compared with the largest group (26%) for male, which have the same income level). The median monthly income is HK\$12,000 (USD1,538) for male and HK\$8,900 (US\$1,141) for women (**Table 3**).

By occupation, managers and administrators are still predominately male (14.1% against 6.5%). The gap is narrower for professionals and associate professional at 6.3% and 14.6% respectively for male, and 4.6% and 16.2% respectively for female (**Table 4**).

In the judicial, government and political sectors, women's participation is significant. As of January 2002, there are a total of 30 female judges and judicial officers, representing 30% of the judiciary (**Table 5**). Eleven of the 60 (18%) members of the legislature of the Hong Kong SAR are women. Six of the 16 (37.5%) heads of Government Bureaux are women. While the numbers are not equally balanced between male and female, the impact made by the women participants seems just as notable in the community. Gender has no noticeable effect on how their views or actions are perceived or evaluated. However, it is not among the eminent that women are discriminated against. The concern is with the ordinary women in the community whose plight is often compounded by gender.

### **3. Women workers**

The total labour force in Hong in 2001 numbers 3,437,992 persons of which 43.31% are female. Most of the women are engaged as clerks (26.6%), in elementary occupations (26.2%), as associate professionals (16.2%) and service workers and shop sales workers (15.7%). By contrast, the four largest groups of occupation for men are craft and related workers (16.2%), associate professionals (14.6%), service workers and shop sales workers (14.5%) and elementary occupations (14.3%), with a marginally smaller group (14.1%) as managers and administrators (**Table 4**).

Under the Basic Law of the Hong Kong SAR, labour rights are protected. The Employment Ordinance of Hong Kong provides for employment benefits including paid rest days, statutory holidays, sick leave, maternity leave, severance pay and long service payment. It is an offence for an employer to dismiss a pregnant employee. The assignment of heavy, hazardous and harmful work for her is also prohibited. There is a statutory Mandatory Provident Fund which came into effect in the year 2000. There is a Labour Tribunal which deals with labour disputes from which legal representation is excluded. The Employment Ordinance protects the right to form and join trade unions, and the Trade Union Ordinance protects the right to picket.

Notwithstanding the above, female workers have in practice little protection. A major sustained criticism of labour unions is against the "4-18" requirement. This refers to the requirement under the Employment Ordinance that in order to qualify for employment benefits, an employee has to be employed for at least 18 hours a week for a continuous period of 4 weeks. This excludes a large number of casual workers 75% of whom are women.<sup>1</sup> Women are prone to casual employment because of a number of factors. A survey of a labour union carried out in January–February 2001<sup>2</sup> shows 33% of the women interviewed had been employed as casual workers in the two year period preceding the survey. Factors cited for their taking up casual rather than regular employment are: having to take care of family members (51.49%); difficulty in getting a full-time job because of age discrimination (58.91%); lack of education qualification (57.43%); lack of experience (30.2%); dislike of regular employment (15.35%); and discrimination on the basis of family responsibilities (13.37%). Thus certain categories of discrimination (age, family status) are aggravated in the case of women, leaving them little choice other than casual labour, and thus liable to fall short of the "4–18" threshold for employment benefits.

A particularly vulnerable occupation is that of the local domestic helper, who are almost invariably female, and usually serve an employer on part-time basis. Although they work full time, they serve each employer only a few hours per day. It is easy for the employer to evade liability for employment benefits domestic helpers.

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<sup>1</sup> Information from the Hong Kong Domestic Workers General Union

<sup>2</sup> From a survey conducted in Jan-Feb, 2001 by the Women Affairs Committee of the Hong Kong Confederation of Trade Unions.

As Hong Kong's economic recession continues, the "4-18" threshold is increasingly deliberately exploited by employers. In some cases, terms of employment expressly stipulate 17.5 hours of work every fourth week.

It is also a strong complaint that the provision for maternity leave and prohibition of dismissal during pregnancy are illusory. Female workers have been dismissed just before the notification period, and it is difficult to prove this is the reason for dismissal.

Likewise the protection against wrongful dismissal for trade union membership. In answer to a question asked in the Legislative Council by a unionist Leg Co Member in May 2001, the Government disclosed that 18 complaints had been received in the past five years for anti-union discrimination. Yet not one prosecution was instituted. In 8 cases the reason was the claimant refused to act as prosecution witness. In the remaining 10, the prosecution authorities considered that there was insufficient evidence to prove the matter beyond a reasonable doubt.

Another problem is the costs of litigation. The Labour Tribunal is inexpensive and precludes legal representation so as to save time and costs. However, an employee who has won faces a tough dilemma when the employer appeals on a point of law. Unless the employee can get legal aid for the appeal and have lawyers to represent him or her, the employee would hesitate to contest the appeal, since if he/she should lose the appeal, he/she would have to pay the legal costs incurred not only by himself/herself, but also by the employer. This could wipe out whatever he had been awarded by the Labour Tribunal. The dissatisfactory law concerning legal aid thus operates to vitiate the employee's rights. Although the problem is not gender-specific, this adds to the many disadvantages a female worker already has to face.

#### **4. Foreign Domestic Helpers ("FDH")**

As of 2001, there are a total of 232,290 Foreign Domestic Helpers in Hong Kong, 98.1% of them are female, and 68% of them are from the Philippines. Together with



Indonesian and Thai FDH's, they represent the overwhelming majority of foreign nationals in the Hong Kong SAR.<sup>3</sup>

The ready availability of FDH's in the past two decades in Hong Kong at comparatively low wages had contributed tremendously to Hong Kong's economy by freeing women, traditionally the home-carer, for the labour market. Yet their own vulnerability is serious.

As a matter of law, FDH's are protected by the same legislation as those applicable to local workers. However, FDH being "imported labour" there are further legal requirements applicable. They have to be paid a minimum wage of HK\$3,670 (USD471) per month. This is designed to protect the local labour market rather than any rights of the FDHs themselves. They are prohibited from switching employers, and if their employment contracts are over or broken, they have to return to their countries of origin within 2 weeks.

In spite of their contribution to Hong Kong's economy, FDH's are subject to common social and racial discrimination. Up to now, there is no anti-racial discrimination legislation in Hong Kong. Living in the household of their employers, the majority of whom live in already very cramped accommodation, they can be victims of verbal, physical and sexual abuse.

Accordingly to a survey carried out in February 2001 by a group of FDH

<sup>3</sup> Source: Women's Commission "Employment-Related Services and Vocational Training and Retraining Programmes for Women" 2001

As at the end of month/ year	Philippines	Indonesia	Thailand	Other Nationalities	Total Number
Dec 1996	134,700	21,000	5,800	2,800	164,300
Dec 1997	138,100	24,700	5,100	3,100	171,000
Dec 1998	140,500	31,800	5,300	3,000	180,600
Dec 1999	143,200	41,400	5,760	3,340	193,700
Dec 2000	151,490	55,200	6,450	3,650	216,790
July 2001	154,360	63,680	6,820	3,850	228,710
Sept 2001	155,370	66,130	6,900	3,890	232,290

Population Distribution of Foreign Domestic Helpers (FDH) in Hong Kong  
Source: Immigration Department of HKSAR

organizations,<sup>4</sup> verbal abuse is common (23.5%). Sexual abuse ranging from sexually offensive language to rape together constitute 7.2%. Various degrees of physical abuse ranging from slapping to beating, constitute a total of 16% (Table 6). In recent years, there were a number of high profile court cases of physical assault of FDHs by their women employers and rape by their male employers. There were also cases of FDHs assaulting infants in their care, in some with fatal consequences. These cases underline the extremes of the traumatic tensions in the work environment of FDH's.

On a more day-to-day level, FDH's experience greater difficulties in enforcing their employment benefits. Despite the legal minimum wage, in the survey just referred to, 15.2% are paid less. Although the law requires four rest days per month, 22.1% reported 3 days or less allowed, including 2.2% where no rest day or less than 1 rest day per month. However, FDH's are restraint by their work situation from obtaining any legal remedy unless they are prepared to break their contract. Yet if they do so, they are not allowed to work while waiting for their cases to be heard or determined. The two-week rule means their stay is restricted, even if extensions of stay are granted or renewed.

FDH's are not allowed to acquire residency status in Hong Kong and have no right to vote. They are not permitted by law to take up part-time jobs. As Hong Kong's labour market worsens, FDH's are watched with increasing resentment. A live-out arrangement whereby in order to avoid the cramped condition of their employers' household FDH's share rented accommodation elsewhere, is being attacked by some people in the community as a breach of their condition of stay.

One strength of FDH's is their organisation representing their interest. Recently, a proposal has been made by an employers' association to reduce FDH wages in view of current deflation, notwithstanding the purpose of the minimum wage which is a protectionist. FDH organisations staged a protest march in opposition. Their resistance and the support of their sympathizers in the community may delay the acceptance of the proposal, but the proposal is likely to be accepted and implemented in the end.

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<sup>4</sup> The Asian Migrant Centre, Asian Domestic Workers Union, Forum of Filipino Reintegration and Savings Groups, Indonesian Migrant Workers Union and Thai Women Association

## 5. Women facing domestic violence

The vulnerability of women in a situation of domestic violence is well recognized in Hong Kong. Correspondingly, there are NGO's designed to assist them.<sup>5</sup>

As far as the law and law enforcement are concerned, two improvements are worth noting in the last two years. One is amending the statutory law to make it clear that marital rape is a criminal offence. Whether as a matter of law a husband can rape his wife has been an issue on two bases. First, it was believed that a kind of irrevocable consent to sexual intercourse was given by the wife in marrying her husband, and therefore rape is impossible, since the absence of consent is an element of the offence. Secondly, rape is defined in Reg v R [1991] 3 WLR 767 as unlawful sexual intercourse without the woman's consent, but "unlawful" sexual intercourse is thought to mean "sexual intercourse outside marriage". The House of Lord's decision settled the matter by deciding that any sexual intercourse of a man with a woman knowing that she does not consent constitutes rape, whatever the relationship. The Legislative Council ("LegCo") considered whether it is necessary or desirable to amend the statutory definition of rape in view of the fact that the House of Lord decision has the same effect. In the end, amendment was favoured, because it would facilitate the ready understanding of marital rape as a crime. Wives who are raped by their husbands usually refrain from reporting the crime to the police. It is all the more important that when a wife is driven by desperation to report, her case should be dealt with immediately as a serious crime, and not brushed aside as a "domestic dispute". Further, publicity on the amendment will raise consciousness and disabuse husband of any misapprehension that their wives are obliged to consent.

Another important development is the pilot scheme to encourage parties caught in divorce proceedings to use mediation as an alternative dispute resolution method. Launched by the judiciary, the most recent report is that success rate has been 80%, with

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<sup>5</sup> A partial list of organisations assisting women would include non-government organisations (NGO) like the Association for the Advancement of Feminism, Hong Kong Federation of Women's Centres, Association Concerning Sexual Violence Against Women, Hong Kong Association for the Survivors of Women Abuse. Other bodies specifically providing refuge centres for women facing domestic violence are Harmony House, Serene Court operated by NGOs, and the Wai On Home for Women run by the Government's Social Welfare Department.

complete agreement achieved in 72% of the cases which followed mediation, and partial agreement achieved in another 8%.<sup>6</sup> One advantage of mediation over litigation is that it encourages consensus and avoids the tension and mutual recrimination which almost inevitably accompany litigation. Indirectly, this would reduce domestic violence by removing some of the factors causing it.

## **6. Women immigrants: new or illegal**

Since the early 1980's, Hong Kong men who originally came from China had been marrying and raising families in China. The exit and immigration policies of China and Hong Kong respectively were such as to make it very difficult for the women and children to join the men in Hong Kong. They have to apply for an exit permit called a "one way permit" from the Chinese authorities, and the number of people on one way permits allowed to come to Hong Kong is subject to a fixed quota. The women and children may also apply for a "two way permit" to come to Hong Kong for short visits. Some women have given birth to children while visiting, and remained to look after them, thus becoming "overstayers". To overstay without permission is a criminal offence punishable by imprisonment. Some women also sneaked into Hong Kong without permission in order to join their husbands and children, thus becoming "I.I. mothers" (Illegal Immigrant mothers). Illegal entry is a criminal offence punishable by imprisonment.

When Hong Kong reverted to China on 1<sup>st</sup> July 1997 and the Basic Law came into force, the children of Hong Kong permanent residents born outside Hong Kong (including China) became permanent residents entitled to the right-of abode in Hong Kong. There is no provision for the wives and mothers of permanent residents. The great fear that such children would flood into Hong Kong prompted the Government of the Hong Kong SAR to introduce laws and policies effectively restricting their entry by subjecting them to immigration control. The constitutionality of the relevant provisions became the subject of bitter, prolonged and high profile court proceedings known as "the right of abode cases". In their argument before the court on behalf of the children, the right of family and rights of the

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<sup>6</sup> The Chief Justice's Address at the Opening of the Legal Year, 14 Jan, 2002

child under the ICCPR (International Covenant on Civil and Political Rights), the ICESCR (International Covenant on Economic, Social and Cultural Rights) and United Nation Convention on the Rights of Children were cited in support.

This situation has created a multitude of problems and vulnerable groups of people, one of which is women who arrived in Hong Kong recently (within the last 7 years) either legally or illegally. They are the subject of widespread and strong discrimination. They are and feel isolated from the community. They have serious difficulties finding jobs, earning money and making friends. Most of them are the main care-provider of their families most of which belong to the lower income groups. The protection of their rights by law are virtually put beyond their reach. Although more than half of the women have secondary education, many have come from rural background and received little education. All face language and social barriers. Thus they struggle under heavy responsibilities and against severe disadvantages. Their predicaments are at least in part created by the law and government policies as well as systematic maladministration. They are entitled to effective legal protection.

Publicly funded programmes targeted at them, are far from adequate. Indeed, although a number of surveys and studies have been carried out by social groups about these women based on small sampling, no attempt has yet been made to take stock of their situation by a comprehensive survey. According to government statistics, released in May 2000, there were 190,900 female persons from the Mainland of China who have lived in Hong Kong for less than 7 years, against 83,600 male persons.<sup>7</sup> They are, respectively, 69.6% and 30.4% of the population of arrivals from Mainland China who have lived in Hong Kong for less than seven years. On an annual basis, the number of immigrants from Mainland China who came to Hong Kong on a one way permit in 1998, 1999 and 2000 were 56039, 54625 and 57530 respectively. Of these, women joining their families in Hong Kong as wives and mothers probably represent some 30-40% (Table 7). Thus the size of this exceedingly vulnerable groups will continue to grow in the coming years. A meaningful scheme of support, which must include access to legal remedy, is urgently required.

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<sup>7</sup> Information from the Census and Statistics Department

## 7. Conclusion

The vulnerable groups of women outlined above highlights the discrepancy between recognized rights and the protection provided by law, and between legal protection in principle and in practice. The gaps identified suggest that there is much for those concerned in legal justice for women to do. One category of action is to promote better legislation, e.g. in a clearer definition for rape; in closing the loopholes in the Employment Ordinance. Another category is improving access to justice by more easily available legal advice. In this direction, efforts are being made to establish a "Community Legal Services Centre".<sup>8</sup> It is not exclusively or predominantly for women, but being designed to be user-friendly, bearing in mind the practical difficulties for various sectors of the community, such a Centre will ensure that the vulnerable groups of women will be warmly included instead of kept out.



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<sup>8</sup> Speech of Margaret Ng at the British Council Colloquium on Access : the future of law referring to "Paths to Justice- Hong Kong", a research report compiled in June 2001 by the office of Margaret Ng

**TABLE (1)**

**Population** – There may be a slight discrepancy between the sum of individual items and the total as shown in the tables owing to rounding

	1991	1996	2001
Total	100% 5 522 281	100% 6 217 556	100% 6 708 389
Female	49.08% 2 710 290	50.01% 3 109 449	<b>51.02% 3 423 045</b>
Male	50.92% 2 811 991	49.99% 3 108 107	48.97% 3 285 344

Source: 2001 Population Census—Summary Results p.24, Census and Statistics Department, HKSAR

**TABLE (2)****Education attainment**

Population aged 15 and over by education attainment (highest level attended) and sex, 2001

	Male		Female	
No schooling/ kindergarten	124 670	4.6%	345 269	12%
Primary	552 983	20.4%	595 290	20.6%
Lower Secondary	608 889	22.5%	451 600	15.6%
Upper secondary	702 076	25.9%	771 605	26.7%
Matriculation	240 510	8.9%	287 580	10.0%
Tertiary				
Non-degree course	104 156	3.8%	105 722	3.7%
Degree course	377 703	13.9%	330 919	11.5%
Total	2 710 987	100%	2 887 985	100%

Source: 2001 Population Census—Summary Results p.42, Census and Statistics Department, HKSAR

**TABLE (3)****Income**

Working population by monthly income from main employment and sex 2001

	Male		Female	
< 1 000	20 639	1.1 %	9 020	0.6%
1 000 – 1 999	11 283	0.6%	16 127	1.1 %
2 000 – 3 999	46 528	2.6%	232 051	16.2%
4 000 – 5 999	102 239	5.6%	164 348	11.5%
6 000 – 7 999	203 521	11.2%	194 378	13.6%
8 000 – 9 999	233 093	12.8%	162 383	11.3%
10 000 – 14 999	473 519	26.0%	269 514	18.8%
15 000- 19 999	242 946	13.4%	128 035	8.9%
20 000 – 24 999	163 532	9.0%	87 584	6.1%
25 000 – 39 999	160 675	8.8%	97 360	6.8%
40 000 and above	155 276	8.5%	55 056	3.8%
Unpaid family worker	6 152	0.3%	17 447	1.2%
Total	1 819 403	100%	1 433 303	100%

Median Monthly income from main employment, 2001:

Male: 12 000    Female: 8 900

Source: 2001 Population Census—Summary Results p.56, Census and Statistics Department, HKSAR

**TABLE (4)**

Working population by occupation and sex, 2001

Occupation	Male		Female	
Managers and administrators	257 023	14.1%	92 614	6.5%
Professionals	114 340	6.3%	65 485	4.6%
Associate professionals	265 829	14.6%	232 842	16.2%
Clerks	148 646	8.2%	381 346	26.6%
Service Workers and Shop sales workers	264 466	14.5%	224 495	15.7%
Craft and related workers	294 036	16.2%	26 964	1.9%
Plant and machine operators and assemblers	207 001	11.4%	31 665	2.2%
Elementary occupations	260 337	14.3%	375 056	26.2%
Skilled agricultural and fishery workers; and occupations not classifiable	7 725	0.4%	2 836	0.2%
Total	1 819 403	100%	1 433 303	100%

Source: 2001 Population Census—Summary Results p.54, Census and Statistics Department, HKSAR

**TABLE (5)**

Rank	Number of female judges	% of female judges
Justice of the Court of Appeal of High Court	1	14.29%
Judge of the Court of First Instance of the High Court	5	22.73%
Senior Deputy Registrar, High Court	1	33.33%
Deputy Registrar, High Court	1	25%
Judge of the District Court	7	22.58%
Registrar, District Court	1	100%
Adjudicator, Small Claims Tribunal	1	100%
Magistrate	12	20.69%
Special Magistrate	1	9.09%
<b>TOTAL</b>	<b>30</b>	<b>19.23%</b>

Position as at: 18 January, 2002

Source: Judiciary, HKSAR

**TABLE (6)**

Physical Abuses Suffered by FDH

Physical Abuse	Number	%
1) Verbal abuse (e.g shouting, abusive language, pointing finger).	588	23.5%
2) Slapping on face, hand or any part of the body	110	4.4%
3) Spitting	44	1.8%
4) Kicking	65	2.6%
5) FDH hit with objects; objects thrown at FDH	87	3.5%
6) Beating	55	2.2%
7) Other physical abuses	37	1.5%
Total respondents	2,500	----

● Above percentages are the no. of cases divided by total no. of respondents

The sum of the above different kinds of physical abuse is not equal to the no. of total respondent



because some respondents reported no physical abuse suffered by them.

*Source: "Baseline Research on Racial and Gender Discrimination Towards Filipino, Indonesian and Thai Domestic Helpers in Hong Kong" jointly undertaken by the Asian Migrant Centre, Asian Domestic Workers Union, Forum of Filipino Reintegration and Savings Groups, Indonesian Migrant Workers Union and Thai Women Association, February 2001, Hong Kong*

**TABLE ( 7 )**

No. of One-Way Permit Holders by Types of Relatives in Hong Kong and Sex, 1998-2000

Types of Relative in HK	1998			1999			2000		
	male	female	total	male	female	total	male	female	total
With only parents in HK	18210	17307	35517	15933	15610	31543	15802	15507	31309
With only spouse in HK	250	9125	9375	247	6509	6756	514	7066	7580
With only children in HK	81	242	323	113	311	424	118	361	479
With a combination of parents &/ or spouse &/ or children in HK	381	9773	10154	421	15064	15485	840	17088	17928
With no next-of-kin in HK	458	212	670	278	139	417	149	85	234
Total	19380	36659	56039	16992	37633	54625	17423	40107	57530

Source: Census and Statistics Department, HKSAR

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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 rights 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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