

Dr. Rangita de Silva de Alwis
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Legislative Reform on Selected Issues of Anti-Gender Discrimination and Anti-Domestic Violence: the Impact on Children

Legislative Reform Initiative

Legislative Reform on Selected Issues of Anti-Gender Discrimination and Anti-Domestic Violence: the Impact on Children.

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This is a working document. It has been prepared to facilitate the exchange of knowledge and to stimulate discussion.

This paper is part of the Legislative Reform Initiative (LRI) spearheaded by the Gender, Rights and Civic Engagement Section of UNICEF. The aim of the Legislative Reform Initiative is to explore and provide guidance on the role of legislation – including regulations and policies which may have a direct or indirect bearing on children – in protection and advancing children’s rights in a particular area.

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FOREWORD

Dr. Rangita de Silva's work points to the enormous importance of empowering women within the family and the community as a way of ensuring their rights as well as the well being of the family as a whole, especially the children. Research shows that women use economic means to enhance the welfare of their family members. Research also shows a link between women's access to resources within the family and domestic violence.

Dr. de Silva makes recommendations for a legal framework of family law that recognises women's role in the family and her right to equality in the private sphere that will ensure the better protection of the children within the family. Further as she illustrates, if this framework is supported by a framework of laws that protect women in the workplace from discrimination and recognises her rights of citizenship, the ultimate beneficiary is again the children and the family. Dr. de Silva's work is a welcome, erudite reminder of this juxtaposition.

Radhika Coomaraswamy

Under-Secretary-General, Special Representative for Children and Armed Conflict

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Introduction

The Convention on the Rights of the Child (CRC) which came into operation in 1989 and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which came into operation ten years before that have had a profound impact on the promotion of women and children's human rights. Constitutional and legislative reform initiatives in many countries now prohibit discrimination based on sex and age.¹ Such revisions based on equality in the areas of property and land ownership, marriage, family relations and employment benefit both women and children, highlighting the causal relationship between the two groups. New legislation outlawing violence against women and family members provide further protection and remedies. Unfortunately, gender-based discrimination remains pervasive, manifesting itself throughout the life cycle in the guise of foeticide, infanticide, son preference, girl child marriage, dowry, domestic violence, sexual harassment and a host of custom-specific devaluing of girl children and women. These discriminatory provisions affect boys in different ways as they create an enabling environment and even a climate of impunity for violence and discrimination against women which diminishes girls and boys, women and children.

The CRC, CEDAW, and their treaty body jurisprudence are important tools to examine existing laws and draft new ones. Both the CEDAW and the CRC underscore the need to analyze the disproportionate impact of laws on women and children even when these laws are facially neutral. While law reform efforts use these conventions as separate tools to guide reformist projects, this chapter emphasizes the need to link both perspectives in lawmaking and law reform efforts. Just as children's rights cannot be realized within a legal framework that discriminates against women, Charlotte Abaka forcefully argues that, "[t]he enjoyment of women's rights is also very much linked to how well the Convention on the Rights of the Child (CRC) is implemented."²

This paper examines case studies and law reform initiatives that establish the inseparability of discrimination against girl children and women. While laws that facilitate the equal participation of women in decision-making in the family and the workplace, enhance children's well-being a gender-sensitive children's rights agenda can address the roots of gender discrimination. Unfortunately, women's issues are often linked with children's issues within a social welfare context, resulting in tensions and displacement over resource allocation. This chapter employs a rights-based framework to examine women's and children's issues in critical areas where women's and children's rights often intersect. Within a human rights framework, both children's and women's rights can co-exist with minimum risk of displacement.³ Both sets of rights have their roots in the Universal Declaration of Human Rights and are premised on the fundamental principles of indivisibility and inalienability of rights. The cause and effect relationship between women's and children's rights is best reflected in laws in action where gender equality cannot be

1 Special reference must be made to the South African Constitution of 1996. See Article 28, The Constitution of the Republic of South Africa, 1996. Article 28 (2) states that "A child's best interests are of paramount importance in every matter concerning the child".

2 Charlotte Abaka, *Women in War and its Aftermath: Liberia*, in *THE CIRCLE OF EMPOWERMENT: TWENTY FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN*, 234-247 AT 237. (Hanna Beate Schöpp-Schilling et al., eds., 2007).

3 See also Savitri Goonesekere's Keynote address at UNICEF/ WCW Conference on Women and Children: The Human Rights Relationship, Bangkok 2007. She argues that, it is this failure to forge a link between feminism and child rights' activism in a human rights based approach that has prevented greater progress on both agendas. Analyzing the nature of women's and children's human rights under CRC and CEDAW can help to both reject protective approaches to women's issues, and forge partnerships in protecting the human rights of women and children.

addressed without being linked to equality in the family and the equality of the girl child; and where children's rights cannot thrive in an environment of discrimination.

This paper examines three key areas of gender discrimination that affect the well-being of women and children: access to economic resources, family relations and domestic violence. Each thematic section includes: detailed, critical examinations of the subject matter and relevant CRC and CEDAW provisions, analyses of innovative developments in legislation and case law, and check lists for law reform that integrate both gendered and child rights perspectives. This check list is not meant as an exhaustive list of issues for consideration in law reform but meant to draw attention to the need for a paradigm shift and a new legislative focus on an intersectional analysis of women's and children's rights so as to guarantee the rights of both women and children in law reform in the areas examined in this chapter.

The first theme concerning women's access to economic resources explores three primary forms of economic resources: employment opportunities; property and land ownership; and inheritance. This section uses a two-pronged approach to assess gender discrimination in the workplace by examining exciting legal developments aimed at reconciling work-family obligations. The analysis of women's access to and ownership of property and land holistically evaluates this ownership and access' impact on children. As inheritance is intertwined with property and land ownership, they will be discussed together.

The second part of the chapter examines gender discrimination in family law and its negative effects on children. Family law most commonly exposes its gendered bias in the following areas: issues of citizenship, guardianship, custody disputes, and the minimum age of marriage. Using legislative developments and case studies, analyses of the aforementioned areas will highlight the impact of gender discrimination on a child's well-being and offer recommendations to abolish discrimination.

The third and final part of the chapter focuses on the multiple ways in which domestic violence impacts on children. This section will analyze innovative examples of domestic violence lawmaking, identifying their strengths and weaknesses in relation to the remedies and support services available to children.

Part One:

Women's Access to Economic Opportunities and the Impact on Children

Gender equality in the arena of economic resources is crucial to the well-being of all, especially women and children, in its promise of better opportunities. New lawmaking initiatives have recognized the importance of this to the family and attempt to dismantle gender stereotypes as a precursor to equality in employment, property and land ownership, and inheritance. Consequently, in addition to the immediate tangible rewards equal employment legislation provides to women, such legislation also play a normative and constitutive role which helps to shape public attitudes regarding acceptable careers and family roles for men and women. Furthermore, as public attitudes and the labour markets articulate children's educational opportunities and career aspirations, legislation must support and reflect the breadth of possibilities available to both genders.

The active agency of women, influenced by a number of factors, impacts the well-being of women and the family.⁴ Amartya Sen notes that these factors comprise: the reach and power of women's economic opportunities, in relation to land ownership, women's education, employment opportunities and the workings of the labor market.⁵ He describes the culmination of this economic participation as "both a reward on its own (with associated reduction of gender bias in the treatment of women in family decisions), and a major influence for social change in general."⁶ Sen writes that, "the lives that women save through more powerful agency will certainly include their own... That, however, is not the whole story... Even within the family, the lives affected may be those of the children, since there is considerable evidence that women's empowerment within the family can reduce child mortality significantly."⁷

Through representative and carefully selected areas of law reform that are relevant to the intersections of women's and children's rights, this section analyzes the ways gender discriminatory policies in employment not only inhibit women's access to economic resources, but also negatively impact children. It critically examines the need for policies that reconcile work-family obligations and gender equal retirement policies that will equalize opportunities for women in the workplace.

a. Reconciling Work Family Obligations

*"But even today, women's opportunities in the public sphere are limited by their obligations in the private domestic sphere."*⁸

Women's disproportionate share of family and caretaking responsibilities relates directly to the discrimination they face in the labor market and subsequent inequalities in their social and economic progress.

Family needs must be recognized and privileged by the workplace, not as the primary duty of women, but as the shared duty of both sexes. This is a particularly salient issue given gender discrimination in the form of discrimination against mothers. Scholars in the U.S. have termed this discrimination the "Motherhood

4 AMARTYA SEN, DEVELOPMENT AS FREEDOM 191 (New York: Alfred Knopf, 1999).

5 *Id.* at 193

6 *Id.* at 202.

7 *Id.* at 193.

8 Nadine Taub and Elizabeth M. Schneider, WOMEN'S SUBORDINATION AND THE ROLE OF LAW, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151-157 (David Kairys ed., rev. ed., Pantheon Books 1990).

Penalty" and it is characterized by overt denials of promotion to women following childbirth or rejections for new jobs due to a perceived inverse relationship between work productivity and motherhood. Additionally, as Shelley Correll argues in her groundbreaking work on the Motherhood Penalty, mothers suffer a substantial wage penalty. Using an experiment to evaluate the hypothesis that parental status plays a role in salary differentials, authors found that mothers were penalized on an array of measures including perceived incompetence, and starting salary. Men, on the other hand, were not penalized for being parents but were in fact valued more for their parental role.⁹

Gender discrimination in the home and workplace can be combated by workplace policies that facilitate greater male engagement as caregivers in the lives of children. Labor laws that equalize employment opportunities for men and women by redistributing family leave benefits create an environment in which women are neither discriminated against nor stereotyped and men are better able to shoulder family and caregiving responsibilities. Furthermore, lost opportunities for career advancement are minimized, resulting in more equitable economic situations for both sexes. Equally shared responsibility between men and women in both private and public spheres enhances the rights of all to equal citizenship by dispelling notions of gendered roles and privilege. Consequently, children will flourish as their emotional, physical, and educational needs are better met in a family founded on equality and mutual respect.

Unfortunately, despite the general principles of gender equality and equal access to employment, women are still disproportionately disadvantaged at home and at work because of their childbearing and childrearing roles.¹⁰ Thus, although the CEDAW establishes maternity as a "social function" and the CRC enshrines the need for both parent's to play a role in the upbringing of the child, workplace regulations do not accommodate the caregiving roles of both male and female workers.

For several reasons, including the need to balance their work and family obligations, many women also work part time or in the informal sector. The resulting feminization of part time work opportunities is thus escalating, in contrast to women's access to full time work opportunities. As a consequence, around the world, women are trapped in low-paying, low-ranking jobs that negatively affect both their own and their families' development.¹¹ This development is further impacted by the increasing numbers of female migrant and part time workers in the informal sector,¹² as it entails long hours in precarious working conditions for mothers. Additionally, most work policies do not cover the aforementioned sectors, disproportionately marginalizing women's workplace benefits while endangering children's security. Reformist projects have paid little attention to women's work in the informal sector. Gender aware and child centered laws that cover both the formal and informal sectors will help benefit children who are most vulnerable to labor laws and practices that render women invisible.

9 See Shelley J. Correll et. al, *Getting a Job: Is there a Motherhood Penalty?*, 112 AMERICAN JOURNAL OF SOCIOLOGY, 1297-1338 (2007).

10 In their examination of women's subordination, Nadine Taub and Elizabeth M. Schneider note that: "Excluded in the past from the public sphere of marketplace and government, women have been consigned to a private realm to carry out their primary responsibilities, i.e. bearing and rearing children, and providing men with a refuge from the pressures of the capitalist world. *Id* at note 8.

11 See generally, Jeanne M. Woods and Hope Lewis; *Human Rights and the Global Marketplace: Economic, Social and Cultural Dimensions*, 2004.

12 See generally: *Violence against women migrant workers, Report of the Secretary-General*, U.N. Advancement of Women, 50th Sess., Provisional Agenda Item 109, U.N Doc. A/51/325 (1996), available at <http://www.un.org/documents/ga/docs/50/plenary/a50-378.htm>.

Relevant CEDAW and CRC Provisions

CEDAW and CRC Committee jurisprudence have articulated the critical role gender equality in its numerous forms and quality child care play in reconciling work and family obligations. Gender equality is the key to uprooting long held stereotypes and notions of gendered privilege, enabling parents to share childrearing duties and reconcile their work and family tensions.

Article 6 of the CRC establishes the responsibility of both sexes to fulfill caretaking and nurturing roles. Article 18 of the CRC recognizes that “both parents have common responsibility for the upbringing and development of the child.”¹³ The CEDAW complements this in Article 5 which urges States parties to take all measures necessary to eliminate stereotyped roles for men and women and to ensure that “family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children.” Additionally, both Conventions establish the best interest of the child as the overarching consideration.

In Concluding Observations to many State party reports, both the CEDAW and the CRC Committees have been concerned about the way gender role stereotyping reinforces women’s roles as primary caregivers. The CEDAW Committee has urged State parties to undertake a variety of programmes, including ones to review and revise textbooks to encourage men and boys to undertake domestic responsibilities.¹⁴ Additionally, the CEDAW Committee has further urged the increase in female enrolment in traditionally male dominated fields and has called upon the media to address stereotypes in reporting and portrayals of girls and women.¹⁵

Article 3(2) of the CRC obligates States Parties to ensure the child such care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her. In addition, Article 18 (2) and (3) of the CRC requires that States Parties “ render appropriate assistance to parents and legal guardians in the performance of their

13 Convention on the Rights of the Child, Nov. 20, 1989, 3 U.N.T.S. 1577, art. 18, 1.

14 For example, see U.N. CEDAW Comm., Concluding Observations, U.N. Doc. A/52/38/Rev.1 (1997), Part II paras.322-364.

351. The Committee was concerned about the inequality in the sharing of "caring responsibilities" and the fact that such responsibilities fell predominantly upon women in Italy, a factor that was particularly acute in southern Italy. It noted with concern the absence of efforts or programmes to encourage Italian men to undertake their fair share of domestic responsibilities, and to care for the children and the elderly.

356. The Committee urged the Government of Italy to take large-scale measures to combat the widespread acceptance of stereotypical roles of women and men, particularly in the south, by alerting the public to the importance of an equitable distribution between women and men of family roles and "caring responsibilities". The Committee deemed it essential that textbooks and teaching material be reviewed and revised to reflect the non-stereotypical roles of men and women.

15 See U.N. CEDAW Comm., Concluding Observations, U.N. Doc A/54/38 (1999), paras 213-250.

“218. The representative acknowledged that stereotyping of women and men still existed in Thai society, but there was growing awareness of the impact of gender stereotypes. NCWA had conducted a research project with regard to stereotypes in textbooks, and the Ministry of Education was revising textbooks. There had been increasing enrolment of women in traditionally male-dominated fields. The media had also begun to address stereotypes in programmes that presented women's views and gender perspectives, but the mass media in Thailand sometimes portrayed women and girls in accordance with traditional stereotypes.

245. The Committee urges that a review be made of laws and policies and school text books in order to remove gender stereotypes. It also recommends that the media be encouraged to portray girls and women in non-stereotyped ways.”

child rearing responsibilities. “ and affirms that States parties should take appropriate steps to ensure that working parents have access to child care. Furthermore, the Guidelines for Reports to be submitted by States Parties under the CRC mandate that State Parties should “ provide information... on the institutions, facilities and services developed for the care of children.” And indicate the measures adopted...to ensure that working parents have the right to benefit from child care services and facilities for which they are eligible.”¹⁶ In the second subpoint of Article 11, the CEDAW notes that to prevent gender discrimination, States parties should “encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.”¹⁷ Thus, we see that both conventions establish the strong relationship between the eradication of gender discrimination and the establishment of a range of childcare options for both parents.

The CEDAW¹⁸ and CRC Committees and the Committee on Economic, Social and Cultural Rights have encouraged States Parties to provide information on the provision of child care services. While the CRC Committee lauded Denmark for its child care initiatives¹⁹ it encouraged Honduras to “further support measures which promote the provision of child-care services and centers for working mothers.”²⁰ Based on CRC Committee recommendations, Nepal reported that it has made efforts to “ to get information about existing child care centers, and encourage and help to NGO’s to establish child care centers especially for disadvantaged groups.”²¹ The Committee on ESCR has recommended that ‘ federal and provincial agreements should be adjusted so as to ensure, in whatever ways are appropriate, that service such as ...child care... are available at levels that ensure the right to an adequate standard of living.’²²

Article 11 of the CEDAW states:

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- a) To Prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;*
- b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;*
- c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;*
- d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.*

16 COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL GUIDELINES FOR PERIODIC REPORTS, U.N. Doc. CRC/C/58 (1996).

17 CEDAW, *supra* note 25, art. 11, 2.

18 See Barbados IRCO, A/49/38, para. 439; Japan IRCO, A/49/38, para. 566).

19 Denmark, CRC/C/15/Add.151, para.5).

20 Honduras IRCO. Add.24, para.27).

21 Nepal, Additional Report on Initial Country Report, 1996, para. 29).

22 Canada IRCO, E/C.12/1/Add.31, para. 42).

Legislative Developments

Revisions in laws on work family reconciliations are making efforts to capture the changing reality of the lives of both men and women and give voice to the needs of both groups. In demystifying laws and re-envisioning them, women's and children's concerns are given a voice, equalizing men and women in the eyes of these laws. Traditionally, the private sphere, and thus the reconciliation of work-family responsibilities, was considered outside the ambit of law. More and more, however, new reformist projects are recognizing this concern as pivotal to efficiency and equality in the workplace and the home. Additionally, the omnipresence of gender in determining the responsibilities of and opportunities for men and women mandates that laws address gender equality in addition to work-family obligations. As a result, such concerns are now placed at the heart of law reform.

In concretizing such concerns however, law and policy reform must provide corresponding safety nets and mechanisms so that both sexes can live by values of shared family responsibility. While honoring the child caring duties and parental leave of women, however, reforms must be wary of reinforcing traditional gender stereotypes. Furthermore, laws that only focus on women's childrearing and child bearing responsibilities must not disadvantage men who choose the bulk of childrearing responsibilities. Special treatment must be offered to both men and women who choose to perform child caring and child rearing duties. The laws and policies analyzed below reflect a breadth of approaches to reconciling work-family obligations, whether by addressing: the root cause of gender inequality; the resulting symptoms of unfair work policies; or both the cause and its symptoms. Some of the legislative strategies include the following: strategies include the following:

Defining Equality in the Family and the Workplace

Transformative gender equality in the public sphere can be achieved only through gender equality in the private sphere. New legal reforms such as the **Ukraine** law on gender equality defines gender equality in both public and private life including in the family. On the other hand, some laws make explicit references only to equality in public life. For example, the **Albanian law of Gender Equality** explicitly refers only to gender equality in public life.²³ Similarly, **Finland's Act on Gender Equality** restricts the act from governing family relations.²⁴

²³ Article 1.b of the REPUBLIC OF ALBANIA THE ASSEMBLY L A W, Nr.9198, dated 26.2.2004. ON AN EQUAL GENDER SOCIETY.

²⁴ Finland's 2004 Act on Equality between Men and Women. Section 2.2.

**Relevant Provisions on the
Slovenia law
On Equal Opportunities for Men and Women 2002
(Highlights included by Author)**

**Article 4
(Gender equality)**

Gender equality means that women and men shall equally participate in all fields of **public and private life** and that they shall have equal status, equal opportunities for the exercise of all rights and for the development of their personal potentials by which they contribute to social development, as well as equal benefit from the results arising from development.

**The Law of Ukraine
On State Guarantees of Equal Rights and Opportunities For Men And Women 2005
(Highlights included by author)**

Article 2. Equality Of Men And Women

Equality of men and women means equality of their legal and social status in all spheres of **public, state and private life**, based on the principle of parity.

Estonia's Act on Gender Equality in 2004²⁵ too attempts to advance gender equality both in public and private life. The law requires that the different needs of men and women be considered in drafting social policies. As a legal remedy, the act provides a right to claim compensation for damage suffered as a result of discrimination and creates the possibility of cases being referred to **the Gender Equality Commissioner** for an expert opinion. Another law that complements Estonia's Gender Equality Act is **the Act on Parental Benefit of 2004**. The aims and goals of this Act are to compensate for the loss of income flowing from raising a child and to support the reconciliation of work family obligations. Despite these laudable developments in law reform, the new Act on Parental Benefits directs that these benefits be paid after a child birth only to the mother, thus perpetrating traditional gender roles and reinforcing gendered behavior in the family.

The Need for Legislative Consideration of Family Responsibilities of both Men and Women

Care giving must be realized as a policy issue and many newly drafted or revised laws attempt to integrate the values of the CEDAW into the language of the law. For example, the **Gender Equality law of Norway** refers directly to the CEDAW.

25 An English translation of this law is with the author.

Relevant Provisions of the Norway Act relating to Gender Equality (the Gender Equality Act)

Title of the Act amended by the Act of 10 June 2005 No. 38 (in force from 1 July 2005 pursuant to the Decree of 10 June 2005 No. 527).

Section 1b. (*Incorporation of the UN Convention on the Elimination of All Forms of Discrimination against Women*)

The United Nations Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 with the Optional Protocol of 6 October 1999 shall apply as Norwegian law. The convention shall be published in the Norwegian Law Gazette in one original language and in a Norwegian translation.

As far back as 1986, the **Commission on the European Community** labeled the sharing of family responsibilities and occupational responsibilities a *sine qua non* for the promotion of true equality at work. By 2000, **the European Council** was seeing work-family reconciliation as an element contributing to productive working environments for all. In 2002, the **Barcelona European Council** set child care targets, recommending that Member states provide care for at least 90 percent of the children between 3 years old and mandatory school age, and for at least 33 percent of the children under three years of age by 2010. Moreover, several laws like the **Tajikistan law and the Kyrg Republic law** show cases below have included directly into legislation the need for the consideration of family responsibilities of employees of both sexes.

Selected Provisions of the Law of the Republic of Tajikistan State guarantees of equal rights for men and women and equal opportunities in the exercise of such rights 2005 (highlights added by author)

Article 7. Consideration of family responsibilities of employees of either sex while carrying out service and labor duties.

During the course of the hire, promotion, professional education, establishment of labor regimes and also retirement of employees including officials, the requirements of legislation in respect of the rights and guarantees to a person of either sex with family obligations should be taken into account. Employers should have system of retraining and advancing the qualifications of employees of either sex, essentially including that required in connection with breaks in labor activity permitted by the legislation such as birth, the raising of children, military service, and fulfillment of other state duties.

Relevant Provisions of the Law of the Kyrg Republic

On the Basics of the State Guarantees of Gender Equality

Law on Gender Equality in Labour 2003

Article 19. Sharing of Household Work

The principle of gender equality in labour shall also apply to household work.

The **Kosovo law** goes even further to embody the principles of gender equality in child care responsibilities and takes into consideration the need for parental leave in the event that a child is hospitalized due to sickness. Further, as seen below, parental leave up to three months is granted for parents who are engaged in less than 25 percent of active labour. All provisions apply to the care of natural as well as adopted children.

Relevant Provisions of the Law of Gender Equality in Kosovo 2004
(highlights have been added by the author)

[Art. 15. a.

SECTION V

Exceptional circumstances.

Art. 16

Multiple births.

Parents shall have a joint right to the extension of maternity/paternity leave by three months for each child after the first in a multiple birth [that is born alive]¹⁾ .

[Parents who adopt, or take into permanent foster care, more than one child at the same time, shall have a joint right to extend maternity/paternity leave by three months in respect of each child after the first.

Payments shall be in accordance with Article 13.]

Art. 17

Illness of a child or its mother.

Should a child need to stay in hospital for more than seven days directly following the birth, it is permitted to extend the parents' joint right to maternity/paternity leave by the number of days the child has to stay in hospital, prior to its first homecoming, by up to four months.

It is also permitted to extend the parent's joint right to maternity/paternity leave by up to three months in the case of a serious illness of the child which requires more intensive parental attention and care.

It is permitted to extend the mother's maternity leave by up to two months due to a serious illness

suffered by her in connection with the birth.

Should it become necessary for a pregnant woman to cease paid employment for the sake of her health more than a month prior to the expected birth of her child, she shall be entitled to payment during her maternity leave during this period, though not for more than two months. Should the birth occur prior to the expected birth date of the child, the authorization for extension under this provision shall cease to apply from that time. The Minister shall issue regulations on further conditions regarding the application of this provision.

SECTION VI

Parents not active in the labour market or attending full-time educational programmes.

Art. 18

Maternity/paternity grants to a parent who is not active in the labour market.

Parents who are not active in the labour market, or who are employed in less than 25% of a full employment position, shall have an independent right to a maternity/paternity grant for up to three months each in connection with a birth, primary adoption or permanent foster care of a child. This right shall not be assignable. In addition, parents shall have a joint right to a maternity/paternity grant for three additional months, which may be exercised entirely by one parent or divided between them. The right to a maternity/paternity grant [in connection with the birth of a child]¹⁾ shall lapse when the child reaches the age of 18 months.

[The maternity/paternity grant shall be ISK 40,409²⁾ per month. ...

Regarding adoption, or permanent foster care of a child, the payment of the maternity/paternity grant to the parents shall be made on the basis of the time when the child enters the home,

providing this is confirmed by the child welfare committee in question, or other competent bodies. If the parents have to fetch the child from another country, the payment of the maternity/paternity grant could start at the beginning of the journey, providing the relevant authorities or institute have confirmed that permission has been granted....

The recently drafted **Gender Equity law in Vietnam**, which became operationalized in July 2007,²⁶ is a valuable case study as it directs the state to set up systems of support services for family work. Although provisions on implementation have not been drafted, the law is seen as a change agent of constitutive force that will become ingrained in the public consciousness. This law provides for gender equality both in public and private spheres and covers state institutions, political organizations, socio-political and professional organizations, armed forces, the family and individuals.

Legislative Efforts to Address Gender Stereotypes in the Family

It is important to look at ways in which the Vietnamese law on gender equity addresses gender stereotyping and attempts to mainstream gender awareness both in private and public spheres. Article 1 of the law provides that the law is meant to ensure the “equality of men and women all in areas of social life, namely political, economic, cultural, social and family as well as the responsibility of agencies, organizations, individuals in ensuring the equality of men and women.” Article 2 of the Vietnamese law prohibits discrimination both in public and in private. Article 6 states that “[m]an and woman are equal in all fields of social and family life.” Article 8 of the law forbids acts against gender equality and attempts to describe an exhaustive list of what constitutes forbidden acts which include violation of equality of both men and women.²⁷ These articles thus embody the values of Article 5 of the CEDAW, which recommends the dismantling of cultural values that stereotype women.

Yet, at the same time, the law does not go far enough to address those stereotypes and in fact indirectly reinforces them through its assignment of care taking responsibilities to each gender. For example, Article 14 of Chapter 2 provides that: “[f]emale officials, public servants bringing along their children at less than 36 months of age when participating in the training and fostering courses are given assistance and support as provided by the government.” Article 32(f) further supports the concept of child care assistance for women laborers participating in training: “[t]o support female laborers who bring along their children at less than 36 months of age, to participate in the training and fostering activities.” Unfortunately, Article 32(f), as well as Article 14, only allow female officials and public servants to bring their children when participating in programs. This provision assumes that when male employers participate in training programs, a mother would be at home to care for the young children. This provision seems to reinforce patriarchy in its contradiction of the spirit of Article 11 of the law, which guarantees the equality of men and women in all fields of family life.

On the other hand, Article 32 (g) of the Vietnamese law is a commendable provision that mandates conditions be created for male laborers to have full paid leave when their wives give birth. Article 33 provides that families should, amongst their other responsibilities, “create conditions for family members to raise their awareness and knowledge on gender equality and to participate in gender equality activities.”²⁸ In a subset of Article 33 on labor performance in the family, the law also provides that work in the family is the duty of both men and women and that both boys and girls should participate in family work. The provision also goes on to state that the family should take measures to develop systems of support services

26 An English translation of this law is with the author.

27 This includes, “1. Direct or indirect discrimination based on the reason of religion, belief and gender bias; 2. Restriction of men and women in participation in political, economic, social, cultural and family activities as well as in other activities for satisfaction of the rational and legitimate needs of individuals; 3. Violence in the family, community, society on the gender grounds; 4. Restriction of family members to carry out activities for enhancing the knowledge and implementation of gender equality.”

28 See Article 33(1).

for family work, including gender equality in education.²⁹ Article 33(4) directs that equal opportunities be granted to sons and daughters in their study, work, and participation. This is in keeping with Article 29 of the CRC which states that the child's education shall be directed to preparing the child for a "responsible life in the spirit of...equality of sexes." Equal educational opportunities will not only dispel negative gender stereotypes and gendered hierarchies, but will also encourage broad-minded career aspirations and increased awareness of human rights entitlements. Although provisions on implementation for the articles have not been drafted, these laws help raise consciousness and over time, become ingrained in gender awareness campaigns.

The Vietnamese law makes provisions for both men and women to take time off to care for sick children. The law also embraces the role of the media in shaping public perceptions on gender and directs the mass media to coordinate with competent government agencies to educate people in gender equality.³⁰ An important characteristic of this provision is that the Fatherland Front³¹ has been asked to engage in gender mainstreaming to achieve equality of the sexes. The importance of including the Fatherland Front in these efforts presumes a good faith effort to engage men in actualizing both gender equality and equal participation in family responsibility.

Relevant Provisions of the Vietnam Law on Gender Equity, 2006

Article 1: Scope of adjustment

This law provides for principles of gender equality in all fields of social and family life, measures ensuring gender equality, responsibilities of agencies, organizations, families, individuals in exercising gender equality.

Article 3: Application of international treaties on gender equality

In case of an international treaty to which the Socialist Republic of Vietnam is a signatory contains provisions that differ from those of this law, the provisions set out in that international treaty shall be applied.

Article 4: Objectives of gender equality

The objectives of gender equality are to eliminate gender discrimination, to create equal opportunities for man and woman in socio-economic development and human resources development in

²⁹ See Articles 14 & 18.

³⁰ Gender Equity Law of Vietnam, Art. 29 (2007).

³¹ Vietnam Fatherland Front is a political coalition organization, a voluntary union of political organizations, socio-political organizations, social organizations and individuals representing all classes, social strata, ethnic groups, religions and overseas Vietnamese.

Vietnam Fatherland Front constitutes a part of the political system of the Socialist Republic of Vietnam, led by the Communist Party of Vietnam; and constitutes a political base of the people's administration, a place where the people express their will and aspirations, the entire people's great solidarity bloc is built up, the people's mastery is brought into full play, where its members hold consultative meetings, and coordinate and unify their actions, thus contributing to the firm maintenance of national independence, sovereignty and territorial integrity, and successfully carrying out the cause of national industrialization and modernization, so as to achieve the objective of a prosperous people, a strong country and an equitable and civilized society. See Article 1 of the Law on the Vietnam Fatherland Front.

order to reach substantial equality between man and woman, and to establish and enhance cooperation and mutual assistance between man and woman in all fields of social and family life.

Article 6: Basic principles on gender equality

1. Man and woman are equal in all fields of social and family life.
2. Man and woman are not discriminated in terms of gender.
3. Measures aimed at promoting gender equality are not considered gender discrimination.
4. Policies aimed at protecting and supporting mothers are not considered gender discrimination.
5. Ensuring the mainstreaming of gender equality issues into the development and implementation of laws.
6. Exercising gender equality is the responsibility of agencies, organizations, families and individuals.

Article 7: State policies on gender equality

1. To ensure gender equality in all fields of politics, economy, culture, society and family; to support and provide conditions for man and woman to bring into full play their abilities; to give them equal opportunities to take part in the process of development and to benefit from the achievements of the development.
2. To protect and support mothers during pregnancy, giving birth and upbringing children; to facilitate man and woman in sharing housework.
3. To apply appropriate measures to eliminate backward customs and habits hindering the implementation of gender equality objectives.
4. To encourage agencies, organizations, families and individuals to take part in gender equality promoting activities.
5. To support gender equality activities in the remote and mountainous areas, in areas of ethnic minority groups and areas of extremely difficult socio-economic conditions; to provide necessary supports to increase GDI in the industries, fields, and localities where GDI is lower than the average level of the entire country.

Article 14: Gender equality in the field of education and training

4. Female officials, public servants bringing along their children at less than 36 months of age when participating in the training and fostering courses are given assistance and support as provided by the Government.

Article 18: Gender equality in family

1. Wife and husband are equal in civil relationships and other relationships related to marriage and family.
2. Wife and husband have equal rights and duties in possessing common assets and are equal in using their common income and in deciding their family resources.
3. Wife and husband are equal in discussing, deciding to choose and use appropriate family planning measures and use their leave to take care of their sick children according to regulations of laws.

4. Boys and girls are given equal care, education and provided with equal opportunities to study, work, enjoy, entertain and develop by the family.

5. Male and female members in the family have the responsibility to share housework.

6. To cooperate with the Central Committee of Vietnam Fatherland Front and the Central Vietnam Women's Union; and to direct concerned agencies in communication, dissemination and education of the law and in raising the public awareness on gender equality.

Article 33: Responsibilities of the family

1. To create conditions for family members to raise their awareness and knowledge on gender equality and to participate in gender equality activities.

2. To educate family members to be responsible for sharing house works and to appropriately allocate house works to family members.

3. To take care of reproductive health and provide conditions to women to exercise their safe motherhood.

4. To equally treat and provide equal opportunities to sons and daughters in their study, work and participation in other activities.

In this effort, **Japan** too seems to feel need to deconstruct conventional gender roles that have hamstrung gender equality. The **Basic Law for a Gender- Equal Society**,³² drafted as part of Japan's obligations under the CEDAW, states in Article 4 that in "consideration that social systems or practices can become factors impeding formation of a Gender-equal Society by reflecting the stereotyped division of roles on the basis of gender, etc., thus having a non-neutral effect on the selection of social activities by women and men, care should be taken so that social systems and practices have as neutral an impact as possible on this selection of social activities." The law aimed to lay out basic principles, clarify responsibilities, and stipulate provisions to form the basis of policies. In another example of how law can be used to reconcile work family obligations and minimize the punitive consequences of those actions, the **Japanese Law revising the Law Concerning the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave**, promulgated on 16 November 2001,³³ prohibits unfair treatment on the grounds of taking childcare leave, etc. and establishes a right to claim exemptions from overtime work.

Addressing Gender Stereotypes in the Family through Education

Policymaking on caregiving alone is not an effective way to address deeply embedded stereotypes. Taking this to mind, as seen below, several recent law reform initiatives have included creative provisions to address gender stereotypes through education.

32 Basic Law for a Gender-Equal Society, No. 78 (1999).

33 An English translation of the law is with the author. The translation was provided by Akiko Ito, Chief Disability Unity, DESA, United Nations.

Relevant Provisions of the Law on Croatia's Gender Equality Act of 2003

V. EDUCATION

Article 14

- 1) Education in gender equality shall be an integral part of the system of elementary, secondary and tertiary education as well as life-long learning, which shall include the preparation of both genders for active and equal participation in all areas of life.
- 2) Gender studies curricula should stimulate new non-discriminatory knowledge about women and men, abolishment all gender/sexual inequalities and gender stereotypes at all levels of education, recognition of gender aspects in all educational areas and adoption of measures to ensure equal representation of both genders among students as well as among teaching staff.
- 3) All government bodies, legal entities vested with public authority and especially all educational institutions and other legal entities that participate in the promotion and realisation of gender equality shall be obliged to systematically engage in education and awareness raising in gender equality.
- 4) The competent government body for education and institutions that are active in the field of education shall implement affirmative actions, especially in regard to:
 1. access to education,
 2. preparation, adoption and implementation of the educational programme,
 3. issuing mandatory approvals for text-books and teaching aids,
 4. introduction of organisational innovations,
 5. changes in teaching and pedagogical methods.

Relevant Provisions on the Act on Equal Opportunities for Women and Men Bulgaria 2002

CHAPTER SIX: REMOVAL OF NEGATIVE STEREOTYPES OF ROLES OF WOMEN AND MEN

Article 38. (1) Persons providing education and training, as well as authors of textbooks and study materials shall present information and apply training methods aiming at removal of the negative stereotypes of the roles of women and men in all spheres of public life, including the family.

(2) The kindergartens, schools and high schools shall include in their educational programmes and plans training on the gender equality issues.

Relevant Provisions of the Law of Ukraine
"On State Guarantees Of Equal Rights And Opportunities For Men And Women"
(Provisions highlighted by author)

Article 35. Provision Of Equal Opportunities To Men And Women In Education

1. The state provides equal opportunities for men and women as regards their education.

The employer should create equal conditions for women and men in training and acquiring further education, by granting sabbatical leaves, etc. In the event that women and men are treated differently, the employer should be able to prove that it is not related to the sex of the worker.

2. At admission to school or any other educational institution, training course, as well as in the case of other measures designed to encourage individuals to acquire any specific skill or trade, it is allowed, other conditions being equal, to prefer one sex if this can help in the long term to improve gender balance in the relevant occupation specialty or trade.

3. Educational institutions provide equal conditions for men and women in relation to:

- Admission to educational institutions;
- Assessment of educational achievement;
- **Vocational guidance, that is advice on trades which were once considered as male or female;**
- Provision of grants;
- Provision of loans to students;
- **Publication of textbooks, manuals for all educational levels are to be developed with due account of the principle of gender equality and do not discriminate against women or men.**

4. Students of both sexes are offered a non-discriminative preparation for active participation in public life, family life and all other spheres of life.

5. Training should be free from stereotype ideas about the role of the man and the woman, and promote a shared participation in professional and family duties.

Legislating Parental Leave

Successful work/family reconciliation measures have included parental leave and childcare. The **Icelandic** law makes it clear that the reason behind parental leave is to strengthen children's access to parents.³⁴ The main aim of the **Maternity/Paternity Leave and Parental Leave Act** is to create conditions in which men and women are able to participate equally in paid employment and other work outside the home, and to guarantee children time with both parents. By reinforcing men's rights to mandatory leave-of-absence during childbirth, the **Gender Equality Act of Norway, 2002** provides gender equal protection for fathers and mothers. One of the creative ways in which **Sweden** attempted to ensure the sharing of family responsibility was to introduce paid parental leave. This was directed at changing male attitudes and behavior. Either parent could make avail of parental leave with 90 percent of his or her salary for the first nine months and a fixed allowance for the last three months.³⁵ In the European Union concrete policy formulations have included: short to long term parental leave; care for children, the elderly, and the disabled; and programs for parents re-entering the workforce.

34 Article 2.1 of the Iceland Act on Maternal and Paternal Leave, 2004.

35 Hanna Beate Schopp- Schilling, Impediments to Progress: The formal Labor Market; The Circle of Empowerment, 2007.

The **Council Directive of the EU regarding parental leave**³⁶ embodies the requisite recognition by legislative bodies of the crucial need for familial duties to be shared by both fathers and mothers. The Preamble states its intention to establish “minimum requirements on parental leave and time off from work on grounds of *force majeure*, as an important means of reconciling work and family life, and promoting equal opportunities and treatment between men and women.” The ensuing provisions further elucidate the goals of the Directive:

Relevant Provisions on the EU Council Directive on Parental Leave

4. Whereas the Community Charter of Fundamental Social Rights stipulates at point 16 dealing with equal treatment that measures should be developed to enable men and women to reconcile their occupational and family obligations;
5. Whereas the Council Resolution of 6 December 1994 recognizes that an effective policy of equal opportunities presupposes an integrated overall strategy allowing for better organization of working hours and greater flexibility, and for an easier return to working life, and notes the important role of the two sides of industry in this area and in offering both men and women an opportunity to reconcile their work responsibilities with family obligations;
6. Whereas measures to reconcile work and family life should encourage the introduction of new flexible ways of organizing work and time which are better suited to the changing needs of society and which should take the needs of both undertakings and workers into account;
7. Whereas family policy should be looked at in the context of demographic changes, the effects of the ageing population, closing the generation gap and promoting women's participation in the labour force;
8. Whereas men should be encouraged to assume an equal share of family responsibilities, for example they should be encouraged to take parental leave by means such as awareness programmes;
9. Whereas the present agreement is a framework agreement setting out minimum requirements and provisions for parental leave, distinct from maternity leave, and for time off from work on grounds of *force majeure*, and refers back to Member States and social partners for the establishment of the conditions of access and detailed rules of application in order to take account of the situation in each Member State....

36 Council Directive 96/34/EC, 1996 O.J..

**Relevant Provisions on Iceland's Act
on Maternity/Paternity Leave and Parental Leave,
No. 95/2000, as amended by Act No. 90/2004.**

SECTION I

Aim and scope.

Art. 1

Scope.

This Act shall apply to the rights of parents working in the domestic labour market to be granted maternity/paternity leave and parental leave. It shall apply to parents who are employed by others or are self-employed.

This Act shall also apply to parents who are not active in the labour market and parents attending full-time educational programmes as to receiving a maternity/paternity grant.

Art. 2

Aim.

The aim of this Act to ensure a child's access to both his/her father and mother.

Furthermore, the aim of this Act is to enable both women and men to co-ordinate family life and work outside the home.

Legislation like the newly promulgated **Law on Guaranteeing Equality between Women and Men in Spain**, passed in March 2007,³⁷ has taken the lead in transforming gender roles by shaping both men and women's work and family aspirations.³⁸ Mandating pregnancy leave not just for the mother but for the father as well has eased the burden of care on the mother. The workplace has been reinvented to recognize gender equality and the role that both parents play in child bearing and child rearing.

The highlights of the new Spanish law include 15 days of paternity leave which will expand to a month in 2013 for new fathers. This provision changed a seldom-used arrangement in which mothers of newborns could lend all or part of their 10 weeks leave to the father. According to this new law, Spanish companies that achieve a more balanced male-female ratio among their executives and at lower levels will receive favorable treatment when they bid for government contracts. Moreover the law obligates all companies with more than 250 employers to put in place gender equal policies and to have 40 percent of women on their boards within eight years. In addition women must represent at least 40 percent of political candidates. The new regulations also attempt to achieve a reconciliation of work-life balance by allowing parents to the right to reduce work time by as much as half in order to care for children under the age of 12 years and for people with disabilities. These provisions not only hope to privilege childcare as a workplace obligation but also hope to promote full citizenship of both men and women.

Harmonizing Work/Family Obligations through Legislative Reform

Sweden was one of the first countries to alter the way in which men and women's roles in the family were normalized. Sweden's reconceptualization of sex role stereotypes and socialization of boys and girls created a paradigm shift in understandings of the dual roles of men and women in work and family. Responding to a United Nations request to report on the status of women, Sweden argued for changes in men's lives both to fulfill the mutual familial obligations and responsibility of spouses for sharing family

37 Law on Guaranteeing Equality between Women and Men ('Ley de Garantía de la Igualdad entre Hombres y Mujeres).

38 Law for True Man-Woman Equality, 2007.

obligations and “to abolish the conditions which tend to assign certain privileges, obligations or rights to men. No decisive change in the distribution of functions and status as between the sexes can be achieved if the duties of the male in society are assumed a priori to be unaltered.”³⁹

Several countries have adopted equality laws that not only prohibit gender specific discrimination, but are extended to include discrimination on the grounds of: marital status; pregnancy or potential pregnancy; or family responsibility.⁴⁰ The coverage of such laws is also defined clearly and broadly. For example, the **Australian Sex Discrimination Act** states that it covers work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of laws and programs.

Relevant Provisions from the Australia Sex Discrimination Act 1984 – SECT 7A

Discrimination on the ground of family responsibilities

For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:

- (a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
- (b) the less favourable treatment is by reason of:
 - (i) the family responsibilities of the employee; or
 - (ii) a characteristic that appertains generally to persons with family responsibilities; or
 - (iii) a characteristic that is generally imputed to persons with family responsibilities.

The new **Gender Equality Act of 2006, effective beginning 6 April 2007 in the United Kingdom**, requires all public authorities, including those commissioning parenting services, to have “due regard” for the need to promote equality of opportunity between men and women.⁴¹ According to an analysis by the U.K. Equal Opportunities Commission, the lack of shared caring responsibilities between women and men is the single biggest cause of the pay gap. Supporting fathers in taking more responsibility for caring for children, therefore, is a key component in achieving gender equality.

The Law on Gender Equality in Bosnia and Herzegovina of 2003, as shown below, prohibits discrimination based on child birth, pregnancy or on efforts to reconcile work family obligation. 42

39 Hanna Beate Schopp- Schilling, *Impediments to Progress: The formal Labor Market; The Circle of Empowerment*, 2007.

40 See Sex Discrimination Act, No. 85 (2005).

41 Available at <http://www.eoc.org.uk/default.aspx?page19951>.

42 Pursuant to Article IV.4. a) of the Constitution of Bosnia and Herzegovina, at a session of the House of Representatives held on 22 April 2003 and of the House of Peoples held on 21 May 2003, the Parliamentary Assembly of Bosnia and Herzegovina enacted the Law on Gender Equality in Bosnia and Herzegovina.

Relevant Provisions on the Gender Equality Law in Bosnia and Herzegovina, 2003

Article 8

Prohibited discrimination on the grounds of gender at work and in employment is defined as:

- failure to pay equal wages and other benefits for the same work or work of equal value;
- failure to ensure promotion at work on equal terms;
- failure to provide equal opportunities for education, training and professional qualifications;
- failure by an employer to provide work premises, ancillary facilities and equipment appropriate to the biological and physical needs of employees of both sexes;
- different treatment on the grounds of pregnancy, childbirth or exercising the right to maternity leave, including failure to enable an employee to return to the same job or another job of the same seniority with equal pay after the expiry of maternity leave, as well as different treatment for men and women in regard to deciding how to take up maternity leave following the birth of a child;
- **any unfavourable treatment of a parent or guardian in balancing their commitments in family and professional life;....**

An exemplary model is the **Iceland Act on the Equal Status and Equal Rights of Women** which predicates gender equality on the need for reconciliation of work-family obligations for both men and women. The stated goals of this law include the establishment of equal opportunities for women and men to be reached, by among other things: enabling both women *and* men to reconcile their occupational and family obligations; increasing education in matters of equality; analyzing statistics according to sex; and increasing research in gender studies. Article 16 of the above referenced Icelandic law establishes that reconciliation of occupational and family obligation are the duties and responsibilities of both men and women and that employers shall take the necessary measures to enable women and men to reconcile their family obligations. Moreover, **The Prohibition on Redundancies due to Family Responsibilities Act of Iceland, No. 27/2000** affirms that a person may not be made redundant solely because of the family responsibilities he/she bears.

The legislative excerpts below look at ways in which selected countries have attempted to achieve this balance:

Relevant Provisions of the Iceland Act on the Equal Status and Equal Rights of Women and Men

SECTION I

Aim and Scope of this Act

Art. 1

- ▶ The aim of this Act is to establish and maintain equal status and equal opportunities for women and men, and thus promote gender equality in all spheres of the society. All individuals shall have equal opportunities to benefit from their own enterprise and to develop their skills irrespective of gender. This aim shall be reached by:
 - ▶ a. gender mainstreaming in all spheres of the society,
 - ▶ b. working on the equal influence of women and men in decision-making and policy-making in the society,
 - ▶ c. **enabling both women and men to reconcile their occupational and family obligations,**
 - ▶ d. improving especially the status of women and increasing their opportunities in the society,
 - ▶ e. increasing education in matters of equality,
 - ▶ f. analysing statistics according to sex.
 - ▶ g. increasing research in gender studies.

Relevant Provisions of the Canadian Human Rights Act

1985

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, **family status**, disability and conviction for which a pardon has been granted.

16. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or **reduce disadvantages** that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

Relevant Provisions of the Canadian Charter

Section 15 of the Canadian Charter

Section 15 2) states:

Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age, or mental or physical disability.”

Section 15 (2) states:

“Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national origin, color, religion, sex, age or mental or physical disability.”

Relevant Provisions of the Denmark Act on Gender Equality

Part 1

Purpose of the Act

1. The purpose of this Act is to promote gender equality, including equal integration, equal influence and Gender Equality in all functions in society on the basis of women's and men's equal status. The purpose of the Act is also to counteract direct and indirect discrimination on the ground of gender and to counteract sexual harassment.

Measures to promote gender equality

3. - (1) Irrespective of the provision laid down in section 2, a minister may within his or her portfolio permit measures to promote gender equality which aim at preventing or redressing discrimination on the ground of gender.

Relevant Provisions of the Japan The Basic Law for a Gender-equal Society (Law No. 78 of 1999) (Compatibility of Activities in Family Life and Other Activities) Article 6

Formation of a Gender-equal Society shall be promoted so that women and men can perform their roles smoothly as household members in home-related activities, including child-raising and nursing of family members through mutual cooperation and social

support, and can thus perform activities other than these.

Relevant Provisions of the European Union Law

Article 2 (1) of the binding European Council Directive:

“The Principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

Article 2 (4) states:

“This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities.”

An additional paragraph was added to the European Community Treaty:

“With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers.”

Relevant Provisions of the Republic of South Africa: Promotion of Equality and Prevention of Unfair Discrimination Act

CHAPTER 2

- ▶ 6. Neither the State nor any person may unfairly discriminate against any person.
- ▶ Prohibition of unfair discrimination on ground of gender
- ▶ 8. Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—
 - ▶ (a) gender-based violence;
 - ▶ (b) female genital mutilation;
 - ▶ (c) The system of preventing women from inheriting family property;

(d) Any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;

- (e) Any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
- ▶ (f) Discrimination on the ground of pregnancy;
- (g) Limiting women's access to social services or benefits, such as health, education and social security;
- (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
- ▶ (i) Systemic inequality of access

Providing Strong Monitoring Mechanisms

While hortatory legal reform will remain weak, a carrot and stick approach will help with strict compliance with law. An example of the way in which laws can be normative as well as effective is the recently promulgated Norwegian law. In 2002, **Norway** passed a law requiring all companies to ensure that women comprise 40 percent of their boards. If the board has two or three members, both sexes must be represented. Under these rules, the Register of Business Enterprises can refuse to register a company board if its composition does not meet the statutory requirements. Companies that do not comply with this regulation face closure in 2008.⁴³

Several newly drafted laws, including laws in **Croatia** and **Kosovo** have set up **Gender Equality Ombudsman/ Equal Opportunities** offices 44 with quasi judicial responsibilities or a **Gender Equality Attorney** to prosecute gender-based violations. These offices will be effective only if they are able to enforce their decisions over the recalcitrant employers.

43 See CNN INTERNATIONAL, available at <http://edition.cnn.com/2005/WORLD/europe/04/05/norway.women.reut/index.html>

44 See Sweden's Law on an Act on Equality between Women and Men
The Equal Opportunities Act (SFS 1991:433)

**Relevant provisions of the Croatian
Gender Equality Act of 2003**

2. GENDER EQUALITY OMBUDSMAN

Article 19

- 1) Gender Equality Ombudsman (hereinafter: the Ombudsman) shall be appointed and dismissed by the Croatian Parliament on the proposal of the Government of the Republic of Croatia.....

Article 21

- 1) The Ombudsman shall act autonomously and independently, monitor the implementation of this Act and other regulations relating to gender equality and report thereof to the Croatian Parliament at least once a year.....

3)Everybody shall be entitled to approach the Ombudsman for the reason of a violation of this Act, regardless of whether the person is directly harmed or not, unless the person harmed expressly objects to it.

Article 23

- 1) The Ombudsman shall be entitled to propose to the Constitutional Court of the Republic of Croatia to initiate the proceedings to decide on conformity of laws with the Constitution and conformity of other regulations with the Constitution and the law, in cases where he/she believes that the principle of gender equality is violated.

**Selected Provisions of the Law No.2004/2
ON GENDER EQUALITY IN KOSOVO**

SECTION 6

THE GENDER EQUALITY ATTORNEY

6.1. The Gender Equality Attorney (the Attorney) shall be nominated by the Government and shall be appointed and dismissed by the Assembly.

6.2. The Gender Equality Attorney shall have a deputy, who is elected by the Attorney and is appointed by the Assembly.

6.3. The Gender Equality Attorney and his/ her deputy shall meet the following conditions:

- a) A degree in law;
- b) Work experience in human rights, and gender equality;
- c) Must have passed the bar exam.

6.4. The Attorney and his/her deputy shall be discharged from duty in the case of:

- a) Resignation accepted by the Kosovo Assembly;
- b) Permanent loss of capability to perform the duty;
- c) A court order for criminal offence;
- d) Non-fulfillment of the duties specified by the present law.

6.5. The Gender Equality Attorney shall monitor and supervises the implementation of the present law and shall report once a year before the Kosovo Assembly and in case of need even more frequently.

Legislating State Responsibility for Child Care

Government subsidized childcare and paid maternity leave enhances both the participation of women in the labor market as well as the economic stability of a country. In 1985, **Sweden** passed a law mandating that all children between 18 months and school age receive access to childcare by 1991. This law has helped to transform gender roles and increase women's participation in the market place. A recent survey of Sweden revealed that 76 percent of mothers with children under the age of six work outside the home.⁴⁵ This has also contributed to changes in the father's role in the family and instituting child rearing as a parental right and duty of men and women. Today, most children in Sweden grow up in a family where child caring and child rearing are shared responsibilities.

In **Finland**, the Helsinki Court of Appeals held that parents have a subjective right to have their child in municipal day care until the child reaches the age of compulsory education and begins school. A delay in child-care arrangements by municipality for a couple with two children prevented one of the parents from working for a few weeks. The court noted that this right was derived from constitutional and legislative mandates of public authorities to guarantee everyone adequate social, health, and medical services.⁴⁶ Furthermore, the constitution and legislation required public authorities to support families and other child-care providers in their ability to ensure the well-being and personal development of children. Therefore, the city was responsible for the damage it caused to the parent as a result of its delay in making appropriate day-care arrangements.

The **Finnish law on Gender Equality** also underscores the importance of work family reconciliation: Article 6.3 of the **Law on Equality between Women and Men of 2004**.

45 See AUGUSTO LOPEZ-CLAROS AND ZAHIDI SAADIA, WORLD ECONOMIC FORUM, WOMEN'S EMPOWERMENT: MEASURING THE GLOBAL GAP (2005), available at <http://ncwo-online.org/data/images/WorldEconomicForum.pdf>.

46 See Helsinki Court of Appeals.

Relevant Provisions on the Finland's Act on Equality between Women and Men, 2004 (provisions highlighted by the author)

Section 1

Aim of the Act

The aim of the Act is to prevent discrimination on the basis of sex and to promote equality between women and men, and, for this purpose, to improve the status of women, particularly in working life.

Section 6

Employer's duty to promote equality

Each employer shall promote equality between women and men within working life purposefully and systematically.

In order to promote equality in working life, the employer shall, with due regard to the resources available and any other relevant factors,

- (1) act so that both women and men apply for vacancies;
- (2) promote an equitable recruitment of women and men in the various jobs and create for them equal opportunities for promotion;
- (3) develop working conditions so that they are suitable for both women and men, and facilitate the reconciliation of working life and family life for women and men; and....**

Apart from countries of the European Union, countries in the Asian region are making an effort to institute childcare policies. In **Japan** and **Korea**, childcare leave regulations have been revised. In 2005, Japan revised its laws to allow parents to take time off of work for 18 months after the birth of a child. Through employment insurance a parent can receive a total of 40 percent of the salary during the time of the leave. In **Korea**, from 2008, parental leave will be extended to three years. During maternal leave, employers have to pay 100 percent of their salary for 60 days.⁴⁷

Constructing care as a policy issue must become central to the issue of work-family reconciliations and must animate any revision or lawmaking on gender equality. What is important to understand in lawmaking is that policies directed toward the labor market, the family, and equality are closely interrelated. For example, a paid maternity leave of one year with job guarantee have been linked to 91 percent of women working in the German Democratic Republic (GDR). The second periodic report of the GDR to the CEDAW Committees highlighted 81 percent of children under the age of three could find places in creches

⁴⁷ The policies referred to here are with the author.

and all children of pre- school age could go to kindergarten. 48 The recommendations below for law and policy reform grow out of a need to balance the rights of women, men and children so as to meet family and the workplace.

Recommendations for Legislative Reform on Work Family Obligations (Check List):

- Create work conditions and family leave policies to enable the reconciliation of work family obligations for both women and men. Family leave policies must be mandated for both men and women. Support male workers to take advantage of paternal leave policies.
- If policies are in place, what provisions refer to employment leave (maternity, paternity, and other parental leave and childcare)? Do these provisions apply equally to men and women?
- Ensure that the current law guarantees employment during parental leave. Does the law or policy mandate continuation of income during this period of time?
- Is maternal/paternal leave considered employment for the purposes of calculating pensions or other benefits?
- Ensure that the law or policy guarantee employees returning from paternal or maternal leave the same working position, level and salary as prior to leave
- What efforts have been made to put in place policies on caring for sick or disabled children or family members?
- Mandate leave for the care of a sick child or family member for both men and women employees
- Where parental leave is specified by law, to what extent do both women and men take advantage of these provisions? Are there inducements put in place for father's to make use of parental leave?
- Provide sanctions for companies that do not comply with gender equal leave, family and parental leave policies and provide benefits for companies that comply
- Increase worker education in matters of equality by (include a few more specifications on how to do this)
- Review workplace guidelines for gender equality and gender equal child care policies
- Are there any other workplace measures to support policies such as flex- time or job sharing to help parents combine employment and child care?

48 Research conducted in the U.S. with the Aetna corporation shows that it increased its retention rate for women from 77 percent to 88 percent when it instituted a six-month leave program with flexible return to work possibilities. Based on a cost-of-turnover study that found employer replacement costs 193 percent of annual salary, Aetna estimated its savings to be \$1 million per year.

- What are the work place policies on childcare? Does the employer provide on site child care and/or is child care subsidized
- In the absence of state-sponsored childcare, do workplaces offer free-of-charge or subsidized childcare options to their employees? What other means do parents use to resolve childcare and work obligations?
- To what extent do men and women take advantage of other family-friendly employment programs or options?
- What is the practical impact of employees taking advantage of family-friendly policies (e.g. in terms of job advancement, other benefits, status in the workplace)?
- What efforts have been taken to ensure that workplaces adopt family-friendly provisions?
- What are the family benefits put in place by the employer? Ensure that women and men qualify equally for these benefits?
- Ensure that benefits such as children's allowances, housing allowances, health insurance, educational allowances are available
- Ensure that women and men have access to loans, and other forms of credit made available by the employer

b. Gender Equality in Property

Women's unequal access to property remains one of the most fundamental barriers to complete gender equality and the enjoyment of human rights. Around the world, women and girls' restricted access to and ownership of property are due to unequal laws, customary practices and patriarchal legal interpretations. The negative social and economic impacts of restricted access are widespread, but they fall most heavily on women and girl children.

Access to and ownership of land and income often decrease women's risks of being subjected to numerous forms of violence.⁴⁹ Consequently, impediments to this access such as inadequate inheritance rights often contribute to the economic and social violence perpetrated against women, such as sex work and subsequently, HIV/AIDS.⁵⁰ For this reason, Bina Agarwal writes that "a field of one's own" can have far reaching effects on the balance of power between women and men.⁵¹

Unequal property laws and inheritance laws not only subordinate women but they also impoverish families. Women's absence from decision making in the home and in the public results in policies that do not capture the reality of their lives or the lives of their families. Lacking full legal capacity or access to land particularly disadvantages female heads of households, who form a substantial proportion of the total rural

49 THE NATIONAL COUNCIL FOR RESEARCH, GAINS AND GAPS: A LOOK AT THE WORLD'S WOMEN, 2007.

50 1 AFRICA HOUSING RIGHTS BULLETIN (2004), available at: <http://www.cohre.org/library/COHREMarch 2004.pdf>.

51 BINA AGARWAL, A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA (1994).

households in many countries. Unfortunately, most agricultural communities' land registration documents, such as land tenure or use certificates, often bear just the name of husbands or another male head of household, leaving women without opportunities to increase land productivity, or sell or use land for credit. Consequently, women's access to land often depends on their marital status, with the result that unmarried and divorced women who may contribute to family labor on the land are rarely named on title deeds. In this context, properly documented joint land use rights for both wives and husbands can significantly reduce gender asymmetries in access to and control of real property, and thereby increase agricultural productivity and family security.

Additionally, land ownership is especially critical to rural women in developing countries where there is a high dependence on agricultural production. Increasing women's access to the means of agricultural production and land tenure will increase agricultural input and result in better security for both women and children.

A woman's equal access to property and land enhances the well-being of her entire family,⁵² as land rights are inextricably linked to women's and children's food security. Security in land tenure is especially important to rural women in developing countries where there is a direct correlation between the improvement in a woman's income and assets and the enhanced health, education, nutrition, and overall well-being of her children.⁵³ This correlation can be explained by the augmented financial security that often accompanies female land ownership, particularly as such ownership gives women opportunities to build credit and take out loans. Furthermore, women's increased access to land is often empowering through ensuing improvement of women's status both in the family and the community. Consequently, limitations on inheritance rights and the access to land tenure of married, divorced, and widowed women derogate from the general welfare of women and children.

Addressing Cultural Traditions Preventing Equal Property and Inheritance Rights

Given the fundamental importance of property to women's equality, women's rights litigators have challenged unequal inheritance laws and customary practices so as to secure daughters' rights to parental property in Nepal.

The *Meera Dhungana*⁵⁴ case in **Nepal** challenged the discriminatory inheritance law in Nepal. Under this law, the son had an unconditional right to ancestral property whereas only an unmarried daughter above the age of 35 had this right. The court directed the government to revise the inheritance law. The Nepal Supreme Court's directive became a lightning rod for the reform of the inheritance law. The Country Code 11th Amendment was revised to acknowledge daughters as heirs to family property and became law in September, 2006.⁵⁵

Similarly, in *Ephraim v. Pastory*,⁵⁶ the **Tanzanian** High Court cited CEDAW in a decision invalidating a customary law that prevented daughters from inheriting clan land from their fathers. The Court found that the law violated Tanzania's own Bill of Rights as well as CEDAW and other international human rights

52 AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 191 (New York: Alfred Knopf, 1999).

53 Jennifer Brown, *Rural Women's Land Rights in Java, Indonesia: Strengthened by Family Law, But Weakened by Land Registration*, 12 PAC. RIM L. & POL'Y 631 (2003).

54 *Meera Dhungana for FWLD vs. the Office of Prime Minister and Council of Ministers*, Writ No. 64/061 decided on March 29, 2006.

55 The Committee on the Rights of the Child, in its Concluding Observations on Nepal, also drew attention to discrimination in inheritance rights and parental property.

56 PC Civil Appeal No.70 of 1989.

treaties to which Tanzania has acceded. The Court ruled: “The principles enunciated in the above named documents are a standard below which any civilized nation will be ashamed to fall.”

C. Masilamani Mudiliar and others v Idol of Sri Swa Swaminathaswami Swaminathaswami Thirukoil and others)⁵⁷ in India challenged the property rights of women and sex discrimination in Hindu succession law and considered whether Hindu women had equal succession rights with men under the Hindu Succession Act 1956. What is fascinating about this case was the range of human rights instruments that were examined in the course of the litigation. The court noted that the United Nations General Assembly Declaration on the Right to Development 1986 recognizes that all human rights are indivisible and independent and that the State is under an obligation to fulfill the same without any discrimination as to sex, race, language or religion. The court also referred to CEDAW and its preamble, which states that discrimination against women violates the principles of equality of rights and respect for human dignity. The court noted that discrimination presents an obstacle to the equal participation of women in the social, political, economic, and cultural life of the country. Although India acceded to CEDAW with some reservations, Article 2 (f), 3 and 15 of CEDAW when read together with the declaration negate the effects of such reservations. Read together, these provisions oblige a state to take all appropriate measures including legislation to modify or abolish gender-based discrimination in the existing laws, regulations, customs and practices. The court held that this provision on the right to life of Article 21 of the Constitution must be read broadly to incorporate within its scope the elimination of gender-based discrimination to make it meaningful for human development. The court noted that women’s human rights are recognized as part of the right to life under the fundamental human rights provision of the Constitution. This reading is important to give effect to the fundamental duty to development of women’s economic, social and cultural rights.

Relevant CEDAW and CRC Provisions

In CEDAW General Recommendation No. 21 adopted at the occasion of the International Year of the Family in 1994, the CEDAW Committee provides an important exegesis of individual articles of the Convention that have particular relevance for the status of women in the family.⁵⁸

Articles 13 and 14 of CEDAW emphasize the importance of eliminating economic and social discrimination against women. Article 13 highlights the rights both women and men are entitled to, including: family benefits; bank loans, mortgages, and other forms of financial credit; and participation in recreational activities, sports, and all other aspects of cultural life.⁵⁹ Article 14 serves as a reminder to States parties of the particular economic, social, and cultural difficulties faced by rural women. Furthermore, Article 14 notes that rural women play a significant role in the “economic survival of their families,” due to their additional work in “non-monetized sectors of the economy.”⁶⁰

CEDAW

Article 13: States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of

⁵⁷ 1996 8 Supreme Court Cases 525, Supreme Court of India, 30 January 1996.

⁵⁸ See CEDAW, art. 9, 15, and 16.

⁵⁹ *Supra* note 25, at 8, art. 13.

⁶⁰ *Supra* note 25, at 8, art. 14.

equality of men and women, the same rights, in particular:

- a) *The right to family benefits;*
- b) *The right to bank loans, mortgages and other forms of financial credit;*
- c) *The right to participate in recreational activities, sports and in all aspects of cultural life.*

Article 14: 2. States Parties shall take into account the particular problems faced by rural women and the significant roles which they play in the economic survival of their families, including their work in the non-monetized sectors of the economy and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on the basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

The CEDAW Committee has further underscored the need for gender equality in areas of land and property ownership by highlighting its concerns in Concluding Observations to varying States parties. For instance, in recent comments to Sri Lanka, the Committee notes the discrimination justified by the legislative Land Development Ordinance, arguing that the ordinance and other “economic policies do not incorporate a gender perspective and do not take into account rural women's role as producers.”⁶¹ Such comments have sometimes spurred action, as in the case of Vietnam. The Committee urged the government to “remove any administrative obstacles that may prevent the issuance of joint land use certificates to husbands and wives, particularly in rural areas.”⁶² Since this recommendation, Vietnam has taken a few critical steps in attempting to remedy these gendered obstacles, which will be examined in the following section.

Legislative Developments

Despite the general recognition of women's equality, formal and informal discrimination against women in access to economic resources continues to exist in many countries around the world. Often, inheritance rights for widows and daughters do not reflect the principles of equal ownership of property acquired during marriage. Even legislation overseeing property ownership during marriages seldom exemplifies the notion of equal ownership. For example, **Article 1749 of the Civil Code of Chile** provides that “the marital partnership is to be headed by the husband, who shall administer the spouses' joint property as well as the property owned by his wife.” While mechanisms available under human rights treaties can be used as one tool to challenge unequal access to property, new developments in land and property law, if implemented, will have an enormously positive impact on both women and children.

Legal responses to property distribution at dissolution of marriage, especially in the face of domestic violence, is sometimes problematic to both women and children.

61 U.N. CEDAW Comm., 26th Sess., 545th to 546th mtg., U.N. Doc A/57/38 (2002), paras.256-302.

62 U.N. CEDAW Comm., 37th Sess., 759th to 960th mtg., U.N. Doc. CEDAW/C/VNM/CO/6 (2007), Comment 9.

Under **Article 13 of the Marriage Law in China**, property has to be distributed equally, and according to Article 39, common property must be divided based on mutual agreement at divorce. China's Supreme People's Court has laid out certain criteria that must be taken into account at distribution of property upon divorce. These standards take into consideration child rearing responsibilities. Other criteria include: women's and children's interests; fault of a spouse; whether a spouse is guilty of illegal transfer of property; and housing considerations of the parties. Although the Chinese law maintains that property will be distributed on divorce on principles "favoring the wife and the child,"⁶³ most properties in China are still owned by the State or the work unit to which the employer belongs. Consequently, upon divorce, the husband, wife and children are called upon to share the home until one party finds alternative accommodations. Such situations have led to numerous instances of violence against children, particularly when marriages have broken down due to violence in the family.⁶⁴

c. Gender Equal Land Reform: The Impact on Children

Rural women's unequal access to land is one of the major causes of feminization of poverty and the impoverishment of the family.⁶⁵ The lack of gender equality in ownership, and tenancy of land has enormous negative consequences on the whole family.⁶⁶ In Asian and African regions, customary practices disallowed daughters from inheriting land and women from being registered as co-tenants in land registration. This system of registration is not only inherently unequal, but also hurts women's abilities to support their families. As land is registered in only the husband's name, a common practice in many countries, the extended absence of husbands prevents families from taking advantage of usufruct or land tenure rights. Consequently, wives cannot use the land as collateral or for credit to support their families.⁶⁷

Legislative Developments

The **1993 Land Law of Vietnam**, which provides for equal land-use rights between women and men, has had little impact in reality. Despite policy changes, most of the land use certificates continue to be issued in the husband's name as he is traditionally considered the head of the household. Similarly, in China, despite guarantees of equal distribution of land in **Article 48 of the Chinese Constitution, Article 39 of Marriage Law of 2001, Article 10 of the Inheritance law, and the Rural Contracting Law of 2003**, in practice, certain village committees will not allocate land to women who leave their village of birth to reside in their husband's village. The lack of land for rural women is exacerbated when women and their children return to the woman's "birth village" due to divorce or widowhood.

China's new land contract law, which came into effect on March 1, 2003, attempts to address the land use rights of women who tend to settle patrilocally upon marriage and become impoverished after the dissolution of marriage due to loss of land ownership. Under the new land contract law, a woman is allowed to own unused land in her husband's village rather than waiting for a round of land readjustments.

63 Article 30 of the Revised Marriage Law of China 2001.

64 See Rangita de Silva-de Alwis and Charles J. Ogletree, Jr., *The Recently Revised Marriage Law of China: The Promise and the Reality*. 13 TEX. J. WOMEN & L. 251 (2004).

65 See generally Agarwal, *supra* note 73, at 24; Jacqueline Asimwe, *Practitioner's Note: Making Women's Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses*. 4 YALE HUMAN RIGHTS AND DEVELOPMENT L.J.(2001); Jacqueline Asimwe, *The Uganda Women's Movement and the Land Struggle*, in THE WOMEN'S MOVEMENT IN UGANDA: HISTORY, CHALLENGES AND PROSPECTS, (A. Tripp et al. eds., 2002); JACQUELINE ASIIMWE ET AL., INCLUDED YET EXCLUDED: A STUDY OF WOMEN'S LAND RIGHTS IN THE DISTRICTS OF PALLISA AND KAPCHORWA (2003).

66 TSEHAINESH TEKLE, WOMEN'S ACCESS TO LAND AND PROPERTY RIGHTS IN ERITREA (1998). Available at <http://www.oxfam.org.uk/resources/learning/landrights/downloads/eritprop.rtf>

67 Aili Mari Tripp, *Women's Movements, Customary Law, And Land Rights in Africa: The Case of Uganda*, 7 AFRICAN STUDIES QUARTERLY: THE ONLINE J FOR AFRICAN STUDIES, available at <http://www.africa.ufl.edu/asq/v7/v7i4a1.htm>

Further, the law mandates that a woman's home village must keep land available for her until she has obtained land from her husband's village.⁶⁸

The new **China Rural Land Contracting Law** of 2003 provides some safeguards to women. For example, Article 6 provides that equality guarantees in laws such as the Law on the Protection of the Rights and Interests of Women and the Inheritance Law apply to land contracts. Article 30 will protect the rights of girls from when they become women, marry, and move to their husbands' villages to when they receive land in their new villages. Article 28 specifies types of land to be used for "readjustment of contracted land or contracted to newly added populations within the village," and Article 28(1) also states that at the end of the thirty-year allocations, land may be set aside for allocation to new wives in the future.

Women's movements have mobilized around land issues and new land laws have been promulgated in Uganda, Tanzania, Zanzibar, Mozambique, Zambia, Eritrea, Namibia, and South Africa in the 1990s. Rwanda, Malawi, Lesotho, Zimbabwe, Kenya and Swaziland have implemented new land policies.⁶⁹

In **Vietnam**, Land Tenure Certificates documenting a household's long-term use rights to land were originally provided only in the name of the head of the household, which was almost always a man. This made it easier for husbands to transfer household land without the wives' consent. To address this problem, the Vietnamese government recently mandated that all co-owned marital property must be registered in the names of both husband and wife.⁷⁰

The lack of titles to land becomes an impediment when women try to apply for credit for their and their families upkeep. Given this, it is useful to explore legislation that would grant all married women the right to use property registered in the name of their spouses as security to obtain financial loans. One way to dismantle the dependence on the head of household is to initiate the principle of partnership between spouses. **Tunisia's amendments to the Personal Status Code in 1993** established the principle of joint ownership of property between husband and wife. Under this law, spouses are obliged to contribute equally to the management of their household. The objective is to ensure joint partnership between husband and wife. In landmark advocacy initiatives around the world, women's rights advocates have challenged discriminatory property, land and inheritance laws as a continuum of efforts to secure the rights of both women and children.

Relevant Provisions of the Uganda: Land Act of 1988

Sec 32. (1) Any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally shall be in accordance with the

68 De Silva-de Alwis & Ogletree, *supra* note 64 at 27.

69 While the attention of the women's movements has been on customary land practices that have subordinated women, they have also focused on the negative effects of the privatization of land and land grabbing as governments have increasingly sought foreign investment through tourism, mining, and other businesses in the name of development. In Cambodia, recent news reports reveal that land grabbing and forced evictions disproportionately affect women and Children.

70 Government Decree No. 70/2001.ND-CP on the Implementation of the Law on Marriage and Family, art 5 (2001) Vietnam.

custom, traditions and practices of the community, except that a decisions which denies women or children or persons with disability access to ownership, occupation or use of any land or imposes conditions which violate Articles 33, 34 or 35 of the Constitution on any ownership, occupation or use of any land shall be null and void.

Relevant Provisions of the Republic of South Africa's Law

PROMOTION OF EQUALITY AND

PREVENTION OF UNFAIR

DISCRIMINATION ACT

(Provisions have been highlighted by the author)

CHAPTER 2

- ▶ 6. Neither the State nor any person may unfairly discriminate against any person.
- ▶ Prohibition of unfair discrimination on ground of gender
- ▶ 8. Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—
 - ▶ (a) gender-based violence;
 - ▶ (b) female genital mutilation;
 - ▶ (c) **the system of preventing women from inheriting family property;**
 - ▶ (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
 - ▶ (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
 - ▶ (f) discrimination on the ground of pregnancy;
 - ▶ (g) limiting women's access to social services or benefits, such as health, education and social security;
 - ▶ (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
 - ▶ (i) systemic inequality of access

Recommendations for Legislative Reform (Check List):

- Provide for equal rights for men and women to sell, mortgage, or use property and land as collateral, even if the property or land in question is jointly owned or held.
- Provide equal land tenure or usufruct rights for women and men.
- These land tenure grants must keep in mind the patrilocal nature of women farmers and ensure security of land tenure for women who follow their husbands to the husband's village and women who return back to their villages following divorce or widowhood.
- All land tenure rights must be registered in both householders' names.
- Provide widows and children of a deceased (sons and daughters) an equal right to inherit land and other property.

PART TWO

Gender Discrimination in Family Law: The Impact on Children

[Family law is] the litmus test in any society with regard to legal norms and the status of women. It is also the area where the law, ethnicity and ideology with regard to the rights of women merge to become a powerful ideological force.

- Radhika Coomaraswamy⁷¹

Around the world, family law is in a state of reinvention. Although the State still determines who constitutes a family and delineates the responsibilities and privileges of said family members, the boundaries of family law are rapidly shifting in accordance with social change. In acknowledging that there is neither a monolithic nor static definition of family, the Human Rights Committee has invited State Parties to define the term in respect to its culture and needs. In *Cziffra and Nineteen Mauritius Women*, the Committee observed that this definition must be "without discrimination" and in accordance with international human rights law.⁷² Expanding the boundaries of family and those who it covers has created possibilities for the elimination of gender role distinctions within the family. According to the Human Rights Committee, Article 17 of the International Covenant on Civil and Political Rights requires that the term 'family' be broadly interpreted to include "all of those comprising the family as understood in the society of the State Party concerned."⁷³

Unfortunately, although changes in family law have eliminated some gender role distinctions within the family, some states still retain discriminatory provisions which negatively impact both women and children. For example, **the Penal Code of Northern Nigeria** provides that assault is not an offense if inflicted by a husband for the purpose of correcting his wife so long as it does not amount to the infliction of grievous hurt. In Chile, **Article 1749 of the Civil Code of Chile** provides that the marital partnership is to be headed by the husband, who shall administer his spouses' joint property as well as the property owned by his wife. In **Algeria under Article 39 of the Family Code of 1884**, the wife is required to obey her husband and recognize his position as the head of the family, nurse her progeny if she is capable and rear her progeny and respect her husband's parents and close relatives. In **Mali too, under Article 7 of The Code of Marriage and Guardianship of 1992**, the husband must give protection to the wife and the wife obedience to her spouse. In **Yemen, under Article 40 of the Personal Status Act of 1992**, a husband has a right to his wife's obedience in matters affecting the family's interests. This same act also requires that a wife "permit him (her husband) to have illicit intercourse with her" and that "she must not leave the conjugal home without him."⁷⁴

71 Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 48, 39-57 (Rebecca J. Cook ed., 1994).

72 P.R. Gandhi & E. MacNamee, *The Family in UK Law and the International Covenant on Civil and Political Rights 1996*, 5 INT'L J. OF L., POLICY AND THE FAMILY 104 (1991).

73 International Convention on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, art. 17.

74 HUMAN RIGHTS WATCH, *DIVORCED FROM JUSTICE: WOMEN'S UNEQUAL ACCESS TO DIVORCE IN EGYPT* (2004), available at <http://www.hrw.org/reports/2004/egypt1204/egypt1204.pdf>.

These provisions often manifest themselves in the relationships most commonly associated with families: marriages and parental obligations to children. Consequently, this section explores a few case studies that illustrate the connections between different stages of a family's creation - from marriage (including child marriage), to citizenship rights and lastly, to guardianship and child custody - through a gendered lens.

Principles of gender equality in family law positively impact women and children.⁷⁵ Gender-based reforms and analysis of family law will advance the rights of women and children, in the family and in society. In analyses of marriage and family issues below, both the CEDAW and CRC repeatedly establish the intimate relationship between gender equality and marriage and family rights, under the umbrella of human rights.

a. Re-envisioning Equality in Marriage and Family

Relevant CEDAW Provisions

Article 16: 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- a) The same right to enter into marriage;*
- b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
- c) The same rights and responsibilities during marriage and at its dissolution;*
- d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interest of the children shall be paramount;*
- e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.*
- f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children or similar institutions where these concepts exist in national legislations; in all cases the interests of the children shall be paramount.*
- g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.*
- h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*

2. The betrothal and the marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registration of marriages in an official registry compulsory.⁷⁶

⁷⁵ For example, the **Moroccan family law of 2004** supported gender-sensitive legislation which increased women's political participation.

⁷⁶ CEDAW, *supra* note 25, art. 16.

General Recommendation 21 states:

A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that there are countries, which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others, women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on a woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced law.

Concluding Observations to the Maldives:

35. The Committee remains concerned that family law discriminates against women. It is concerned about the high divorce rates, recent reports of early marriage and the practice of polygamy. It is further concerned at the lack of a specific time frame within which the State party will conclude its review of the compatibility of its family law with article 16 of the Convention.

36. The Committee urges the Government to aim to complete its law reform in the area of family law within a specific time frame and ensure that spouses have the same rights and responsibilities both during marriage and in the event of its dissolution.⁷⁷

Legislative Developments

Despite the broad recognition of the right to equality before the law,⁷⁸ discrimination against women still continues in many countries, particularly in the context of the family. This section examines a wide range of legislative examples that speak to the ongoing struggle for equality in marital and familial relations around the world, especially in countries governed by *Shariah* law.

Morocco

In 2003, **Morocco's revisions of its Family Code of Laws** resulted in women being free from the guardianship of male family members and the outlawing of polygamy. Despite some laudable changes, certain revisions of the law do not have enough far reaching effects. Although the 2000 amendment to the Egyptian family law gives women the right to end marriages without having to prove their mistreatment, women forfeit their financial rights and must return the bride price paid at the time of marriage. Gender

77 U.N. CEDAW Comm., 37th Sess., Concluding Observations, U.N. Doc. CEDAW/C/MDV/CO/3 (2007)

78 Constitutional developments around the world articulate equal protection before the law and prohibit discrimination on the basis of race, gender, age, and ability. Moreover, Many African states have enshrined children's rights in their Constitutions. For example, see Constitution of the Republic of Namibia 1990 Art. 15; Constitution of the Republic of South Africa 1996 s 28; Constitution of the Republic of Ghana 1992 Art 28; Constitution of Malawi 1994 s 23; Constitution of Uganda 1995 Art.34.

discrimination still persists in the obedience laws that result in women losing their rights to alimony upon divorce.⁷⁹

In 2004, Morocco promulgated a major reform of its family law (al-Mudawwana) which is “consistent with the spirit of our tolerant religion... is meant to reconcile lifting the inequity imposed on women, protecting children’s rights and safeguarding men’s dignity. The new law upholds the principle of equality between men and women; allows polygamy only under stringent legal conditions and judicial supervision, making the practice nearly impossible; provides for divorce by mutual consent and divorce because of irreconcilable differences’; demonstrates concern for fairness and justice in the law; and provides additional rights and safeguards for children.

Turkey

In Turkey, the reform of the **Turkish Civil Code in 2001** and the **Turkish Penal Code in 2004** established the equal division of property between men and women acquired during the marriage, criminalized marital rape, and repealed suspensions or sentence reductions given to rapists or abductors who married their victims and committed honor killings.⁸⁰

Progressive amendments to the Civil Code were made in 2001 largely propelled by women’s groups. The amendments define the family as a union based on equal partnership, with spouses jointly running the matrimonial union with equal decision –making powers. Further, in 2004, an amendment was made to the constitution redefining the family as an entity based on the “equality of families” and abolished the definition of man as head of the household.

Iraq

Similarly, although Article 14 of **Iraq’s new Constitution**, which came into operation in October 2005, states that Iraqis are equal before the law, the same Article provides that no law should contradict the “established rulings” of Islam. This second stipulation thereby overturns a series of relatively progressive personal status laws dealing with marriage, divorce and inheritance. Under this provision, Shiite women would need the permission of their families to get married, while men would be able to divorce simply by stating their intention three times.⁸¹

Maldives

Revisions to the family law are of critical concern to Islamic communities pursuing a revision or reinterpretation of family law which captures the realities of contemporary life. **The Family Code enacted in the Maldives in 2001** provides for rights of women in polygamous marriages and limits the *talaq* form of divorce (unilateral repudiation by the husband) by the husband.⁸²

79 HUMAN RIGHTS WATCH, EGYPT: ENSURE WOMEN’S EQUAL RIGHT TO DIVORCE (2004), available at <http://hrw.org/english/docs/2004/11/29/egypt9728-txt.htm>.

80 See Report of the expert groups meeting on regional strategies for implementing the recommendations from the Secretary General’s in depth study on all forms of violence against women, 26-27 April 2007, Bangkok, Thailand, United Nations Economic and Social Commission for Asia and the Pacific, Page 13.

81 Human Rights Watch Report 2007.

82 Savitri Goonesekere, *Overarching Challenges Universalizing Women’s Human Rights Through CEDAW*, in THE CIRCLE OF EMPOWERMENT: TWENTY FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN,

Indonesia

The Indonesian draft Islamic marriage code referred to as the **Counter Legal Draft (CLD)**⁸³ embraces Islamic principles of gender equality and human rights principles.

The Working Group of the CLD was guided by the track record of family law reform in other Muslim countries, including Tunisia, Jordan, Syria, Iraq, and Egypt. The overarching principle that animated the reform of these laws was improvement in the status and protection of women and children in the family.⁸⁴

Some revisions proposed by the Working Group of the CLD serve as pertinent analyses of similar law reform processes. One of the most important reforms focused on the principle that women and men are equals within a marriage and that marriage is a bond between a man and a woman based on the assent and agreement of all parties.⁸⁵ The emphasis on these principles revolutionized marriage as an institution based on a contract between a man and woman and not as it was traditionally interpreted to be a command by God and its performance a religious obligation. It also challenged the traditional requirement established in the current compilation of Indonesian family law that a marriage is a contract between the guardian of the bride and the prospective husband. The CLD is also unequivocal about the minimum age of marriage and recommends a single standard applicable to both men and women. Thus while the current family law in Indonesia specifies the minimum age of 16 for girls and 19 for boys, the CLD recommends 19 as the minimum marriage age for both parties.⁸⁶ The CLD also challenges traditional doctrine of disobedience (*nusyuz*) in marriage. The current law reinforces the doctrine of disobedience and a wife who refuses to perform her obligations under the family law⁸⁷ is deemed disobedient is not entitled to the financial support of her husband.⁸⁸ The CLD recommends that either spouses should be considered disobedient for failure to perform his or her obligations to the marriage. If the matter cannot be resolved by either party, the wronged party can file a claim in court. The CLD provisions on divorce do not recognize a spouse's change of religion as a ground of divorce. However, the CLD recognizes a broader category of acts of cruelty and abuse as grounds for divorce. While the CLD has not succeeded in reforming the law, these principles of gender equality are important principles that will advance the protection of children and the family unit.

Iran

A 1982 amendment to the **Iranian divorce law** allows domestic wages for the work the wife has done during the marriage to be returned to her if the divorce is not initiated by her or caused by any fault of hers. In 1997, a new law required courts to calculate the maintenance (*mahr*) payments husbands must pay divorced wives according to an index updated for inflation.

(Hanna Beate Schöpp-Schilling et al., eds., 2007).

83 The CLD was drafted by a seven –member committee of Islamic legal scholars led by Siti Musdah Mulia in her capacity as Special Assistant to the Minister of Religion. It was developed under the auspices of the Minister of Religion with the intention of submitting the draft for consideration by the legislature. See ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS (R. Michael Feener & Mark E. Cammack, eds., 2007).

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 Art. 83(1).

88 Art. 80 (4) (a) (b) of the Indonesian Family Law.

A male interpretation of Iran's custody laws meant that widows frequently lost custody to their deceased husband's families. By publicizing the way in which this was harmful to both women and children, Iranian feminists argued for the revision of the provisions concerning custody.⁸⁹

Egypt

Egypt promulgated a law in 2000 that allows women to obtain a divorce (khul) on the grounds of incompatibility and on the wife's return of the *mahr*. This is a major change from the judge making the decision based on conclusive proof and independent corroboration of her husband's ill treatment or physical abuse.⁹⁰

Jordan

The Jordanian law allows a wife to state in the marriage contract that the husband cannot take another wife and that the wife is entitled to divorce if he does. ⁹¹

Mozambique

On December 16, 2003, after more than a decade in the works, the Mozambican Parliament passed a new Family Law. The new Family Law protects a broad range of women's rights and for the first time legally recognizes customary marriages.

The Family Law protects informal unions between men and women. Men who live with women for years will frequently avoid formalizing these relationships because they cannot pay an adequate dowry to protect their property. Under the new law, women who have lived with their partners for more than a year are entitled to inherit the property of their husbands. The Family Law also asserts that both spouses have responsibility over the family and can decide who will represent the family on a particular issue. In the past, women required their husband's consent before taking a paid job.

The law also offers more protection to children by increasing the minimum age of marriage from 14 and 16 years (for girls and boys respectively) to 18 years for both sexes. In Mozambique, members of the woman's family traditionally decide whether or not a girl is to wed. Marriage brings money and gifts to the bride's family, so a family desperate for money might seek to marry their daughter despite her young age. By marrying at an older age, research has proven that women's economic opportunities are greater, their educational levels are higher, and their health from delaying childbirth is much better than those marrying at younger ages.⁹²

Recommendations for Legislative Reform (Check List)

⁸⁹ Sisters in Islam Newsletter. Changes in Family Law.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

- Women and men must be treated equally under laws governing marriage and family, be they be civil law, religious laws, customary laws or a combination of these laws
- Bride price and dowry should be prohibited
- Marriage should be seen as an union of man and woman and not a contract between male members of families
- Women and men must have equal access to property and equal rights to acquire, dispose and manage property acquired during the marriage
- The form of family that exist under laws and customs must be recognized by the state in relation to access to resources including education and healthcare for children
- Women and men must have equal rights to choose the place of domicile of the family and religion of their children after marriage
- The responsibilities of men and women who live together as husband and wife without legal marriage towards each other and towards their children must be identified
- State and community agencies have a responsibility to implement prevention programs aimed at identifying high risk families and to provide supportive intervention to reduce occurrence of maltreatment.
- Concepts of “wife obedience” must be dismantled in the law
- At divorce, women and men must have equal rights in respect to property.
- Provide legal aid, advocacy services, health, social and economic programs and services for women and children after separation or divorce.
- Men and women must have reciprocal duties in the marriage and in the family
- Women and men must have the same responsibilities for child care and upbringing of children
- Make marriage registration compulsory
- Make birth registration mandatory.

b. Reforming Unequal Citizenship Laws

Around the world, women’s and children’s equality has been impeded by unequal citizenship laws. Unequal citizenship laws affect women as well as children because a mother’s inability to pass on her citizenship to her children often means that these children are not able to enjoy the benefits afforded to children who are citizens of the state. This results in unequal access to health, education, and other benefits for children whose mother’s are married to non-citizens.

Relevant CEDAW and CRC Provisions

Citizenship and nationality rights are the bedrock of human rights. The CEDAW affirms the concept of equality in the transmission of citizenship to children in Article 9. In General Recommendation 21, the CEDAW Committee has emphasized the connection between discriminatory nationality law and discrimination in the family and states that, “Nationality is critical to full participation in society”⁹³

Several countries have withdrawn their reservations to Article 9 and have reformed their laws in compliance with Article 9. For example, Fiji, Jamaica, Liechtenstein and Thailand withdrew their reservations while countries such as Burundi, India and Sri Lanka have brought their laws in compliance with the CEDAW.⁹⁴

⁹³ CEDAW General Recommendation 21.6.

⁹⁴ See Savitri Goonesekere, *Overarching Challenges Universalizing Women’s Human Rights Through CEDAW*, in THE CIRCLE

At the same, the **Algerian** and **Egyptian** governments have retained reservations to CEDAW article 9 (2) on nationality of children. Despite much debate, the African Protocol on Women’s Rights subjects a child’s right to nationality to domestic legislation.⁹⁵

CRC and CEDAW Provisions on Equal Citizenship Rights

Article 29 of the CRC affirms that children should respect the values and culture of their parents. Given the unequal status of women in the family, this often means that children have little choice but follow the culture and religion of the father. The problem arises in situations when the mother and father come from different religious, ethnic and racial backgrounds. Given that in several countries mothers are not allowed to pass down their citizenship to their children, children are often not considered citizens in their mother’s countries, causing a conflict in both the public and private spheres.

Article 9 of the CEDAW guarantees that women have equal rights with men to acquire, change or retain their nationality and grants women equal rights with men to respect the nationality of their children.

The CRC’s Article 2 expressly declares that no child shall be subject to any discrimination based on “the child’s or his or her parent’s or legal guardian’s ...sex.” This, when read with Article 7 of the CRC, which affirms the child’s right to acquire a nationality, requires equal citizenship rights for both parents.

The following table includes relevant Concluding Observations made by the CEDAW Committee regarding citizenship and nationality legislation:

Bangladesh

249. Although acknowledging that the State party has initiated the amendment of the 1951 Citizenship Act, the Committee is concerned that women are still unable to transmit their nationality to their foreign husbands and children.

250. The Committee urges the State party to ensure that a new citizenship law, which is in line with article 9 of the Convention, is adopted without delay, in order to eliminate all provisions that discriminate against women in the area of nationality.⁹⁶

Indonesia

28. The Committee is concerned that the amended Law on Citizenship still does not provide women with the same rights as men to retain or transmit their Indonesian citizenship and is not in compliance with article 9 of the Convention. The Committee expresses concern that the imposition of time limits and administrative requirements

OF EMPOWERMENT: TWENTY FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, 58 (Hanna Beate Schöpp-Schilling et al., eds., 2007).

95 Article 6 (h) of the African Protocol on Women’s Rights states that : “ a woman and a man shall have equal rights with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests.”

96 U.N. CEDAW Comm., 31st Sess., Concluding Observations, U.N. Doc. A/59/38 (SUPP) (2004), Para. 228-267.

for women to retain their Indonesian citizenship creates obstacles to women's full enjoyment and retention of their citizenship rights. In particular, the Committee is concerned about the discriminatory impact of the law on women who migrate abroad, especially those facing situations of violence or who are trafficked as mail-order brides or for purposes of commercial sexual exploitation, as they are at risk of losing their nationality under the amended Citizenship Law. 97

Nepal

198. The Committee expresses concern that the Constitution, in contradiction to article 9 of the Convention, precludes Nepalese women from passing their nationality on to their children or to a spouse of foreign nationality.⁹⁸

The CEDAW Committee's Concluding Observations to State parties have included concerns regarding equal marriage and family rights for both men and women.

Bangladesh

247. The Committee is concerned about the unequal status of Bangladeshi women within the family, particularly in matters related to marriage, divorce, custody, alimony and property inheritance. The Committee expresses concern that personal laws, derived from religious precepts which are discriminatory to women, continue to prevail in the country and that no uniform Family Code is in place.

248. The Committee urges the State party to adopt without delay a uniform Family Code that fully complies with the provisions of the Convention and general recommendation 21 on equality in marriage and family relations, as a way to protect the rights of all Bangladeshi women in matters related to marriage, divorce, custody, alimony and property inheritance. It recommends that the State party step up its efforts to provide awareness-raising and training, including on the importance of a uniform Family Code and the State party's obligations under the Convention, to community leaders.⁹⁹

Indonesia

18. The Committee is concerned about the discriminatory provisions in the Marriage Act of 1974, which perpetuate stereotypes by providing that men are the heads of households and women are relegated to domestic roles, allow polygamy and set a legal minimum age of marriage of 16 for girls. The Committee is also concerned about the lack of progress in the law reform process with respect to marriage and family law, which allows the persistence of discriminatory provisions that deny women equal rights with men. In particular, it expresses concern that amendments to the Marriage Act of 1974 have not yet been completed, although the Committee expressed concerns about the discriminatory provisions in this Act in its previous concluding comments.

97 U.N. CEDAW Comm., 39th Sess., Concluding Observations, U.N. Doc. CEDAW/C/IDN/CO/5 (2007).

98 U.N. CEDAW Comm., 30th Sess., Concluding Observations, U.N. Doc. A/59/38 (2004), paras.189-225

99 U.N. CEDAW Comm., *supra* note 86.

19. The Committee requests the State party to take immediate steps to revise the Marriage Act of 1974 in accordance with its obligations under the Convention, the Committee's general recommendation 21, the Convention on the Rights of the Child, and the State party's expressed intention to amend the law without delay. It further urges the State party to put in place an effective strategy with clear priorities and timetables to eliminate discrimination against women in the areas of marriage and family relations. 100

Legislative Developments

Apart from legislative reform, case law has shaped change in various jurisdictions, proving that litigation is a powerful tool of social change. In several countries unequal citizenship laws have been struck down through litigation. One seminal case where unequal citizenship laws were challenged was *Unity Dow v. Botswana*. Unity Dow, an attorney who was married to a foreigner and had three children, challenged the 1984 Citizenship Act under which a children of a woman married to a foreigner were not entitled to citizenship while children of a man married to a foreigner were entitled to citizenship. Significant benefits accrued to individuals deemed citizens while serious liabilities were attached to the lack of citizenship. The Botswana Appeals Court cited CEDAW in its opinion invalidating the law as unconstitutional.¹⁰¹ Since then, *Unity Dow* has become a paradigm- setting case for similar challenges to unequal citizenship and soon became a lightning rod for change around the world.

In a groundbreaking **Nepalese** citizenship case,¹⁰² the Nepalese Supreme Court considered whether provisions which treat Nepalese men marrying non-nationals differently from Nepalese women marrying non-nationals were in violation of the 1990 Constitution of Nepal. The challenged provisions provided that when a Nepalese man married a foreign woman, she was automatically entitled to a non-tourist visa for the duration of the marriage with an additional three months if the marriage should end. However, if a Nepalese woman were to marry a foreign man, he was only entitled to a non-tourist visa for a maximum of four months and the visa must be renewed every year.

An unanimous Supreme Court decision held that the regulation was discriminatory on the basis of sex and thus violated Article 11 of the Nepalese Constitution. The Court ruled that the law discriminated against women and directed the Department of Immigration to reconsider the husband's visa application and to promulgate new rules based on gender equality.¹⁰³

Litigation filed in order to bring the CEDAW home is one way to change national legislation and remove discrimination. In a number of cases, the Convention has been successfully invoked to persuade domestic

100 U.N. CEDAW Comm., *supra* note 87.

101 Court of Appeal of Botswana, Civil Appeal No.4/91 (unreported 1992).

102 *Meera Gurung v Her majesty's Government, Department of Central Immigration, Ministry of Home Affairs* Decision number 4858 of 1994.

Supreme Court (full bench).

103 In a similar case, a different decision was entered into in Bangladesh on the same issue. In this case the petitioner challenged as discriminatory a law that denied Bangladeshi citizenship to the children of female citizens married to non-nationals. The petitioner based her claim on the equal protection clause of the Bangladesh Constitution, which outlaws discrimination on the basis of sex, and Article 7 of CEDAW which prohibits discrimination against women in relation to "acquiring, changing or transmitting nationality". Unfortunately, the Court held that the prevailing interpretation of nationality law should not be dismantled at the expense of cultural tradition.

courts to refer to international standards, in particular the Convention, when applying existing law¹⁹. In fact, in Japan it has been held that “[i]nvoking CEDAW in future cases in these fields will contribute to accelerating the social trend towards more equality in marital and family relationships.” Similarly, it is important to refer to international human rights norms in lawmaking and law revision and ensure that the impact of these laws on women children are based on norms of equality.

Recommendations for Legislative Reform (Check List):

- Ensure that women and men have equal rights to pass on citizenship to their children and this must not be contingent upon marriage.
- If citizenship and nationality are determined by birth and by parentage, ensure that a mother has the equal rights to pass on her citizenship to her child. The children must have equal rights to all resources and benefits including access to health care and education.
- Citizenship should be gender neutral and children should receive similar treatment irrespective of the citizenship of the mother.

c. Child Marriage

Child marriage is at the very intersection of gender equality and child rights. Among the most frequently addressed issues by both the CRC and CEDAW committees in their dialogue with State parties and in Concluding Observations¹⁰⁴, the two committees jurisprudence on child marriage emphasize the complementary and mutually reinforcing features of the two Conventions. While the CRC does not specifically prohibit child marriage but clearly defines the age of majority as 18, the CEDAW categorically renders child marriage void *ab initio*.

Relevant Provisions of Human Rights Conventions

Apart from the CEDAW, CRC, the Slavery Convention of 1956, the UN Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962, the African Charter on the Rights and Welfare of the Child 1990 proscribes early marriage and articulates age 18 as the legal age of marriage. The Protocol on the Rights of African Women 2003 has also specified a minimum age of marriage of 18 years.

The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage

The Convention was passed by the General Assembly in November, 1962. The Preamble to the Marriage Convention establishes both the context to the passage of the Convention, and appropriate manner of interpretation of its provisions. The Preamble declares that the Marriage Convention recalls article 16 (1) of the Universal Declaration of Human Rights which states that: Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. It further

104 Goonesekere, Savitri & De Silva-de Alwis, Rangita (2005). Women’s and Children’s Rights in a Human Rights Based Approach to Development. Working Paper. Division of Policy and Planning. UNICEF. 14

establishes that State Parties should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded.

This Convention also requires state parties to take legislative action to specify a minimum age for marriage and stipulates that no marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to the age, for serious reasons, in the interest of the intending spouses. Crucial provisions of the Convention are listed below.

Article 1

No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person....as prescribed by law.

Article 2

State Parties to the convention shall specify a minimum age for marriage ("not less than 15 years" according to the non – binding recommendation accompanying this Convention). No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses...

Article 3

All marriages shall be registered in an appropriate official register by the competent authority.

The CRC enumerates the rights of children in detail, especially in regards to child marriage, as can be seen by the list below.

CRC rights that relate to child marriage include the following:

Article 1: A child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

Article 2: Freedom from discrimination on any grounds, including sex, religion, ethnic or social origin, birth or other status.

Article 3: In all actions concerning children...the best interests of the child shall be a primary consideration.

Article 6: Maximum support for survival and development

Article 9: The right to not be separated from their parents against their will.

Article 12: The right to express his or her views freely in all matters affecting the child in accordance with age and maturity

Article 13: The right to seek, receive and impart information and ideas.

Article 19: The right to protection from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, including sexual abuse, while in the care of parents, guardian or any other person

Article 24: The right to health and to access to health services; and to be protected from harmful traditional practices

Articles 28 and 29: The right to education on the basis of equal opportunity

Article 31: The right to rest and leisure, and to participate freely in cultural life.

Article 34: The right to protection from all forms of sexual exploitation and sexual abuse

Article 35: The right to protection from abduction, sale or trafficking

Article 36: The right to protection from all forms of exploitation prejudicial to any aspect of the child's welfare

The CRC Committee often highlights the extremely deleterious consequences of child marriage in its Concluding Observations to various signatories. In its comments to Lebanon, the CRC Committee noted the widespread practice of child marriage in Lebanon and drew attention to the related consequences of high child mortality rates and the negative impact on the health of the young girls made to bear children.¹⁰⁵ Just as the CRC Committee expressed concern to Nepal regarding the differentials in the minimum ages of marriage for boys and girls,¹⁰⁶ the CRC was concerned about the discrepancy in the age of marriage between male and female in Guatemala.¹⁰⁷

The CRC Committee has also urged Kuwait to undertake all measures, including legal measures, to prevent and combat the harmful traditional practice of child marriage, which directly affects the health and well-being of the girl child.¹⁰⁸ What can be seen here is that the CRC committee links child marriage to a whole host of rights violations against the girl child and sees child marriage in the context of gender discrimination and inequality.

Legislative Developments

Many law reform initiatives have attempted to bring the age of marriage of both parties in compliance with the CEDAW.¹⁰⁹ This section focuses on changes in **India**, and examines a litigation effort, new

105 U.N. CRC Comm., 12th Sess., Concluding Observations, U.N. Doc.,CRC/C/Add.54 (1996), Para 16.

106 U.N. CRC Comm., 12th Sess., Concluding Observations, U.N. Doc.,CRC/C/15/Add.57 (1996) Para- 12-17.

107 U.N. CRC Comm., 12th Sess., Concluding Observations, U.N. Doc.,CRC/C/Add.58 (1996), Para. 15.

108 U.N. CRC Comm., 19h Sess., Concluding Observations, U.N. Doc.,CRC/C/151/Add.96 (1998), Para. 28.

109 The Ethiopian Revised Family Code of 2000 provides that marriages contracted according to custom, religion or civil law are recognized. However, the code specifies the necessity of the consent of both parties to the marriage and sets 18 as the

development in legislation and a novel policy initiative as a recent interrelated case study in the landscape of creative strategies to prevent child marriage.

In April 2003, the Forum for Fact Finding Documentation and Advocacy (FFDA), a human rights NGO filed a public interest case seeking strict implementation of the Child Marriage Restraint Act of 1929.¹¹⁰ According to the petition, “more than half of the girls in the **State of Chattishgarh** are married by the age of 16 which reflect the gross neglect and callous attitude of government, local administration and officials responsible for abetting child marriage”. The petition further illustrated that child marriage was merely a camouflage for servitude and child sexual abuse of the girl child which is “violative of her rights to life under Article 21 and constitutes bondage...within the meaning of Article 23.”¹¹¹

The FFDA petition cited several international conventions, including the CEDAW and the CRC and the Concluding Observations of both Committees. The FFDA also drew attention to the Sri Lankan experience, and argued that in Sri Lanka, legislative changes have been supported by social policies on health and education “to create an environment in which the practice of early marriage is in steep decline.”¹¹² The FFDA requested that the Court issue a writ directing the respondent states to: to require police officials to prevent child marriage from taking place; to hold government officials who fail to prevent child marriage liable; ensure that the Child Marriage Restraint Act is implemented; and to engage NGO’s in reporting on the implementation of court directives.

In February 2005, the Court issued an interim order noting that pending passage of **the Prevention of Child Marriage Bill**, which had been introduced in parliament, it would therefore refrain from ruling. However, the Courts stated that, “We...hope and trust that in the meantime the...States shall make endeavor to prevent child marriages as far as possible and preferably in cases where mass marriages take place.”

The FFDA case¹¹³ was a turning point for the Bill that was introduced in December 2006.¹¹⁴ In December 2006, the Indian Upper House of parliament approved a bill outlawing child marriages and voiding those that have taken place. Introducing **the Prohibition of Child Marriage Act**, the Minister of State for Women and Child Development declared that: “Sixty-five percent of the girls married in India are below the age of 18. We need to remove this biggest obscenity of child-child and child-adult marriages.”¹¹⁵

A positive feature of this law includes appointments by state governments for the establishment of child marriage prevention officers who is charged with preventing the solemnisation of child marriage. The new law also provides for maintenance of the minor girl until her remarriage. In the case of the husband being a minor at the time of marriage, the guardian must be called upon to pay maintenance to the minor. Moreover, who ever performs, conducts, directs or abets any child marriage shall be punishable with imprisonment up to two years and a fine up to a lakh of rupees. This extends to a parent or guardian of the child or any person who promotes the child marriage or fails to prevent it. At the option of the contracting party, every child

minimum age of marriage. In Botswana too, the Marriage Act of 2000 raises the age of marriage from 16 for boys and 14 for girls to the uniform age of 18 for both.

110 See AVANI MEHTA SOOD, CENTER FOR REPRODUCTIVE RIGHTS, LITIGATING REPRODUCTIVE RIGHTS: USING PUBLIC INTEREST LITIGATION AND INTERNATIONAL LAW TO PROMOTE GENDER JUSTICE IN INDIA 73 (2006).

111 *Ibid.*

112 *Id* at 74.

113 *Ibid.*

114 *Ibid.*

115 The bill had been tabled in parliament in 2004. It was then considered by a parliamentary standing committee and a group of ministers before cabinet approval was obtained earlier this year.

marriage, whether solemnised before or after this Act came into force, can be declared void at the option of the contracting party.¹¹⁶ The important elements of this law as discussed above are provided below:

116 See RANGITA DE SILVA DE ALWIS, UNICEF, *Child Marriage and the Law*, in UNICEF OCCASIONAL PAPERS (2007).

**Relevant Provisions of
The Prohibition of Child Marriage Act, 2006
No. 6 of 2007**

3. 1) Every child marriage, whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

4. 1) While granting a decree under section 3, the district court may also make an interim or final order directing the male contracting party to the child marriage, and in case the male contracting party to such marriage is minor, his parent or guardian to pay maintenance to the female contracting party to the marriage until her remarriage.

9. Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reason to believe that the marriage was not a child marriage.

10. Whoever performs conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage;

11.(1) Where a child contracts a child marriage, any person having charge of the child, whether as parent or any other person or in any other capacity, lawful or unlawful, including any member of an organization or association of persons who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend to one lakh rupees:

Provided that no woman shall be punishable with imprisonment.

14. Any child marriage solemnized in contravention of an injunction order issued under section 13, whether interim or final, shall be void *ab initio*.

16.(1) The State Government shall, by notification in the Official Gazette, appoint for the whole State, or such part thereof as may be specified in that notification, an officer or officers to be known as the Child Marriage Prohibition Officer having jurisdiction over the areas specified in the notification.

3) It shall be the duty of the Child Marriage Prohibition Officer-

- a) to prevent solemnization of child marriages by taking such action as he may deem fit;
- b) to collect evidence for the effective prosecution of persons contravening the provisions of this Act;
- c) to advise either individual cases or counsel the residents of the locality generally not to indulge in promoting, helping, aiding or allowing the solemnization of child marriages;
- d) to create awareness of the evil which results from child marriages;
- e) to sensitize the community on the issue of child marriages;
- f) to furnish such periodical returns and statistics as the State Government may direct; and
- g) to discharge such other functions and duties as may be assigned to him by the State Government.

Laws and policies that ensure that children remain in school are an indirect but effective means of preventing child marriage. A policy passed in January 2008 in New Delhi is an innovative and multi-pronged effort at norm creation: to keep girl children in schools, prevent early marriage and protect the girl child. This policy, named the **Delhi Ladli Scheme 2008** comes into operation in 2008 and is a scheme aimed at “enhancing the social status of the girl child in society as well as in the family, ensuring proper education to make the girl child self-reliant, ensuring her economic security and protecting her from discrimination and deprivation. As part of the scheme, the Government will make a payment of Rs.6,000 if the girl child is born in a hospital or nursing home in Delhi and will provide a cash payment of Rs.5,000 each on admission of the child to Class I, VI, IX, X and XII. The scheme envisages periodic payments by the Indian government to families under a certain income bracket, in the name of the girl child, which would be made as fixed deposits in her name and only encashable when the child reaches 18 years and has passed the Class X examination as a regular student.¹¹⁷

In a similar program named **Bolsa Fomila, in Brazil**, where a family earns less than 120 reais, mothers are given up to 95 reais contingent on their children attending school and taking part in vaccination programs. Apart from the short term benefits to families, this scheme has ensured that children remain in school and helped to bolster the economic growth in the northeast of Brazil above the national average.¹¹⁸

Recommendations for Legislative Reform on Child Marriage (Check List):

- Define the minimum statutory age of marriage for both men and women to be and bring all other laws in line with this minimum. No exceptions allowed with regards to the minimum age of marriage.
- Render child marriage null and void
- Establish penalties for those responsible for the child marriage
- Provide remedies for the victims of child marriage
- Create innovative programs to prevent child marriage and to keep girls and boys in school and in vocational training programs.
- Provide incentives to families and communities to prevent the marriage of their children before the age of 18.
- Provide effective monitoring for the implementation of laws banning child marriage
- Provide education and community awareness on the negative impact of child marriage on economic and social wellbeing of children, families and community.
- Integrate awareness of the harm of child marriage In the school curriculum

117 25/01/2008"THE HINDU".

118 An anti-poverty scheme invented in Latin America is winning converts worldwide, The Economist February 9th 2008.

d. Equal Rights to Guardianship of Children

The questions of who is the head of household and which powers are invested in the household head are central to understanding marital and family relations, and relates to the custody and well-being of the children. Gender equality in guardianship is also an issue that cross-cuts with gender equal lawmaking in the area of access to land and property, access to employment benefits and even access to law enforcement. For example, recent research done on the newly promulgated anti- domestic violence law in India showed that a mother who was not considered a guardian of the child was not allowed to file a claim of domestic violence on behalf of her child.¹¹⁹

In communities where a man is considered the head of the family, wives and daughters have little control over family finances and are absent from decisions concerning their and their children's well being including issues of education, health care, and livelihood. The notion of a male as head of household is no longer consistent with rapidly shifting quick sands of economic and social structures.¹²⁰

The lack of legal recognition of women as heads of household discriminates against their employment status and job benefits. As the following cases illustrate, these double standards threaten women's rights to equality as well as undermine children's rights under Article 18 of the CRC, which recognizes that "both parents have common responsibilities for the upbringing and development of the child."

In the 1983 **Japanese** *Nissan Motor Company* Case, several women employees sued their employer, Nissan Motor Company, for its refusal to pay them family allowances, which accounted for more than ten percent of their salaries. Nissan refused to pay the plaintiffs, all married women who were supporting children, as registered heads of households. The company insisted that, consistent with traditional norms, husbands should be considered the heads of households. Although the Tokyo District Court held that it was not discriminatory to treat men as the actual heads of households, on appeal to the high court, the company changed its policy and agreed to pay family allowances to a female employee who supported her family.

In the **Indian** case of *Githa Hariharan and Another v/s RBI and Another*, lawyers have used the Equality provisions of the Indian Constitution to challenge constraints placed on a mother by the Reserve Bank of India to be a guardian of her son's investments during the lifetime of the father. This provision was based on Section 6 of the Hindu Minority and Guardianship Act of 1956 which provides that "The natural guardians of a Hindu minor ...are.... [t]he father, and after him, the mother...."

Although the court did not dismantle the impugned provision, the court agreed that the phrase to which exception is taken, i.e., "the father and after him the mother", does suggest that the mother can be considered to be the natural guardian of the minor only after the lifetime of the father. Consequently, the Court ruled that the law should be read more broadly to cover both parents as natural guardians of the child.

Laws or policies that discriminate against men and women have a negative effect on children. Apart from domestic courts, the Human Rights Committee too has ruled that legislation that discriminates between male and female heads of households is discriminatory. In *Zwaan-de Vries v. the Netherlands*¹²¹, Zwaan de Wries was denied long-term unemployment benefits because she was not the family 'breadwinner'. Married men, however, could receive unemployment benefits even if their wives were the principal income earners or breadwinners. The Human Rights Committee held that Article 26 of the ICCPR provides that all persons are entitled to equal protection of the law without any discrimination. In this case, the legislation required

119 LAWYERS' COLLECTIVE (WOMEN'S RIGHTS NETWORK), ANNUAL REPORT 2007.

120 South Korea has revised its laws to abolish the male as the head of the household.

121 Communication No. 182/1984, CCPR/C/29/D/182/1984, (1987)

married women to meet a condition that did not apply to married men and was not based on objective or reasonable criteria. The legislation was repealed before the decision, and an appropriate remedy for Mrs. Zwaan de Vries was recommended.

In the case of *Broeks v. Netherlands* in 1984, the Human Rights Committee ruled that a **Netherlands law** which required a married woman to prove she was a breadwinner in order to receive unemployment benefits, a condition which did not apply to men, was unreasonable.¹²²

e. Child Custody

Guardianship of children is often intertwined with custodial rights. Too often gender stereotypes play a role in custody determinations, and mothers are held to higher behavioral and parenting standards than fathers. Custody awards often undermine the interests of women who are not seen as ideal mothers. While mothers who work full-time are seen as inadequate mothers, mothers who do not have the financial capability to support children are seen as incapable mothers.

Until the late 19th century, under the common law, a married father held rights to custody and control over children of the marriage. By the turn of the 20th century, there was a growing preference to hand custody of very young children to the mother. In the 1970's in most of the common law world, the prevailing standard was "the best interest of the child" standard. Even though this standard encouraged a case-by-case analysis, it disadvantaged many women whose income levels were less than their husbands. Recently, even when formal equality has been established in family law, it has not always guaranteed equality of result. The lack of knowledge about the lived experiences of women and children has often contributed to stereotypes that hurt women in concrete ways. For example, the Now Judicial Education Program (NJEP) in the United States argues that that courts are not willing to place a financial value on the contributions made by a mother who does not work outside the home. Consequently, the NJEP has found that gender bias also informs custody decisions. Many women were judged based on higher standards of parenting. A fit mother is assumed to be pure, self-sacrificing and a full-time homemaker; yet, the yardstick used to measure a father often consisted of lower expectations and requirements.

In some African countries, women's roles in child care have been translated into the national laws of some states. In **Egypt**, the mother is awarded custody of boys until the age of 10 and until the age of 15 if it is a girl child.¹²³ The gendering of custody decisions is problematic both because it advances a gendered construct of the mother as a primary caregiver and flies in the face of the CRC and the CEDAW which articulate shared parental responsibilities in the best interests of the child. These norms not only reinforce the notion that women bear the primary responsibility for child care, but also deprive fathers of their equal rights to access, custody and guardianship of their child.

Similarly, automatic custody awards to the father without proper consideration of the best interest of the child violate the rights of the child and both parents. The historic revision of **Korean Family Law** in 1994 required a couple to jointly determine the question of child custody upon divorce. Prior to the revision, there was a presumption in favor of the father and the father automatically claimed child custody, unless he waived this right through a special custody agreement.¹²⁴

122 U.N. Human Rights Comm., *S. W. M. Broeks v. the Netherlands*, Communication No. 172/1984, U.N. Doc. Supp. No. 40 (A/42/40) (1987) at 139.

123 Article 20:Law No. 25 of 1929 as amended by Law No. 100 of 1985.

124 Kay C. Lee, *Confucian Ethics, Judges and Women: Divorce Under the Revised Korean Family Law*, 4 PACRIM L.Q. POLY'Y.J. 499 (1995).

Relevant Provisions of the United Kingdom

FAMILY LAW ACT 1996

FAMILY LAW ACT 1996 - SECT 11

Welfare of children.

11. - (1) In any proceedings for a divorce order or a separation order, the court shall consider-

(3) In deciding whether the circumstances are as mentioned in subsection (2)(a), the court shall treat the welfare of the child as paramount.

(4) In making that decision, the court shall also have particular regard, on the evidence before it, to-

- (a) the wishes and feelings of the child considered in the light of his age and understanding and the circumstances in which those wishes were expressed;
- (b) the conduct of the parties in relation to the upbringing of the child;
- (c) the general principle that, in the absence of evidence to the contrary, the welfare of the child will be best served by-
 - (i) his having regular contact with those who have parental responsibility for him and with other members of his family; and
 - (ii) the maintenance of as good a continuing relationship with his parents as is possible; and
- (d) any risk to the child attributable to-
 - (i) where the person with whom the child will reside is living or proposes to live;
 - (ii) any person with whom that person is living or with whom he proposes to live; or
 - (iii) any other arrangements for his care and upbringing.

Relevant Provisions of the Singapore Women's Charter

PART VIII

[30/96]

(3) An application for the maintenance of a child under subsection (2) may be made by

-
- (a) any person who is a guardian or has the actual custody of the child;
- (b) where the child has attained the age of 21 years, by the child himself;
- (c) where the child is below the age of 21 years, any of his siblings who has attained the age of 21 years; or
- (d) any person appointed by the Minister.

[30/96]

(4) The court, when ordering maintenance for a wife or child under this section, shall have regard to all the circumstances of the case including the following matters:

- (a) the financial needs of the wife or child;
- (b) the income, earning capacity (if any), property and other financial resources of the wife or child;
- (c) any physical or mental disability of the wife or child;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) the contributions made by each of the parties to the marriage to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (f) the standard of living enjoyed by the wife or child before the husband or parent, as the case may be, neglected or refused to provide reasonable maintenance for the wife or child;
- (g) in the case of a child, the manner in which he was being, and in which the parties to the marriage expected him to be, educated or trained; and
- (h) the conduct of each of the parties to the marriage, if the conduct is such that it would in the opinion of the court be inequitable to disregard it.

[30/96]

(5) The court shall not make an order under subsection (2) for the benefit of a child who has attained the age of 21 years or for a period that extends beyond the day on which the child will attain that age unless the court is satisfied that the provision of the maintenance is necessary because —

- (a) of a mental or physical disability of the child;
- (b) the child is or will be serving full-time national service;
- (c) the child is or will be or (if an order were made under subsection (2)) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or
- (d) special circumstances, other than those stated in paragraphs (a), (b) and (c), exist which justify the making of the order.

[30/96]

(6) An order under subsection (2) ceases to be in force on the day on which the child attains the age of 21 years unless the order is expressed to continue in force for a period ending after that day.

[30/96]

(7) An order under subsection (2) may direct payment to the person having custody or care and control of the child or the trustees of the child.

[30/96]

(8) When ordering the payment of maintenance under this section or at any time after the making of the order, the court may, if it considers just, order the person liable to pay the maintenance to secure the whole or any part of it by vesting any property belonging to the person in trustees upon trust to pay the maintenance or any part of it out of the income from the property, and subject thereto, in trust for the settlor.

[30/96]

(9) The court shall have the powers conferred by section 85 in respect of proceedings relating to maintenance under this section.

[61A

[30/96]

Duty to maintain child accepted as member of family

70. —(1) Where a person has accepted a child who is not his child as a member of his family, it shall be his duty to maintain that child while he remains a child, so far as the father or the mother of the child fails to do so, and the court may make such orders as may be necessary to ensure the welfare of the child.

[26/80]

(2) The duty imposed by subsection (1) shall cease if the child is taken away by his father or mother.

[26/80]

(3) Any sums expended by a person maintaining that child shall be recoverable as a debt from the father or mother of the child.

[26/80]

(4) An application for an order under subsection (1) may be made by —

(a) any person who is a guardian or has the actual custody of the child;

(b) where the child has attained the age of 21 years, by the child himself;

(c) where the child is below the age of 21 years, any of his siblings who has attained the age of 21 years; or

(d) any person appointed by the Minister.

Legislative Consideration of Domestic Violence in Custody Issues

Many jurisdictions take domestic violence into consideration in making custody decisions. For example, **Article 25 of the Cambodian Law on the Prevention of Domestic Violence and the Protection of Victims** states: “ Making a decision on the custody of the children and the rights to visit the children by paying the highest attention to the rights and interests of the children.” Laws also restrict the visitation rights of the perpetrator of violence. **The Prevention of Women from Domestic Violence Act of India, 2005** provides that a Magistrate shall refuse the visit of any respondent if it is deemed harmful to the interests of the child or children. 125

In a number of jurisdictions in the **United States** parental violence is relevant to custody. State legislation requires courts to consider domestic violence before joint custody is awarded and includes domestic violence as a factor to be taken into account in determining the best interests of the child.

125 Article 21 of the Prevention of Women From Domestic Violence Act, 2005.

Massachusetts has a statute that imposes a reputable presumption against custody to a batterer. In 1998, the Massachusetts legislature passed the Presumption of Custody Law in recognition of the widely documented harm to children of being exposed to partner abuse. The law states:

A probate and family court’s finding, by a preponderance of the evidence, that a pattern of serious incident of abuse has occurred shall create a reputable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent.

The Presumption of Custody Law also provides safeguards for children in the context of visitation. According to the law, if the court orders that the child have visitation with the abusive parent, the “court shall provide for the safety and well-being of the child and safety of the abused parent”, including ordering that the visitation be supervised by an appropriate third party, visitation center or agency... and prohibiting overnight visitation...”¹²⁶

Certain states have allowed the admission of expert testimony on battering in custody cases. In *Knock v. Knock*,¹²⁷ the court held that “when the issue of family violence is found to exist in the context of a dissolution of marriage, domestic relations case of any kind, or in a juvenile court case...the violent conduct should be weighed and considered in making custody and visitation orders”. In *Custody of Vaughn*,¹²⁸ the Supreme Judicial Court recognized that domestic abuse within a family can have harmful effects on minor children and must be considered by a court when a custody or visitation dispute arises.

Using the CRC in Custody Disputes

Many courts have invoked the best interest of the child principle enshrined in the CRC in custody disputes. For example, in the case of *Patricia Molu v. Cidi Molu*,¹²⁹ the courts of **Vanuatu** were willing to be guided by the best interest of the child principle in the CRC. The case examined the principles on which child custody decisions should be decided. The Court considered firstly, the customary laws of Vanuatu which provide that a father should be given custody of children, and secondly, the matrimonial causes act CAP 192, which provides that the welfare of children is the paramount consideration in custody cases. These conflicting principles were decided in light of the Children’s Rights Convention.

The Court noted that in custody proceedings, because of the social and cultural contexts of Vanuatu, many parents, particularly fathers, base their applications on the mistaken belief that they have some property right to “own” their children. In doing so, such parents neglect to consider how they would care for them if custody was granted to them. These considerations were taken into account by the Court in its finding that welfare of the child is paramount.

In deciding that the welfare of the child is paramount, the court also relied upon the CRC’s Article 3-1. Article 3-1 provides: “in all sections concerning children, whether undertaken by public or private social

¹²⁶ The Massachusetts Guidelines for Judicial Practice in Abuse Prevention Proceedings states:

“...the risks of maintaining contact with an abusive parent must be weighed against the impact of disrupting the parent-child relationship. No contact should be allowed, however, unless and until safety can be assured. The court should order visitation options which maximize the safety and well-being of the child and the safety of the abused parent.

¹²⁷ 621 A.2d 267 (Conn. 1983).

¹²⁸ 664 N.E.2d 434 (Mass. 1996).

¹²⁹ Civil Case 30 of 1996, Supreme Court, Port Vila, 15 May 1998.

welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The court confirmed that the provisions of the convention are binding on the republic of Vanuatu since its ratification by the Vanuatu parliament in 1992.

The African Charter on the Rights and Welfare of the Child (1990) goes even further than the CRC and mandates that the best interest of the child shall be the primary consideration.

Principles based on the best principles of the child as against automatic preferences based on customary or gendered considerations must be the paramount consideration in custody awards.

Recommendations for Legislative Reform (Check List):

- All child welfare interventions by the State must have as their its primary goal the best interest of the child.
- Women and men must have equal rights in matters of guardianship of their children
- Women and men must have similar rights in ward ship, trusteeship and adoption of children
- Custody of children must be decided on the basis of the best interest of the child principle
- Women and men must have the same rights to custody of their children subject to the best interest of the child.
- Child support must be divided based on earning capacity of the parents and the child’s special needs; child support orders must be enforced
- A state's child welfare system must be designed to be child-centered, family-focused, community-based, and culturally competent in its prevention and protection efforts.
- Domestic violence must be a consideration in custody awards.
- Visitation options must be contingent upon the well-being and safety of the child.

Part Three

New Developments in the Law on Domestic Violence: The Impact on Children **Introduction**

The Declaration on the Elimination of Violence against Women (DEVAW) defines violence as “Any gender- based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in the family, such as battering, sexual abuse or female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.” Frequently, perpetrators use children to manipulate victims by harming or abducting children; by threatening to harm or abduct children or by using children to participate in the abuse of the victim.

Domestic violence has had a long history around the world. Wife beating, for instance, has also been sanctioned throughout history in varying cultures. Under the English Common law, the “rule of thumb” was that a man did not abuse his wife so long as he used a rod not thicker than a thumb. Anglo- American law allowed a husband as master of the household to subject his wife to corporal punishment or chastisement so long as he did not inflict permanent injury upon her. In many countries around the world, including the United States, the under-enforcement of crimes involving family members up till the 1970’s was of epidemic proportions. Not only were batterers exempt from the law, there was hardly any public discussion of wife and child beating. The crime of domestic violence was not even given name to till the 1970’s. Even when the right to beat one’s family members was repudiated by the authorities, men who assaulted their wives were often granted formal and informal immunity from prosecution so as to preserve family harmony and privacy.¹³⁰ However, despite the pervasiveness of domestic violence it was not considered an actionable offense by domestic legislation until the early 1990s.

Domestic violence was placed on the global agenda as a global epidemic which threatened women and children largely because of an explosion of activism by global women’s rights activists and the 1989 U.N. Commission on the Status of Women report on domestic violence, which reviewed over 250 articles, books and studies on various aspects of domestic violence,. Emerging data increasingly showing the pervasiveness of domestic violence created further momentum for both international and domestic action on domestic violence. **In 2000, the WHO went on record to state that violence against women caused more death and disabilities among women aged 15 to forty four than cancer, malaria, traffic accidents and war. A U.S. Department of Justice Report revealed that approximately 4 of 10 female victims of violence lived in households with children under the age of 12 and each year in the U.S. ¹³¹ an estimated 3. 3million children were exposed to violence by family members against their mothers. ¹³² Bolstered by increasing pressure from international women’s human rights advocates, NGOs made domestic violence central to their human rights advocacy. Domestic violence as human rights abuse was located as a systematic failure of the state to afford women equal protection of the law against that violence. The positive responsibility of the state inherent in human rights treaties therefore required states to take positive measures to end domestic violence. The concept of state responsibility to include accountability for acts of private individuals is an integral part of the definition of domestic violence**

130 De Silva-de Alwis & Ogletree, *supra* note.

131 Bureau of Justice Statistics, U.S. Dept. of Justice, NCJ – 178247, Special Report May 2000.

132 Report of the American Psychological Association Presidential Task Force on Violence and the Family, 11 (1996).

as a human rights violation. The concept of state responsibility has expanded to not only direct state action but also states systematic failure to act.¹³³

Even when laws have changed, the implementation of these laws have been plagued by gender bias and double standards. To date, in certain countries, men are allowed to beat their wives under certain circumstances.¹³⁴ The artificial separation between the private and public spheres still affect implementation of laws. Around the world, law enforcement officials still refuse to interfere in acts of violence in the family, often deeming domestic violent as private and outside the ambit of the law.

Violence in the Family: The Impact on Children

In 1994, the Human Rights Commission appointed a Special Rapporteur to investigate the causes and consequences of violence against women, over the duration of a three year period. The report by the Special Rapportur on Violence against Women, in 1999, adopted an expansive definition of violence in the family and included, inter alia, “woman- battering, marital rape, incest, forced prostitution, violence against domestic workers, violence against girls, sex selective abortions and female infanticide, traditional violent practices against women including forced marriage, son preference, female genital mutilation and honor crimes.”

Domestic violence¹³⁵ has enormous negative economic and social consequences for society as a whole, including: child abandonment, institutionalization, substance abuse and juvenile delinquency. While domestic violence is often gender specific, and renders women and girls in the family the most vulnerable, this vulnerability extends to boys as well. Adolescent boys are also often forced to commit honor crimes against women members of the family because they will receive a light sentence.¹³⁶ Apart from direct participation in acts of violence, experiencing, or even witnessing violence shapes spectators’-- in this case, children’s -- views of the world, themselves, “their ideas about the meaning and purpose of life, their expectations for future happiness and moral development.”¹³⁷ Furthermore, the observation or experience of such violence may result in the exhibition of “psychological and emotional disturbances” that lead to the perpetration and continuation of the cycle of violence.¹³⁸ Research clearly establishes that children who live in violent homes are at risk for behavioral and

133 In the United States, in *Thurman v. City of Torrington*, the victim of domestic violence was awarded a 2.3 million dollar award as damages on the basis that the police had breached their duty to protect her from her violent husband. See 595 F. Supp. 15621 (D. Conn.1984). At the international level, the *Velasquez Rodriguez* case has established state responsibility where the state has abdicated its responsibility to protect and has been thus found guilty of inaction.

134 For example, the Penal Code of Northern Nigeria provides that assault is not an offense if inflicted by a husband for the purpose of correcting his wife, so long as it does not amount to the infliction of grievous hurt. DE SILVA-DE ALWIS & OGLETREE, *supra* note 93, at 58.

135 Domestic violence is a pattern of behavior that one intimate partner or spouse exerts over another as a means of control. Domestic violence may include physical violence, coercion, threats, intimidation, isolation and emotional, sexual or economic abuse to maintain power and control over the intimate partner or spouse. Frequently, perpetrators manipulate victims by threatening to, or actually harm or abduct children or by using children to participate in the abuse of the victim.

136 Report by the Special Rapporteur on Violence Against Women, Its causes and Consequences, Ms. Radhika Coomaraswamy, Commission on Human Rights, U.N. Doc. E/CN.4/1999/68/Add.4 (1999).

137 MARGOLIN & GORDIS 2000, *as qtd. in the* NEW SOUTH WALES GOVERNMENT DEPARTMENT OF COMMUNITY SERVICE, DOMESTIC VIOLENCE AND ITS IMPACT ON CHILDREN’S DEVELOPMENT (2002)

138 PAULO SÉRGIO PINHEIRO, UNITED NATIONS, WORLD REPORT ON VIOLENCE AGAINST CHILDREN (2006)

psychological problems. Evidence is emerging that a range of health, school, and social interaction problems follow in the wake of exposure to violence in the home.¹³⁹

Violence against women often extends to violence against children. Every year, nearly 275 million children worldwide become victims of family violence.¹⁴⁰ In 1999 in the U.K alone, 32,017 women and 22,500 children sought refuge from domestic violence in women's shelters.¹⁴¹

Unfortunately, often health and welfare professionals feel unable to intervene legally to protect child witnesses from extreme incidents of domestic violence, unless there is evidence of child abuse.¹⁴² Additionally, although legislators have taken into account the toll of violence on both women and children and drafted laws that attempt to prevent violence and protect both groups from further victimization, the scope of coverage often does not extend far enough. This is due to a legislative tendency to compartmentalize issues and to view domestic violence as either a women's issue or a criminal justice issue. Consequently, few resources are available to children who witness episodes of domestic violence in many domestic violence laws. However, if a child rights perspective was brought to bear on domestic violence lawmaking, services for child abuse victims including: additional advocacy, judicial training, and shelters involving child welfare services would inform the laws.

Even when children are not direct victims of violence, the impact of violence has a direct toll on their physical, emotional and psychological health. Children's exposure to violence can be addressed by the strict implementation of domestic violence laws that protect all of the members that constitute a domestic abode. Some laws have provisions that relate to the protection of children who may witness violence in the home or run the risk of witnessing violence in the home. **The New Zealand Domestic Violence Act of 1995** (relevant provisions reproduced in the domestic violence section) covers in relation to a child, psychological abuse that:

“Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring...”¹⁴³

Although children are not always the direct target of violence, violence against any member of the family has a negative impact on the children in the family, including violence as both a learned behavior and to be normalized as an acceptable part of family life. Although the focus of domestic violence research has been on the on battered women, children raised in woman-abusive families reflect behavior that suggest that children are negatively affected at various levels. Often the children exposed to marital violence have received inadequate attention and have been called “forgotten”, “hidden”, “unintended” and “silent” victims.¹⁴⁴ George Holden argues that depending on the study, anywhere from 25 percent to 75 percent of

139 *Introduction: The Development of Research into Another Consequence of Family Violence, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES*, (G.W. Holden, R. Geffner and E.N. Jouriles, eds.1998). The authors present a check list of children's problems associated with exposure to marital conflict, including: aggression; alcohol and/or drug use; anger, destructiveness, cruelty to animals, non compliance, oppositional, anxiety, depression, excessive clinging, fears, low self esteem; sadness, self blame, shyness, suicidality, belief in violence in relationship, low empathy, poor problem solving skills, school problems, temperamentally difficult.

140 See UNICEF, *THE STATE OF THE WORLD'S CHILDREN 2007: WOMEN AND CHILDREN: THE DOUBLE DIVIDEND OF GENDER EQUALITY* (2007).

141 JONI SEAGER, *THE PENGUIN ATLAS OF WOMEN IN THE WORLD* (2001).

142 *Ibid.*

143 Article 3 of the New Zealand Domestic Violence Act 1995 of 086.

144 George Holden, *Introduction: The Development of Research into Another Consequences of Family Violence; Children*

these children may have problems that warrant clinical intervention.¹⁴⁵ Scholars working in this area claim that in addition to children modeling aggressive behavior, children may learn to manipulate, to cajole, and to coerce others to have their needs met- in essence to show the beginnings of antisocial behavior. ...For the child, a persistent atmosphere of intimidation and threat can repeatedly simulate posttraumatic play involving members of the family.¹⁴⁶

Moreover, Graham- Berman writes that children in families of domestic violence may be further damaged and harmed by the lack of available support. In the United States, mental health interventions for children who witness violence have traditionally been available in battered women's shelters. However, in recent years, more programs have been established reflecting the fact that children require services in a wide range of settings.¹⁴⁷

Given the often disproportionate statistics of girl-children and women who are battered, Anne-Marie Goetz notes that "any strategy to advance gender justice must focus on power relations in the domestic or 'private' context...the patriarchal mindsets and social relations that are produced in the private sphere are not contained there, but infuse most economic, social, and political institutions."¹⁴⁸ Thus, to ignore gendered rights violations in the home is to allow such discrimination and abuse to spillover to public spheres.

Discriminatory Customary and Traditional Practices

Traditional and customary practices affecting the health of women and girls constitute a definite form of violence against women and girls and a serious violation of their human rights.¹⁴⁹ The Vienna Declaration and Programme of Action on Human Rights has affirmed that gender based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking are incompatible with the dignity and worth of the human person and should forthwith be eliminated.¹⁵⁰ Unfortunately, in spite of international commitments,, the lives of girl children and women around the world are often marked by gendered, discriminatory practices.

Discrimination against women often starts in childhood and continues into adulthood. Harmful customary practices range from virginity testing, female foeticide, sex selective abortion, harmful traditional practices related to menstruation and child birth, polygamy and polyandry, witch hunting, child marriage and forced marriage, marriage of girls to older women, ghost wives, honour killings, widow burning, dowry deaths, dedication of young girls to temples (*devadasi* in India and *deuki* in Nepal), bonded labour, human trafficking and commercial sexual exploitation of girl children and women.

Certain forms of gender discrimination, such as the following, affect both the woman and the girl child: genital cutting; child marriage; the *Chaupadi* custom which requires women and girl children to leave their homes and live in cow sheds during and after child birth; and the *Kumari* practice

Exposed to Marital Violence: Theory Research and Applied Issues 6-11.

145 *Ibid.*

146 Sandra A. Graham- Berman; The Impact of Woman Abuse on Children's Social Development: Research and Theoretical Perspectives; Children Exposed to Marital Violence: Theory, Research and Applied Issues 21, 32-45 (G.W. Holden, R. Geffner and E.N. Jouriles, eds. 1998.

147 *Ibid.*

148 See Maitrayee Mukhopadhyay.

149 The General Assembly Resolution 52/99, inter alia, reaffirmed that traditional or customary practices affecting the health of women and girls constitute a definite form of violence against women and girls. G.A. Res. 52/99, U.N. GAOR, 52nd Sess., U.N. Doc. A/Res/52/99 (1997).

150 The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (A/CONF.157/23) 1993.

which deifies a young girl in Nepal till she reaches puberty. *In Sapana Malla v. Nepal*¹⁵¹ the Supreme Court of Nepal issued a directive order to ban the *Chaupadi* custom which required women and girl children to leave their homes and live in cow sheds during their menstrual periods and during and after child birth.

Across the world, the preference for sons results in millions of missing girls. Sex-selective abortions, infanticide or abandonment are means of controlling the birth and development of the girl child. Furthermore, such preference manifests itself in discriminatory feeding, dowry, polygamy, the devaluing of a woman's education, and the lack of freedom of choice in marriage; all practices which are often both a continuum of and root cause of domestic violence, affecting both women and children.

Honor killings are the murder of women and girls by family members on the grounds that their intended or unintended behavior marred the family's honor and constitute the most egregious form of violence in the family. Acid burning and dowry deaths are other forms of gender-based violence that affect both women, the girl child and all children in the family. The table below details cases where girl children's and women's rights have been severely derogated due to honor crimes, in Pakistan.

Giving Birth To A Daughter

"Ms. D., a teacher, got married to Mr. Q. In 1988, Ms. D. gave a baby called T. In the process of fulfilling family planning, due to poverty, she became abiotic. Then she could not give birth to a boy as Q himself and his family expected. Ms. D misery began on a day late 1998 when Q's mother gave him a small amount of money to get a woman from another commune as second wife. Ms. D. strongly objected to Q's illegal doing. Thus, right this evening, Q. hit brutally and drove D. and the child out of home. To avoid public opinion, Q. built a house in this woman's parents' land so he could freely go there and live spouse life with this woman. To Ms. D., Q. forced her to give him a certain amount of money each month that he called 'rent'. Ms. D. did not accept Q. requirement because it was so irrational. From then on, Ms. D usually suffered from continuous, frightening thrashings. She was taken to hospital many times because of head and face wounds. However, until the late 2003, Q. has not been prosecuted for his wrongdoing. Ms. D's application for prosecution fell in silence."
(Viet Nam's Women newspaper, 24/02/2003)

151 Writ no. 56/058, decided on May 2, 2002.

Honor Crimes Affecting the Girl Child in Pakistan

Below are some cases as reported to the U.N. Special Rapporteur on Violence against Women and Special Rapporteur on Extra Judicial and Arbitrary Executions.¹⁵²

In Shahdad Kot, on 21 January 2002, Ameeran, 9, and her cousin, Aziz Mohammed, also 9, were reportedly shot dead by her father (the boy's uncle), Wali Mohammed Magsi, while they were playing in the courtyard, allegedly for karo-kari. It is reported that this is a traditional form of honour killing in which the karo-. literally black man. and the kari -.black woman are engaged in an illicit relationship bringing dishonour to the family, the punishment for which is death. According to the information received, he kept the bodies in the courtyard for two days and sat beside them. He reportedly fled from the scene when the police arrived.

On 23 January 2002, Rehana, 15, was reportedly shot dead by her father Yaseen, in Bhindi village near Dharki, Sukkur. The father alleged that his daughter was a kari. According to the information received, the police took no action against the alleged killer.

In Sukkur, on 23 February 2002, Wali Mohammed Khoso, along with accomplices, reportedly killed his 14-year-old daughter, Parveen Khoso, and Abdul Razzaq Malik, and escaped afterwards. It was reported that after the killing, hundreds of Malik tribesmen gathered and claimed that the death of Mr. Malik was due to a dispute they had with the Khosos over phutti (raw cotton) dealing. According to the information received, a large contingent of the police went to the area and dispersed the Malik tribesmen but did not take any action concerning the killings.

On 9 March 2002, Inayat Ali reportedly shot dead his 15-year-old niece in Sheihupura. The girl allegedly had relations with Waris, a young man of the same village. She had reportedly eloped with him two days earlier. According to the information received, the incident was not reported to the police and no action was taken against the alleged killer.

On 29 May 2002, in Hafizabad, Anwar Taili reportedly killed death his wife, Kaneez Bibi, 40, and his 18-year-old daughter, Tauqeer Fatima with an axe. According to the information received, he had suspected his wife and daughter of having bad moral characters. He also reportedly tried to kill his youngest daughter, Naila, 13, but she allegedly escaped with severe injuries. The incident was not reported to the police and no action was taken against the alleged killer.

On 24 May 2002, in Duniyapur, Muqadas, a 16-year-old girl, was reportedly electrocuted after being drugged with sleeping pills and tied to a wooden bed with iron chains. She was reportedly killed by members of the Rajput Toors, a large and allegedly powerful community. She was allegedly murdered for marrying outside her community without the consent of the elders. According to information received, the .Toor Welfare Society. association had masterminded the murder as the community elders had reportedly collected 3 million rupees prior to the murder. It was also alleged that Rai Mohammed Younas, the Station House Officer, was

152 Source: <http://ods-dds-ny.un.org/doc/UNDOC/GEN/G04/122/75/PDF/G0412275.pdf?OpenElement>

bribed by the killers in order for him not to register a First Information Report. According to the information received, the incident was not reported to the police and no action was taken against the alleged killers.

On 17 January 2003, in Sargodha, a 12-year-old girl, Asia Parveen, was reportedly killed by her brother, Mohammed Iqbal, who had allegedly suspected her of having a loose moral character. He reportedly gave her a fatal blow with a pair of scissors. According to the information received, the incident was not reported to the police and no action was taken against the alleged killer.

On 7 April 2003, in Lahore, 16-year-old .M. was reportedly killed by her brother, Bashir Ahmed, for allegedly developing illicit relations with a neighbour, Ashraf. Ahmed had allegedly listened to their conversation on the telephone and when Ashraf came to see her, he attacked them killing his sister on the spot while Ashraf managed to escape. The police registered a case based on the complaint of the deceased's father but no further action was reported against the alleged killer.

Shakeela Siddique, aged 16, from Fatewa village in Gujranwala district, was reportedly raped at gunpoint by her 40-year-old landlord and employer, Mohammad Azam, in February 2002. Mohammad Azam allegedly threatened to kill Shakeela and her family if she reported the crime. Shakeela reportedly left her job but did not report the incident until she discovered she was pregnant two months later. Her father, Siddique Masih, is reported to have attempted to confront Mohammad Azam about the incident, but was allegedly badly beaten. According to information received, the police have been reluctant to register or investigate the crime due to Mohammad Azam's standing as an influential landlord in the area.

Naira Nadia Masih, aged 14, was reportedly kidnapped on the night of 11 February 2001 and allegedly gang raped by Maqsood Ahmed Sheikh and other militant Muslims as punishment for sharing her Christian faith with school friends. According to reports, the perpetrators forcibly converted the girl to Islam to absolve their crime and sent a certificate of conversion to her parents. It is reported that local police initially refused to register her family's complaint, and once the case reached the Lahore High Court, a justice allegedly ruled in favour of the abductor, despite concrete evidence in favour of the victim. The girl's family has reportedly appealed to the Supreme Court, but is waiting for a hearing date. Naira Nadia is still reported missing and her family is said to be receiving threats from local Muslims to withdraw the appeal.

Addressing Domestic Violence through the Lenses of the CEDAW, CRC and Regional Human Rights Instruments

Both the CEDAW and CRC prohibit violence against women and children. Furthermore, both committees have articulated concerns about the disproportionately deleterious effects of familial violence on women and children.

CRC Provisions

Of special importance to the girl child is Paragraph 3 of Article 24 of the CRC on health which recommends that, “States Parties shall take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” Paragraph 4 of the same article goes on to state that that, “States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article.”

Article 37 denounces the exposure of children to torture or cruel, inhuman, or degrading treatment.

Article 19 of the CRC prohibits “all forms of physical or mental violence” and in Article 39 asks that States Parties take all “appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment.” In conformity with these articles, read together with Article 24 (3) of the CRC, States Parties should denounce and reform all laws, practices and policies that allow harmful cultural practices such as son preference, crimes committed in the name of honour and genital mutilation.

CEDAW Provisions

Article 16 of CEDAW obligates State Parties to remove discriminatory laws and practices against women. Article 16 (1) grants women and girl children equality in all matters relating to family and marriage. It also protects girl children from marriage by declaring any such marriages legally void and mandates that State parties specify a minimum age for marriage.

Similarly, General Recommendation No. 12 requires that States Parties act to protect women against violence of any kind occurring within the family at the workplace or any other area of social life and recommends that the periodic reports provide information on the legislation in force to protect women against violence in everyday life including sexual violence, abuses in the family, sexual harassment at the workplace etc.

Recommendation 12 also asks States to adopt measures to eradicate violence against women and compile data on the existence of support services for women who are the victims of abuse and statistical data on the incidence of violence.

In 1993, the Committee on the CEDAW adopted General Recommendation 19, which explicitly states that CEDAW prohibits gender-based violence. General Recommendation No. 19 addresses violence against women (including sexual harassment) and emphasizes among others, that discrimination under the CEDAW is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and (5)). For example, under article 2 (e), the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law

and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation. The recommendation emphasizes the fact that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace. Therefore, the Recommendation also suggests that State parties establish support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refugees, specially trained health workers, rehabilitation and counseling. Further, recommendations are made to conduct gender-sensitive training of judicial and law enforcement officers and other public officials for the implementation of the CEDAW. Also, it is recommended that measures to overcome family violence should include criminal penalties where necessary and civil remedies in case of domestic violence. The CEDAW Committee has urged the State party to place high priority on implementing comprehensive measures to address violence against women and girls in accordance with its general recommendation 19 and has called upon states to enact legislation on domestic violence to ensure that women and girls who are victims of violence have access to immediate means of redress.

Further, the CEDAW Committee has asked that governments conduct public campaigns against violence against women and girls and particularly against trafficking in women and children.

Regional Instruments

Apart from the CEDAW and the CRC, regional human rights instruments have addressed domestic violence.

In June 1994, the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women 1995. In Article 2 it defines violence as physical, sexual and psychological violence.” Under Article 7, States agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence.” Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2003. The Protocol defines “harmful practices” to mean all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity; violence against women” means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war and the protocol makes it clear that “Women” means persons of female gender, including girls.¹⁵³ A novel provision in the protocol calls

153 Article 4 of the Protocol asks states to “take appropriate and effective measures to: a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public; b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women; c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence; d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women; e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims; 11 establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women; g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk; h) prohibit all medical or scientific experiments on women without their informed consent; i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at and eradicating violence against women preventing j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women. k) ensure that women and men enjoy equal rights in terms of access to refugee status,

upon states to promote peace education through education and curriculum reform targeted at dismantling cultural and gender stereotypes that harm males and females.¹⁵⁴

In June 2004, the Association of South East Asian Nations (ASEAN) adopted the Declaration on the Elimination of Violence Against Women. The Declaration calls for a more integrated regional approach to address violence against women by calling for domestic solutions through legislative and educational measures and support services. It also seeks to strengthen relations between government's, NGO' and community based organizations.

New Developments in Domestic Violence Lawmaking

Defining what is "Domestic" and what is "Violence"

The model framework prepared by the first U.N. **Special Rapporteur on Violence against Women**,¹⁵⁵ sets out the general standards for a domestic violence law in compliance with international standards. The framework first urges states to adopt the broadest possible definition of domestic violence which makes clear that domestic violence can be either physical, sexual or psychological and can include threats, intimidation, coercion, stalking, and humiliating verbal abuse.

To effectively fight domestic violence, legislation must not only broaden its definition and scope of coverage to address women and children, but must also provide remedies for victims--both women and children, whether in the form of protection orders or special services for children including counseling and educational resources. The coverage of the law should extend to a reconstituted concept of family. The term family has undergone numerous changes and a more dynamic definition of a family includes members beyond a traditional family. Thus all children, whether they be the children of the perpetrator or children of relatives and house helpers, can be protected in this analysis.¹⁵⁶ Idealized notions of what should constitute a family should be set aside in order to capture the reality of what constitutes a family.

determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents."

154 *Ibid.*

155 *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85: A framework for model legislation on domestic violence*, Comm. On Human Rights, 52nd Sess., Provisional Agenda Item 9(a), U.N. Doc. E/CN.4/1996/53/Add.2 (1996).

156 The report of the law commission of the Bangladesh on the proposed law of domestic violence acknowledges that children's rights cannot be guaranteed in a framework that discriminates against women. The report establishes any violence in the family makes children victims too which result in behavioral problems and learned behavior. The draft bill covers children, persons with disabilities, parents, siblings and even domestic workers of any sex or age live in the house or shared household. The Indonesian Domestic Violence Law of 2004 covers domestic workers in the household.

It is important to trace the new developments in domestic violence lawmaking because recent lawmaking covers a broad group of family members including children within the scope of the laws.¹⁵⁷

The **Cambodian** domestic violence law expanded the definition of a family to capture the reality of a post-genocidal and post-conflict society to cover all children in the family whether they were children of a nuclear family, extended family, or borne of polygamous unions. The only criteria is that the children be dependant children of either party.¹⁵⁸

Relevant Provisions on the Cambodian Law

THE PREVENTION OF DOMESTIC VIOLENCE AND THE PROTECTION OF VICTIMS, 2005

CHAPTER 2

Scope of the Implementation

Article 2

Domestic violence is referred to the violence that happens and could happen towards:

- 1- Husband or wife
- 2- Dependent children
- 3- Persons living under the roof of the house and who are dependent of the households.

The domestic violence law of **Thailand** passed in November 2007 embraces the concept that violence against women often takes place in the family and thus harms everyone in the family and therefore defines the law as Anti- Family Violence law.

157 A draft bill recently drafted by the law commission of **Bangladesh** in 2005 attempts to address gender bias by defining domestic violence to include “inducing or compelling a spouse to commit attempted suicide through continued oppression by any member of the family; blaming a spouse of immorality without any rational basis; threatening to divorce a wife on demand of dowry by the husband; baselessly blaming or imputing insanity, or citing barrenness of a spouse with the intention to marry again or to get a male member of the family married again; bringing false allegation upon the character of a female member by any member of the family; keeping a female member of the family disconnected with her father, mother, child, sibling and other relatives; threatening to get a male member of the family remarried by the other member or members of the family on the ground of the female spouse giving repeated birth to female children; and disallowing the children to see their father or mother during their separate living, being divorced or otherwise.” See Government of the People’s Republic of Bangladesh Law Commission; a Final Report on the Proposed Law of Domestic Violence Along with a Draft Bill Namely, The Domestic Violence Act, Office of the Law Commission Old High Court Building Dhaka- 1000 December 29, 2005. The report is with the author.

158 The Cambodian Domestic Violence Law covers parties to a marriage, dependant children and “all persons living under the roof of the house and who are dependent of the household”. Article 2 Law on the Prevention of Domestic Violence and the Protection of Victims.

Section Five of the **Philippines domestic violence law** ¹⁵⁹ highlights the way in which violence against women and children is often interrelated. In attempting to describe what constitutes violence, the law states that it includes:

Causing physical harm to the woman or her child; Threatening to cause the woman or her child physical harm; Attempting to cause the woman or her child physical harm; placing the woman or her child in fear of imminent physical harm; Attempting to compel or compelling the woman or her child to engage in conduct which the woman or her child has the right to desist from conduct which the woman or her child has the right to engage in, or attempting to restrict or restricting the woman's or her child's freedom of movement or conduct by force or threat of force, physical or other harm or threat of physical or other harm, or intimidation directed against the woman or child. ¹⁶⁰

An important element of the Philippines' Act is that it clearly covers domestic violence against women and children. The name of the act emphasizes this: *An Act Defining Violence Against Women and their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore and for Other Purposes* (Republic Act No. 9262) Of 2004. Women protected by the law include those who were a "wife, former wife, or a woman with whom a person has or had a sexual or dating relationship with"; as for children, ones both within and outside the family home are covered. However that the scope of the law extends only to minors (children) and women, a fact that is being challenged by some through the court system. ¹⁶¹

159 *An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore, and for Other Purposes* , No. 9262 (2003) (Phil.)..

160 This includes but is not limited to, the following acts committed with the purpose or effect of controlling or restricting the woman's or her child's movement or conduct: Threatening to deprive or actually depriving the woman or her child of custody to her/his family; Depriving or threatening to deprive the woman or her children of financial support legally due her or her family, or deliberately providing the woman's children insufficient financial support; Depriving or threatening to deprive the woman or her child of a legal right; Preventing the woman in engaging in any legitimate profession, occupation, business or activity or controlling the victim's own money or properties, or solely controlling the conjugal or common money, or properties; Inflicting or threatening to inflict physical harm on oneself for the purpose of controlling her actions or decisions; Causing or attempting to cause the woman or her child to engage in any sexual activity which does not constitute rape, by force or threat of force, physical harm, or through intimidation directed against the woman or her child or her/his immediate family; engaging in purposeful, knowing, or reckless conduct, personally or through another, that alarms or causes substantial emotional or psychological distress to the woman or her child. This shall include, but not be limited to, the following acts: Stalking or following the woman or her child in public or private places; peering in the window or lingering outside the residence of the woman or her child; Entering or remaining in the dwelling or on the property of the woman or her child against her/his will; destroying the property and personal belongingness or inflicting harm to animals or pets of the woman or her child; and engaging in any form of harassment or violence; causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and denial of financial support or custody of minor children of access to the woman's child/children. *See An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore, and for Other Purposes* , No. 9262 (2003) (Phil.)

161 Similarly, the Anti- Trafficking Act too makes specific note of women and children in the very title of the Act. The Anti Trafficking Act of 2003 states that it is an Act to institute policies to Eliminate Trafficking in Persons Especially Women and Children, establishing the necessary institutional mechanisms for the protection and support of trafficked persons, providing penalties for its violations and for other purposes.

Relevant Provisions of the Republic of the Philippines

Anti-Violence Against Women and Their Children Act of 2004

SEC. 2. Declaration of Policy.- It is hereby declared that the State values the dignity of women and children and guarantees full respect for human rights. The State also recognizes the need to protect the family and its members particularly women and children, from violence and threats to their personal safety and security.

Towards this end, the State shall exert efforts to address violence committed against women and children in keeping with the fundamental freedoms guaranteed under the Constitution and the Provisions of the Universal Declaration of Human Rights, the convention on the Elimination of all forms of discrimination Against Women, Convention on the Rights of the Child and other international human rights instruments of which the Philippines is a party.

SEC. 3. Definition of Terms.- As used in this Act, (a) "Violence against women and their children" refers to any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty. It includes, but is not limited to, the following acts:

- A. "Physical Violence" refers to acts that include bodily or physical harm;
- B. "Sexual violence" refers to an act which is sexual in nature, committed against a woman or her child. It includes, but is not limited to:
 - a. rap, sexual harassment, acts of lasciviousness, treating a woman or her child as a sex object, making demeaning and sexually suggestive remarks, physically attacking the sexual parts of the victim's body, forcing her/him to watch obscene publications and indecent shows or forcing the woman or her child to do indecent acts and/or make films thereof, forcing the wife and mistress/lover to live in the conjugal home or sleep together in the same room with the abuser;
 - b. acts causing or attempting to cause the victim to engage in any sexual activity by force, threat of force, physical or other harm or threat of physical or other harm or coercion;
 - c. Prostituting the woman or child.
- C. "Psychological violence" refers to acts or omissions causing or likely to cause mental or emotional suffering of the victim such as but not limited to intimidation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse and mental infidelity. It includes causing or allowing the victim to witness the physical, sexual or psychological abuse of a member of the family to which the victim belongs, or to witness pornography in any form or to witness abusive

injury to pets or to unlawful or unwanted deprivation of the right to custody and/or visitation of common children.

- D. "Economic abuse" refers to acts that make or attempt to make a woman financially dependent which includes, but is not limited to the following:
1. withdrawal of financial support or preventing the victim from engaging in any legitimate profession, occupation, business or activity, except in cases wherein the other spouse/partner objects on valid, serious and moral grounds as defined in Article 73 of the Family Code;
 2. deprivation or threat of deprivation of financial resources and the right to the use and enjoyment of the conjugal, community or property owned in common;
 3. destroying household property;
 4. controlling the victims' own money or properties or solely controlling the conjugal money or properties.

SEC. 5. Acts of Violence Against Women and Their Children.- The crime of violence against women and their children is committed through any of the following acts:

- a. Causing physical harm to the woman or her child;
- b. Threatening to cause the woman or her child physical harm;
- c. Attempting to cause the woman or her child physical harm;
- d. Placing the woman or her child in fear of imminent physical harm;
- e. Attempting to compel or compelling the woman or her child to engage in conduct which the woman or her child has the right to desist from or desist from conduct which the woman or her child has the right to engage in, or attempting to restrict or restricting the woman's or her child's freedom of movement or conduct by force or threat of force, physical or other harm or threat of physical or other harm, or intimidation directed against the woman or child. This shall include, but not limited to, the following acts committed with the purpose or effect of controlling or restricting the woman's or her child's movement or conduct:
 1. Threatening to deprive or actually depriving the woman or her child of custody to her/his family;
 2. Depriving or threatening to deprive the woman or her children of financial support legally due her or her family, or deliberately providing the woman's children insufficient financial support;
 3. Depriving or threatening to deprive the woman or her child of a legal right;
 4. Preventing the woman in engaging in any legitimate profession, occupation, business or activity or controlling the victim's own money or properties, or solely controlling the conjugal or common money, or properties;
- f. Inflicting or threatening to inflict physical harm on oneself for the purpose of controlling her actions or decisions;
- g. Causing or attempting to cause the woman or her child to engage in any sexual activity which does not constitute rape, by force or threat of force, physical harm, or through intimidation directed against the woman or her child or her/his immediate family;

- h. Engaging in purposeful, knowing, or reckless conduct, personally or through another, that alarms or causes substantial emotional or psychological distress to the woman or her child. This shall include, but not be limited to, the following acts:
 1. Stalking or following the woman or her child in public or private places;
 2. Peering in the window or lingering outside the residence of the woman or her child;
 3. Entering or remaining in the dwelling or on the property of the woman or her child against her/his will;
 4. Destroying the property and personal belongingness or inflicting harm to animals or pets of the woman or her child; and
 5. Engaging in any form of harassment or violence;
- i. Causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and denial of financial support or custody of minor children of access to the woman's child/children.

The **Sri Lankan Act to Provide for the Prevention of Any Act of Domestic Violence and for Matters Connected Therewith** was passed in 2005. The law describes a victim as a spouse, ex spouse, cohabiting partners, the father, mother, grandfather, the son, daughters, grandson, granddaughter, step son, step daughter, the brother, sister, half brothers, half sisters, siblings of a parent; the child of a sibling; or the child of a sibling of a parent off an aggrieved person or of the spouse, former spouse or cohabiting partner of the aggrieved person.

New law reform initiatives are often covering violence against not just family members but in some cases those living in the family home including domestic workers, as under **Indonesia's Law Regarding the Elimination of Violence in the Household**, passed in 2004. Moreover, the term child is often not narrowly defined as the daughter or son of one of the parties to the violence but includes any dependent child. For example, the **Trinidad and Tobago Act on Domestic Violence** safeguards the rights of any dependent child of the parties.

The **South African Domestic Violence Act of 1998** also extends the protection of the law to a broad category of persons in a domestic relationship, including persons who are married; persons of the same or opposite sex who are living together or have lived together; parents of a child or persons who have parental responsibility for a child; family members related by consanguinity, affinity, or adoption; or parties who are engaged, dating, or in a customary relationship including whether they are in an actual or perceived romantic, intimate, or sexual relationship of any duration; or persons who share or recently shared the same residence.

South Africa's law is one of the most inclusive, as it not only articulates the general prohibition of discrimination in the form of gender-based violence, but specifies that "[a]ny practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child"¹⁶² is prohibited as well.

¹⁶² Promotion of Equality and Prevention of Unfair Discrimination Act, Chapter 2, 8d.

The spirit of Article 5 of the CEDAW informs the South African law which is comprehensive in its coverage and prohibition of gender-based violence, including female genital mutilation, discriminatory inheritance laws, and any traditional, customary or religious practices perceived to discriminate or subordinate women, both in private and public contexts.¹⁶³

Domestic violence laws often cover violence against any family member and in some cases those living in the family home including domestic workers, as under **Indonesia's Law Regarding the Elimination of Violence in the Household**, passed in 2004.

Other laws are similarly broad in defining what constituted violence. **The New Zealand Domestic Violence Law of 1995** covers physical abuse, sexual abuse, psychological abuse and in relation to a child and goes as far as to protect children witnessing acts of violence or the risk of witnessing violence.

163 In its preamble, the law states: “ And having regard to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child...”

Relevant Provisions of the New Zealand Domestic Violence Act 1995 086

I: Preliminary Provisions

**3 Meaning of ``domestic violence''
(provisions have been highlighted by author)**

3. Meaning of ``domestic violence"---(1) In this Act, ``domestic violence", in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.

(2) In this section, ``violence" means---

(a) Physical abuse:

(b) Sexual abuse:

(c) Psychological abuse, including, but not limited to,---

(i) Intimidation:

(ii) Harassment:

(iii) Damage to property:

(iv) Threats of physical abuse, sexual abuse, or psychological abuse:

(v) **In relation to a child, abuse of the kind set out in subsection (3) of this section.**

(3) Without limiting subsection (2) (c) of this section, a person psychologically abuses a child if that person---

(a) Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or

(b) Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;---

but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.

(4) Without limiting subsection (2) of this section,---

(a) A single act may amount to abuse for the purposes of that subsection:

(b) A number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

(5) Behaviour may be psychological abuse for the purposes of subsection (2) (c) of this section which does not involve actual or threatened physical or sexual abuse.

Developing Multi- Pronged Advocacy Approaches

Community based remedies are an important and effective way to engage the community in addressing family violence. Several countries, such as the Philippines and Cambodia, have integrated community based approaches to address family violence. This is especially important in cases where children are involved.

The model framework prepared by the first U.N. Special Rapporteur on Violence against Women, Radhika Coomaraswamy referenced earlier also highlight the need to provide speedy and flexible remedies, holistic and comprehensive support and emergency services for victims of abuse and their families.¹⁶⁴ Further, the guidelines focus on the need to train law enforcement officials on how to respond to calls of domestic violence and gender sensitivity training for judges on issues relating to child custody, economic support and security for the victims in cases of domestic violence.¹⁶⁵ The Special Rapporteur's guidelines also provide the need to establish departments, programs, services, protocols and duties, including but not limited to shelters, counseling programs and job-training programs to aid victims of domestic violence.

In the Philippines, innovative provisions of the domestic violence law include the *Barangay* Protection Order which is a protection order issued by the local government. In a *Barangay* proceeding, the parties may be accompanied by a non-lawyer advocate.¹⁶⁶ The Bill also establishes an Inter-agency Council on Violence against Women and their Children¹⁶⁷ which is composed of several agencies including the National Commission on the Role of Filipino Women (NCRFW); the Department of Social Welfare and Development; the Council for the Welfare of Children and the Departments of Justice, Health and Education.

Several law reform initiatives have revised their provisions on marriage counseling to engage family and child counseling in cases of domestic violence. **The Australian Family Law** reform act has substituted family and child counseling to marriage counseling.

164 The recommended programs include: education and counseling for both abusers and victims; programs to assist in the prevention and elimination of domestic violence which include raising public awareness and public education on the subject, expanding the capacity of law enforcement officers to assist victims, and enforcing the law effectively in cases of domestic violence.

165 The CEDAW Committee noted that the Convention was yet to be invoked in a court of law. And that although special courts had been established, few legal remedies have been developed thereby circumscribing women's access to justice. The CEDAW Committee also recommended that the Convention and the recommendations become part of the legal education of judges, prosecutors, and lawyers. Most important China is called upon to set up legal remedies and implement awareness raising and sensitization measures on those remedies so that women can have recourse to those remedies.

166 SEC. 14. *Barangay Protection Orders (BPOs); Who May Issue and How.* - Barangay Protection Orders (BPOs) refer to the protection order issued by the *Punong Barangay* ordering the perpetrator to desist from committing acts under Section 5 (a) and (b) of this Act. A *Punong Barangay* who receives applications for a BPO shall issue the protection order to the applicant on the date of filing after *ex parte* determination of the basis of the application. If the *Punong Barangay* is unavailable to act on the application for a BPO, the application shall be acted upon by any available *Barangay Kagawad*. If the BPO is issued by a *Barangay Kagawad* the order must be accompanied by an attestation by the *Barangay Kagawad* that the *Punong Barangay* was unavailable at the time for the issuance of the BPO. BPOs shall be effective for fifteen (15) days. Immediately after the issuance of an *ex parte* BPO, the *Punong Barangay* or *Barangay Kagawad* shall personally serve a copy of the same on the respondent, or direct any barangay official to effect is personal service.

Relevant Provisions of the Australian family Law Reform ACT 1995 No. 167 of 1995 - SECT 53

Family Law Council

53. Section 115 of the Principal Act is amended by omitting from subsection (2) "marriage counselling organizations" and substituting "organisations that provide family and child counselling".

In the area of gender violence in Japan, the **Law for the Prevention of Spousal Violence and the Protection of Victims** stipulates the development of the Woman's Consulting Office and a Spousal Violence Counseling and Support Center, and introduces Mandatory Protection Orders.¹⁶⁸

Recently, on March 2007, **Liberia** adopted a domestic violence law with the support of UNICEF. The law passed by the Parliament of Moldova aims to prevent and combat domestic violence. This new law provides for legal protection of victims of domestic violence and the creation of rehabilitation centres and other support services. In a country where 27 percent of women over 15 years of age have experienced violence in the home,¹⁶⁹ this is a very welcome law that rules that domestic violence is unacceptable.¹⁷⁰

In **Korea**, the **Special Act for the Punishment of Domestic Violence and the Prevention of Domestic Violence and Victim Protection Act** were passed in 1997. The highlights of the law include: mandatory investigation by police; establishment of counseling centers or protective facilities; medical facilities to provide treatment for physical and mental injuries; and police are required to take emergency protection measures for victims by restraining a perpetrator from violent behavior or referring victims to domestic violence counseling centers, protective centers or hospitals.

An important characteristic of the law is that anyone who becomes aware of domestic violence crimes may report them to investigating agencies. These persons can include teachers, doctors and social workers. Further, a new department has been established within the police department to deal with crimes against women. Despite these new developments in the law, the lack of gender sensitivity on the part of the judges continues to mire the translation of the law into practice.

In **Korea**, as illustrated below, counseling centres are required to provide temporary protection to women and children who are victims of domestic violence and also required to coordinate legal aid services if necessary.

168 Law for the Prevention of Spousal Violence and the Protection of Victims, 2004.

169 According to the 2005 Demographic and Health Survey (DHS) carried out by the Government with support from USAID, UNICEF and UNFPA.

170 In 2006 UNICEF supported the Government in developing the draft National Action Plan on preventing and combating violence against children.

Relevant Provisions on the Korean Law on the Prevention of Domestic Violence and Victim Protection Act

Law No. 5487, December 31, 1997

Article 6 (Counseling Center Responsibilities and Services)

The responsibilities of and services provided by a Counseling Center are as follows:

- (1) The Counseling Center shall receive reports on domestic violence and / or provide counseling in regards to domestic violence.
- (2) The Counseling Center shall provide temporary protection to the victims who, as a result of domestic violence, are not able to lead a normal family and social life and / or are in need of urgent protection; or it shall deliver the victims to medical institutions or protective facilities.
- (3) For the purpose of obtaining legal advice on such issues as the reporting of domestic violence to the police, the Counseling Center shall seek cooperation and support of the Korean Bar Association / Local Bar association and the Korea Legal Aid Corporation as necessary.
- (4) The Counseling Center shall provide temporary protection the victims delivered from related facilities such as the police station.
- (5) The Counseling Center shall conduct public education and awareness campaigns concerning the prevention and prohibition of domestic violence.
- (6) The Counseling Center shall conduct research and investigate actual occurrence and consequences of domestic

Addressing Marital Rape

Marital rape goes to the very heart of family violence and is a violation of the right to life and security of the woman and the family. Marriage can never be a defense to violence and rape is an extreme form of violence. In countries where the legislature still does not recognize marital rape, court decisions have recognized marital rape as a crime. For example, the Supreme Court of Nepal recently declared that husbands who force their wives to have sex can now be charged with rape. The Court also directed the Nepali parliament to amend the present laws relating to rape so that they reflect the new ruling, including the right to self-defense against their husbands in the event of rape or attempted rape. The landmark ruling issued last May was a result of a July 2001 petition filed by the Forum for Women, Law and Development, a women's rights organization in Nepal that challenged the Country Code's Chapter on Rape as discriminatory.

Protective Orders to Safeguard Women and Children

Protective orders have proven to be some of the most important tools to protect women and children from domestic violence. Many new laws have developed different protective orders to safeguard women and children. These orders include among others, protection orders include the issuing of *ex parte* restraining orders. *Ex parte* temporary restraining orders can include a preliminary injunction against further violence and/or prevent the abuser/defendant from disturbing the victim/plaintiff's use of property, including the common home and orders to vacate. 171

The **Hong Kong Law**¹⁷² provides for an injunction for a child if the Court is satisfied that the applicant or a child living with the applicant has been molested by the other party to the marriage.

One of the most recent domestic violence laws to be passed was **India's 2005 Protection of Women From Domestic Violence Act**.¹⁷³ This law defines domestic violence to cover harms or injuries or endangerment to the health, safety, life, limb or well-being, whether mental or physical abuse, sexual abuse, verbal and emotional abuse and economic abuse.¹⁷⁴ The fact that the law allots the victim with a share of the abuser's property and salary, medical damages, and allows her to remain in the family household are concrete ways in which the interests of the victim and other family members including children in the family can be protected.

Protection orders are another important part of this new law. For example, the law provides for a protection order prohibiting the respondent from committing any act of domestic violence¹⁷⁵; aiding or abetting the commission of acts of domestic violence;¹⁷⁶ entering the place of employment of the aggrieved person or any other place frequented by the aggrieved person¹⁷⁷; attempting to communicate in any form whatsoever¹⁷⁸; alienating any assets, operating bank lockers, or bank accounts used or held or enjoyed by both parties, jointly by the aggrieved person and the respondent or singly by the respondent any property held jointly or separately by them¹⁷⁹. The protection order includes a residence order directing the respondent from removing himself from the shared household;¹⁸⁰ restraining the respondent or any of his relatives from entering the shared household¹⁸¹ or restraining the respondent from alienating the shared household.¹⁸²

171 An *ex parte* temporary restraining order may order the offender to vacate the family home; limit offender's access to dependent children; Restrain the offender from contacting the victim at work or other places frequented by the victim; Compel the offender to pay the victim's medical bills; Restrict the unilateral disposal of joint assets; Inform the victim and the offender that if the offender violates the restraining order, he may be arrested and criminal charges brought against him; Inform the victim that, notwithstanding the use of a restraining order under domestic violence legislation, she can request the prosecutor to file a criminal complaint against the offender; Inform the victim that, notwithstanding the use of a restraining order under domestic violence legislation and application for criminal prosecution, she can initiate a civil process and sue for divorce, separation, damages or compensation; Require each party to fulfill his/her continuing duty to inform the court at each proceeding for an order of protection at any civil litigation, proceeding in juvenile court and/or criminal proceedings involving either party.

172 Section 3.1 of the Hong Kong Domestic Violence Ordinance, 1986.

173 The Protection of Women From Domestic Violence Act, 2005.

174 *Id* at 3.b

175 *Id* at 18.a

176 *Id* at 18.b

177 *Id* at 18.c

178 *Id* at 18.d

179 *Id* at 18.e

180 *Id* at 19.b

181 *Id* at 19.c

182 *Id* at 19.d

India's new domestic violence law does not clearly define who can file a claim on behalf of a child faced with domestic violence. According to a report done by the Lawyer Collective, which monitored the law one year after its promulgation in 2007, in cases where the mother was not considered the guardian of the child, she was not able to file an application on behalf of the child. Given that the law provides that the applicant must certify that she is the natural guardian of the child, a strict reading of the Indian Family Law would render the mother unable to file a claim on behalf of the child.¹⁸³ This case illustrates very well how a children's rights cannot be asserted in a framework of gender inequality.

In some countries, an application for a protection order may be made by the victim, a relative, a welfare worker or a person assisting the victim of domestic violence. For example, in **Taiwan**, local governments can apply for protection orders on behalf of victims. Applications for protection orders may be made by fax or other communication technology in cases that involve imminent danger and the law requires each central government and each local government to set up domestic violence prevention committees to develop strategies for eliminating domestic violence and to supervise the implementation of the Act.

The **Sri Lankan Domestic Violence law**¹⁸⁴ too entertains an application from an aggrieved person or when an aggrieved person is a child, on behalf of such a child by a parent or guardian of the child or a person with whom the child resides, or a person authorized in writing by the National Child Protection Authority established under the National Child Protection Authority Act, No. 50 of 1998.

The **Cambodian law**¹⁸⁵ too addresses the manner in which child or a person responsible for the child can file a complaint on behalf of the child victim of domestic violence. Articles 33 and 34 of the Cambodian law requires ministries and institutions of the state to "strengthen cooperation with the authorities in charge, local authorities, organizations and private sectors in promoting dissemination and education programs for the citizens about the law on the prevention of domestic violence and the protection of victims."¹⁸⁶

As explained above, an *ex parte* restraining order might include an order for the perpetrator to vacate the family home in the interest of the safety of the victim or the likely victim of violence and her children who may or may not be threatened by violence but would be considered harmed by the violence or potential violence. Occupancy orders can be made to remain in the family home and often one of the legal considerations in making such an order is the best interest of the child as shown in the **Santa Lucia Domestic Violence Law of 1995**.

183 Staying Alive, First Monitoring and Evaluation Report 2007 on the Protection of Women from Domestic Violence Act of 2005. Lawyers Collective Women's Rights Initiative Publication supported by UNIFEM.

184 Prevention of Domestic Violence Act, No. 34 (2005).

185 Law on the Prevention of Domestic violence and the Protection of Victims, 2005. Article 8 of the Cambodian law states that disciplining persons in accordance with Khmer culture is allowed so long as it is accordance with the United Nations Conventions on Human Rights and Child Rights. This provisions lends itself to ambiguity since it implies that discipline could allow corporal punishment. A cardinal flaw in the Cambodian law is that it does not contain specific crimes or penalty provisions. Article 35 of the domestic violence law enumerates that domestic violence that can be considered criminal offenses are punishable under equivalent articles in the penal code. This means that only physical acts can be punishable under the domestic violence law.

186 Article 34

Relevant Provisions of the Saint Lucia Domestic Violence Act No. 7 of 1995

Part II. Occupation Orders

7. (1) Application may be made in accordance with Form 2 of the Schedule to the court for an occupation order granting a specified person named in the order the right to live in the household residence.

(2) Subject to section 14 and subsection (3) of this section, the Court may, on an application under subsection (1), make an occupation order granting to the applicant, for such period or periods and on such terms and subject to such conditions as the Court thinks fit, the right to occupy the household residence or any other premises forming part of the household residence.

(3) The court may make an occupation order under subsection (2) only if the Court is satisfied that such an order --

(a) is necessary for the protection of a specified person; or

(b) is in the best interest of a child.

What we see in these new developments is that provisions of the law which require the removal of victims from the scene of violence might be problematic as it entails a movement from the home which adds to further disruption to the security of children. Thus there is a trend in law revision to ensure that while the perpetrator is made to leave the home, the children of the family remain in the family home.¹⁸⁷

The Breakdown of Marriage Following Violence: Legal Considerations of the Impact on Children

Legal provisions that call for mandatory reconciliation on filing for divorce can be dangerous for children and women victims of violence in the family.¹⁸⁸ When domestic violence is a cause for divorce, mandatory reconciliation will often pose a danger to the health and security of the spouse and children. For this reason, law reform must pay special consideration to violence against women and children in the family, in particular identifying and remedying spousal violence, incest and child abuse. Studies indicate that children are harmed by being exposed to spousal assault and being in a climate of disrespect and abuse of either parent during or after a breakdown in marriage.¹⁸⁹

Since 1999, custody awards in more than forty states in the United States have provided for consideration of domestic violence as a factor in custody decisions. **Child Protection Services in the State of Massachusetts** are called upon to screen all families for domestic violence. In 1992, a protocol was

187 The newly promulgated domestic violence law in Thailand provides for the removal of the perpetrator of violence rather than the family members.

188 See Article 45 of the Law on Marriage and Family, 1989.

189 George Holden Introduction: The Development of Research into Another Consequence of Family Violence; Children Exposed to Marital Violence: Theory, Research and Applied Issues 1, 6-11 (G.W. Holden, R.Geffner and E.N. Jourilles, eds. 1998); Robert B. Strauss; Supervised Visitation and Family Violence, 29 Family Law Quarterly 229, (1995).

developed to assist workers in investigation, risk assessment, and service planning for cases involving domestic violence. It also includes mothers in safety planning and in holding perpetrators accountable for their actions. The state also provides a framework for deciding which reports of domestic violence should involve the engagement of child protection services or community based services.

The recently passed **Indian** domestic violence law as shown below calls for law enforcement officer or service provider to ask for a custody order but the need for child protection is not clearly set out.

**Relevant Provisions of the Indian Law on the Protection of Women from Domestic Violence Act
2005 ACT, 2005 No. 43 OF 2005**

Powers and Duties of Protective and Service Providers

5) A police officer, protective officer, service provider or Magistrate who has received a complaint of domestic violence or is otherwise present at the place of incident of domestic violence or when the incidence of domestic violence is reported to him, shall inform the aggrieved person...
a) of her right to make an appearance for obtaining a relief by way of a protective order an order for monetary relief, a custody order, a residence order, a compensation order...

What this shows is that domestic violence service providers and child protection service providers must work together to create effective responses to family violence. It is important to view both child protection service providers and domestic violence service providers as powerful allies. New alliances must result in collaboration between domestic violence service programs and Child Protective Services and partnerships between community-based child protection programs and domestic violence NGO's. This must include providing training programs for domestic violence service personnel to provide child protection interventions and include domestic violence specialists in child protection agencies.

**The U.S. National Council of Juvenile and Family Court Judges Model Code on
Domestic and Family Violence National Council of Juvenile and Family Court
Judges 1994**

In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue....and in which the county has made a finding of domestic or family violence.

The court shall consider as primary the safety and well being of the child and of the parent who is the victim of domestic of family violence.

The court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person.

If a parent's is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation.

Commentary

This section was constructed to remedy the failure of many custody statutes to give courts direction related to appropriate consideration of domestic and family violence in contested custody cases. Subsection 1 elevates the safety and well-being of the child and abused parent above all other best interest factor in deliberations about custodial options in those disputed custody cases where there has been a finding of abuse by one parent of the other. It contemplates that no custodial or visitation award may properly issue that jeopardizes the safety and well being of adult and child victims.

Inequality in the Pakistan Criminal Laws and Its Impact on Girls

Jehan Mina v. The State, P.L.D. 1983 Fed. Shariat Ct. (Pak)

In 1982, fifteen year old Jehan Mina became pregnant as a result of a reported rape. Lacking the testimony of four eye witnesses that the intercourse was in fact rape, Jehan was convicted of Zina on the evidence of her illegitimate pregnancy. Her child was born in prison.

Safia Bibi v. The State, P.L.D. 1985 Fed. Shariat Ct. 120 (Pak).

In 1985, Safia Bibi, a sixteen year old nearly blind domestic worker reported that she was repeatedly raped by her landlord/ employer and his son, and became pregnant as a result. When she charged the men with rape, the case was dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with Zina (adultery or fornication) and convicted on this evidence.

Police action and inaction in rape cases in Pakistan have in fact been widely reported as instrumental elements to the injustice. There is evidence that Police have deliberately failed to file charges against men accused of rape, often using the threat of converting the rape charge into a Zina prosecution against the female complainant to discourage women from reporting.

Some Important Elements of Domestic Violence Laws as they Affect Children

Japan

The **Law for the Prevention of Spousal Violence and the Protection of Victims** was enacted in April 2001. This is the first such law in Japan. It stipulates the roles of Spousal Violence Counseling and Support Centers, which provide victims with consultation, counseling, temporary protection, and information. The Law also has provisions for protection orders to be issued by the court against the perpetrator on the petition of the victim. Two types of protection orders can be provided: the Order to Prohibit Approach, which prohibits the spouse from approaching the victim for a six month period, and the Order to Vacate, which requires the spouse to vacate the domicile that the spouse shares as the main house with the victim for a two week period. Individuals who violate these

protection orders are subject to imprisonment with labor of up to one year or a fine of not more than 1 million yen.

The Specialist Committee on Violence Against Women under the Council of Gender Equality conducts studies on possible future measures, taking into consideration fields such as spousal violence, sexual crimes, prostitution, sexual harassment and stalking. The committee has submitted reports to the Council for Gender Equality on 3 October 2001 and 2 April 2002. The committee argued for a re-examination of the law, including an extension of the object of the protection order to ex-spouses and an extension of the period of “Orders to Vacate” to one month.

A principal shortcoming of the law is hinted at in its characterization of domestic violence as “violence toward the body by one spouse or words or deeds by one spouse that causes comparable psychological or physical harm to the other.”¹⁹⁰ In specifying spousal abuse, the law severely limits its coverage – although it is noteworthy that in defining “spouse,” the legislation leaves room for de facto arrangements, in addition to de jure ones.

Cambodia

The Law on the Prevention of Domestic Violence and the Protection of Victims was drafted by the Ministry for Women’s and Veteran’s Affairs, in cooperation with women’s NGO’s and supported by UNDP and UNIFEM, and passed in September of 2005.

According to the legislative text, violence includes those acts affecting life, physical integrity, torture or cruel acts, and sexual aggression. In turn, torture is defined as mental, psychological, and physical harm exceeding morality and the boundaries of law. Unfortunately, though a good faith effort has been made to include mental and psychological harm under torture, the phrase “exceeding morality and the boundaries of the law” is subject to the interpretation of judges.

Although the law provides a protection order, which is civil in nature, an act of domestic violence characterized as a felony or a severe misdemeanor can be subject to a criminal suit. A criminal prosecution can be stopped, if an adult victim requests this and of the offenses are minor misdemeanors or petty crimes. In the case of children and persons with mental disabilities, a protection order can be requested by any person who has learned about the incident of domestic violence.¹⁹¹ Furthermore, the welfare and protection of the children are among the stated responsibilities of authorities in charge.

In cases of minor misdemeanors or petty crimes, mediation “can be conducted with the agreement from both parties.”¹⁹² Householders are given the choice to select amongst “parents, relatives, Buddhist monks, elders, village chiefs, and commune councilors to act as arbitrators.”¹⁹³ The courts are also authorized to mediate on the condition that this is

190 Law for the Prevention of Spousal Violence and the Protection of Victims, No. 31 (2001) (Japan).

191 Article 22.2.

192 Article 26.

193 Article 26.

the wish of both parties.

A cardinal flaw in the Cambodian law is that it does not contain specific crimes or penalty provisions. For example, article 35 of the domestic violence law enumerates that domestic violence that can be considered a criminal offense is punishable under equivalent articles in the penal code. This means that only physical acts can be punishable under the domestic violence law.

The **Law on Marriage and Family, 1989** also requires that courts attempt to reconcile husband and wife. This would endanger the safety of partners and children who are victims of domestic violence.

Article 8 of the Cambodian Family law states that disciplining persons in accordance with Khmer culture is allowed so long as it is accordance with the United Nations Conventions on Human Rights and Child Rights. This provision lends itself to ambiguity since it implies that discipline could allow corporal punishment.

Malaysia

Passed in 1994, the majority of acts detailed in **Malaysia's Domestic Violence Act** under domestic violence are characterized by their physical nature, rather than psychological or mental. The Act also established protection orders to restrain perpetrators from “using domestic violence against the complainant; ...from using domestic violence against the child; ...[and] from using domestic violence against the incapacitated adult”,¹⁹⁴

Yet despite these provisions, due to shortcomings in the more than decade-old Domestic Violence Law, women's NGO's are lobbying for the amendment of the law and for the effective implementation of the law.

One-stop crisis centers have been set up in every state to deal with cases of violence against women and children. The first center was established at the University Hospital in Kuala Lumpur in 1986, as the result of a campaign by women's organizations. It took eight years for another center to open. Finally, after women's organizations lobbied the Ministry of Health to make the services more widespread, in 1996 the Ministry directed all state hospitals to set up One-Stop Crisis Centers. By 1997, they were established in 90 percent of state hospitals.

Since 1989, a Special Sexual Assault Unit has been working out of the Police Headquarters, Bukit Aman, to deal with cases of violence against women and children.

A committee was established by the Ministry of Women and Family Development to review the Domestic Violence Act of 1994 and its implementation procedures to ensure that adequate protection is provided for survivors of domestic violence.

The National Steering Committee on Violence Against Women (NSCVAW) composed of members from both governmental and non-governmental organizations has proposed

194 Part 2.5.

the following recommendations for amending the Domestic Violence Act:

Improve the procedure for applying for interim protective orders (IPO) by:

- Removing restrictions on who may apply
- Instituting standard reporting procedures
- Removing the need for a referral letter from the police
- Removing the need for a report from a welfare officer before an interim order is issued
- Standardizing and expanding interim protective order formats
- Serving IPO's within 24 hours of receipt from the court
- Monitoring the IPO pending police investigation
- Instituting measures to prevent contravention of IPOs
- Providing right of exclusive possession of shared residence
- Requiring counseling
- Include protection of informants and provide for on-going training programs

Singapore

Section 64 of the **Women's Charter** protects family members- spouses, ex-spouses, children (including step and adopted children), parents, parents in law, siblings, relatives, or incapacitated persons whom the Court deems as relatives- from family violence. The court can issue a protection order to restrain the perpetrator from using family violence, as well as an exclusion order to bar the perpetrator from entering the shared place of residence. Where the court finds that there is imminent danger of family violence being perpetrated, the court may also issue an Expedited Order- that is, a protection order granted on an expedited basis.

In addition, section 65 (5) (b) of the Women's Charter empowers the Court to mandate perpetrators, victims, and children to counseling. The Mandatory Counseling Program, administered and funded by the Ministry of Community Development and Sports (MCDS), aims to rehabilitate the perpetrator and to give support to victims and their children.

To enhance networking among relevant agencies, regional networking meetings are held regularly. The agencies in the National Family Violence Networking System meet annually to review and enhance the service delivery system. Finally, MCDS has put in place a three level training framework to ensure a high standard of trained family violence workers. Training is targeted at social workers in community and hospital settings. The three levels cover basic training for frontline workers, more advanced training in counseling and specialized courses in dealing with child victims of violence and alcoholic cases.

Korea

The **Prevention of Domestic Violence and Victim Protection Act and the Special Act for the Punishment of Domestic Violence**, both of which cover domestic violence were

introduced in 1997. The Punishment Act was revised in 1999.

The main features of the laws include mandatory investigation by police of domestic violence calls, establishment of counseling centers or protective facilities, medical facilities to provide treatment for physical and mental injuries.

China

Although China has yet to pass a domestic violence law, the **Revised Law on the Protection of Women's Rights and Interests in 2005**, for the first time prohibits domestic violence¹⁹⁵. Article 2 outlaws violence against women as a form of discrimination against women and Article 46 mandates that the state take all measures to prevent and stop domestic violence.¹⁹⁶ In August 2007, the All China Women's Federation announced that the Ministry of Public Security and the other government organs in soon expected to issue "Guidelines on Prevention of Domestic Violence". It is expected that guidelines will clearly define the role of the law enforcement organs on receipt of a report on domestic violence and corresponding support obligations that will should set up to assist the victims of domestic violence.

Pakistan

Pakistan's Prevention of Domestic Violence Bill of 2005 establishes in its preamble that "as a signatory to the UN Convention on the Elimination of Discrimination Against Women," it is obligated to "take action for the protection of women from gender-based violence." In undertaking this obligation, it defines violence as inclusive of physical, economic, sexual, emotional, verbal, and psychological abuse. The coverage of the Bill extends to women, children, and family, as well as those in domestic relationships based on their domiciles.

Apart from domestic violence laws, there are new developments in the reform of laws that pertain to violence against women, girls, and children; these developments involve the reform of health law, criminal procedure laws and *Shariah* laws.

Recently, in Pakistan, the reform of the Hudood Ordinance of Shariah Law provided for the elimination of the four-witnesses requirement in cases relating to rape; permits judges discretion in trying rape cases in criminal, not religious, courts and in introducing DNA evidence; and drops the death penalty and flogging for those convicted on consensual sex outside marriage.

Under Shariah law, a *Qisas* crime is one of retaliation. Punishment can come in several forms and also may include "[d]iyat which is a form of compensation, or blood money,

195 When the Chinese marriage laws were revised, Article 46 of the marriage laws set out domestic violence as a ground for divorce but did not prohibit domestic violence.

196 Article 46 of the LPWRI provides that: "Domestic Violence against women is prohibited. The state shall take measures to prevent and stop domestic violence. The public security organs, civil affairs, judicial and executive organs, autonomous organizations, social organizations at the grass root in the township and rural areas should take measures to prevent and stop domestic violence within their responsibilities, provide the women victims with remedies."

which is to be paid to the victim or the family as reparation for an injury or murder.” *Vinni*, which comes from the Pashtun word for blood, *vanay*,¹⁹⁷ is a centuries-old practice in Pakistan and in parts of Afghanistan, of giving women into marriage as compensation in cases of murder, territorial disputes or other serious. Often, women given in *vinni* live their lives in perpetual bondage.

A 1991 amendment to the Pakistan Penal Code, incorporating the *Qisas* (punishment equal to the crime) and *Diyat* (blood money) Ordinance, was widely interpreted by tribal elders as official sanction for *vinni* practices. Often a tribal *jirga*, or council, has sacrificed women at the altar of the family honor. On the other hand, guilty parties--almost exclusively male--escape further punishment. A bill outlawing this practice is now before the Pakistan legislature.

Additionally, Pakistan’s recent revisions to the Penal Code have amended provisions relating to zina (adultery or fornications) and zina bil jabr (rape) because oftentimes, where a prosecution for rape against a man fails but sexual activity is confirmed by medical examination or on account of pregnancy or otherwise the woman is punished for zina.

India

The Protection of the Indian Women from Domestic Violence (Act. No. 43 of 2005)

explains that “verbal and emotional” abuse under the Act includes “...insults or ridicule especially with regard to not having a child or a male child,”¹⁹⁸ as well as the prevention of a child in custody from attending school, college, or any other educational institution. Economic abuse includes the “deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom.”¹⁹⁹

Domestic Incidence Reports are also provided for, which catalogue the various acts of violence under characterizations of: physical, sexual violence, emotional, or economic. Although an extensive list is provided under each category, there is provision for crimes that are not covered under the given offense.

Taiwan

Taiwan adopts an integrated approach in its tackling of domestic violence in the **Domestic Violence Prevention Act of 1998**. The Act covers all family members and defines domestic violence as an act of physical or mental violence. The law provides civil, criminal, and administrative measures to prevent the recurrence of domestic violence as well as to protect victims. Under this approach, courts may be empowered to issue a variety of orders, including counseling orders. Contravention of an order is punishable by imprisonment or fine.

In terms of criminal proceedings, a mandatory arrest policy may be adopted for cases in

197 The custom is also known as swara in the northern areas of Pakistan. It is common in three of the four Pakistan provinces, including the Northwest Frontier, Sindh and Punjab.

198 Chapter 2, 3.3.

199 Chapter 2, 3.4a.

which a perpetrator is caught in the act of committing domestic violence or violating a protection order.

Furthermore, in terms of remedies, the Act establishes a Domestic Violence Prevention Committee charged with the authority to, among other things, coordinate, monitor, and evaluate the performance of domestic violence control and prevention of bylaws by agencies concerned and to sponsor local governments to promote domestic violence control and prevention programs by providing financial and technical assistance²⁰⁰ and to sponsor the integrated data base of domestic violence offenders for mutual reference among judges, prosecutors, policemen, medical personnel and other government agencies and to keep strict confidentiality of the identity of the victim...²⁰¹

A distinctive feature of the Taiwanese Act is the way in which all local governments are authorized to create a domestic violence prevention committee and to maintain a Domestic Violence prevention Center and to establish among other things a 24 hour hotline; psychological support, housing, counseling etc.²⁰² The engagement of local communities in combating domestic violence is a thread that runs through this law.

Peru

Peru was among the first countries in Latin America to adopt special legislation on domestic violence. **The Law for Protection from Family Violence** adopted in 1993 and subsequently revised in 1997, established a distinct and expedited procedure for dealing with cases of domestic violence and sought to define more clearly the respective roles and responsibilities of those within the justice system who are involved with such cases.

The most recent innovation has been a system of one-stop centers for victims of domestic violence, where women can find under one roof: women police officers, medical examiners, and state prosecutors.

Nevertheless, the law privileges conciliation over prosecution, thus making it difficult to prosecute abusive conduct against women. Also, the Family Violence Law only extends protection to women from their abusive intimate partners in cases where the victim and abuser are co-habiting at the time of the abuse. This excludes from protection all women not actually living with their abuser at the time of assault. Furthermore, the definition of domestic violence does not cover marital rape. Thus, even though the marital rape exemption has been removed in 1991 from the Peruvian Criminal Code, if married women want to file a rape complaint, they do not have access to the streamlined process available to women victims of domestic violence.

Trinidad and Tobago

The Domestic Violence Act no. 10 of 1991, provides for protection orders or interim protection orders in instances where the respondent has engaged in conduct of an

200 Article 5.8.

201 Article 5.7.

202 Article 8.

offensive or harassing nature with respect to a spouse of the respondent, a parent or a child or dependent of the spouse or of the respondent, to the extent that the spouse or the parent is fearful of injury, physical or mental, to herself or himself or to a child or dependent of the spouse or of the respondent.

Cayman Islands

The Cayman Islands Domestic Violence Law No. 20 of 1992 allows a police officer to arrest the respondent without warrant if there is reasonable cause for suspecting that the respondent is in breach of any such provision.

Saint Lucia

The Domestic Violence Act of 1995 defines domestic violence as any act of violence, whether physical or verbal abuse, perpetrated by a member of a household upon a member of the same household which causes or is likely to cause physical, mental, or emotional injury or harm to the abused party or any other member of the household.

Mauritius

Interestingly, in Mauritius, an **Act to Provide Protection to the Victims of Domestic Violence 1997** has an “Occupancy Order” which allows a person who is a victim of domestic violence, and who reasonably believes that the spouse will commit further acts of violence, to apply to the Court for an occupation order granting the person the exclusive right to live in the residence belonging to him. Further, a spouse who is the victim of an act of domestic violence and who reasonably believes that she will be subject to further violence may apply to the Court for a tenancy order so that the tenancy of the residence should vest on the victim of domestic violence.

South Africa

The Domestic Violence Act of 1998 makes special reference to the right to equality and to freedom and security of the person, and the international commitments and obligations of the State towards ending violence against women and children.

The South African Act also gives an expanded reading of domestic violence (physical abuse, sexual abuse, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking or damage to property) and extends protection of the Act to persons who are in “domestic relationships” to each other including those who are married to each other, whether it be marriage according to any law, custom or religion, persons whether of the same or opposite sex who live or lived together in the nature of marriage, parents of a child, or persons who have or had parental responsibility for that child, whether family members related by consanguinity, affinity or adoption or were in engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any sexual duration or if they recently shared the same residence.

Domestic Violence Protection Orders Affecting Children: Some Legislative Examples

State Party	Relevant Articles
<p>Law on the Prevention of Domestic Violence and the Protection of Victims, Cambodia²⁰³</p>	<p><i>Chapter 5, Article 25:</i> The following additional measures can be taken if the courts know that it is necessary to protect or provide the safety, health and welfare to the victims: ...Making a decision on the custody of the children and the rights to visit the children by paying the highest attention to the rights and interests of the children</p> <p><i>Article 28:</i> In case the violence is related to children, the authorities in charge who have the role to serve the interests and protect welfare of the children shall do the follow up of this issue. In severe cases, the authorities in charge shall file a case to the courts. Any responsible person assigned by the courts including the prosecutors shall take charge of doing the follow up of the situation of the children and make a report about this situation to the courts.</p>
<p>L.N. 305, Hong Kong²⁰⁴</p>	<p><i>Sect. 3: Power of District Court to grant injunction</i> (1) On an application by a party to a marriage the District Court, if it is satisfied that the applicant or a child living with the applicant has been molested by the other party to the marriage and subject to section 6, may grant an injunction containing any or all of the following provisions-</p> <ul style="list-style-type: none"> (a) a provision restraining that other party from molesting the applicant; a provision restraining that other party from molesting any child living with the applicant; <p>(2) In the exercise of its jurisdiction to grant an injunction containing a provision mentioned in subsection (1)(c) or (d) the District Court shall have regard to the conduct of the parties, both in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any child living with the applicant and to all the circumstances of the case. [cf. 1976 c. 50 s. 1 U.K.]</p>
<p>Prevention of Women from Domestic Violence Act, India²⁰⁵</p>	<p>8. Duties and functions of Protection Officers.- (1) It shall be the duty of the Protection Officer -</p> <ul style="list-style-type: none"> (vi) to assist the aggrieved person and any child in obtaining medical aid at a medical facility including providing transportation to get the medical facility; (vii) to assist in obtaining transportation for the aggrieved person and any child to the shelter; (xii) to provide all possible assistance to the aggrieved person and the children to ensure that the aggrieved person is not victimized or pressurized as a consequence of reporting the incidence of domestic

203 Law on The Prevention of Domestic Violence and The Protection of Victims, (2005) (Cambodia).

204 [19 December 1986] L.N. 305 of 1986

205 Protection of Women from Domestic Violence Act, No. 43 (2005).

violence...

Form IV Information on rights of aggrieved persons under the protection of women from domestic violence, 2005

You can receive protection and assistance under the Act, if the person with whom you were residing in the same house, commits any of the following acts of violence against you or a child in your care and custody....(including) child sexual abuse...insults for not having a male child....preventing you or your child in your custody from attending school, college or any educational institution, ...preventing you or a child in your custody from leaving the house, not providing you money for maintaining you or your children, ...

**Japan
Law for the
Prevention of
Spousal Violence
and the
Protection of
Victims²⁰⁶**

2. ...the upon petition from the victim, order against the spouse to oblige the spouse, from the day the order takes place to the day after six months from the day the order took effect, as provided for in the above-mentioned paragraph to refrain from approaching the children in question at their domicile, the school the children attend or any other locations normally frequented by them in order to prevent harm to the victim's life or physical conditions.

**Domestic
Violence Act,
Malaysia²⁰⁷**

5. *Protection order.*
(1) The court may, in proceedings involving a complaint of domestic violence, issue anyone or more of the following protection orders:

(b) a protection order restraining the person against whom the order is made from using domestic violence against the child;

**Prevention of
Domestic
Violence Bill,
Pakistan²⁰⁸**

11 (*iii*): Provided that in passing any order under this subsection the Magistrate shall have regard, *inter alia* to the following

The welfare of any child affected or likely to be affected by the conduct of the respondent.

**Republic Act No.
9262,
Philippines²⁰⁹**

SEC. 8. Protection Orders.- A protection order is an order issued under this act for the purpose of preventing further acts of violence against a woman or her child specified in Section 5 of this Act and granting other necessary relief. The relief granted under a protection order serve the purpose of safeguarding the victim from further harm, minimizing any disruption in the victim's daily life, and facilitating the opportunity and ability of the victim to independently regain control over her life. The provisions of the protection order shall be enforced by law enforcement agencies. The protection orders that may be issued under this Act are the barangay

206 Law No.31 of 2001 as amended by Law No. 64 of 2004.

207 Domestic Violence Act, No. 521 (1994) (Malaysia).

208 Prevention of Domestic Violence Bill, 2005.

209 Republic Act, No. 9262 (2004) (Phil.).

protection order (BPO), temporary protection order (TPO) and permanent protection order (PPO). The protection orders that may be issued under this Act shall include any, some or all of the following reliefs:

...Directing the respondent to stay away from petitioner and designated family or household member at a distance specified by the court, and to stay away from the residence, school, place of employment, or any specified place frequented by the petitioner and any designated family or household member;

...Granting a temporary or permanent custody of a child/children to the petitioner;

Directing the respondent to provide support to the woman and/or her child if entitled to legal support. Notwithstanding other laws to the contrary, the court shall order an appropriate percentage of the income or salary of the respondent to be withheld regularly by the respondent's employer for the same to be automatically remitted directly to the woman. Failure to remit and/or withhold or any delay in the remittance of support to the woman and/or her child without justifiable cause shall render the respondent or his employer liable for indirect contempt of court;

Prevention of Domestic Violence Act, Sri Lanka²¹⁰

Prohibitions that an Interim Order or Protection Order may contain.

11. (1) The Court may, by means of an Interim Order or Protection Order prohibit the respondent from

(a) entering a residence or any specified part thereof, shared by the aggrieved person and the respondent;

(b) entering the aggrieved person's —
... (iii) school;

(J) having contact with any child of the aggrieved person or having contact with such child other than on the satisfaction of such conditions as it may consider appropriate, where the Court is satisfied that it is in the best interest of such child

(2) In imposing any prohibition referred to in subsection (1) the Court shall have regard to—

(a) - the need for the accommodation of the aggrieved person or the children (if any) of the aggrieved person and the children (if any) of the respondent;

Taiwan Domestic Violence Prevention Act 1998²¹¹

Article 13

The court, upon receiving the petition for a protective order shall immediately enter into the trial procedure unless such petition is forthwith rejected on the ground of noncompliance with applicable law. Upon concluding the trial and domestic violence is established, the Court shall based on the facts and as required, issue one or more

210 Prevention of Domestic Violence Act, No.34 (2005) (Sri Lanka).

211 Published pursuant to Presidential Order Hua/Tzon (1) Yi/Tze No. 8600077370.

than one of the following ordinary protective orders either as petitioned or by its functional authorities:

6. To specify either party separately or both parties of the concerned jointly what and how to temporarily exercise or bear the rights and duties of his/her or their minors and such provisional exercise or rights may be delivered to said minor(s) is required.

7. To specify the exercise of visitation by the Respondent and may restrict such visitation.

Some Intersecting CEDAW/CRC Concluding Observations Addressing Domestic Violence

Country	CRC	CEDAW
Malaysia	<p>57. [...] Despite the measures taken to provide protection against violence, abuse and neglect, the Committee notes with grave concern that domestic violence, including violence against children in the family, remains a serious human rights problem in the State party. The Committee notes with concern that due to the strong social and cultural taboos victims and witnesses rarely report these cases, although there are established mechanisms to receive reports on child abuse and neglect, including a toll-free helpline “Teledera” which is, however, only limited to reporting on child abuse cases. It also notes with concern that corporal punishment in the home is lawful. (CRC/C/MYS/CO/1)</p>	<p>21. While noting the various initiatives taken by the State party to address violence against women, the Committee is concerned about the reluctance of the State party to criminalize marital rape. In particular, the Committee is concerned that the proposal before Parliament on this issue is narrowly tailored to criminalize sexual assault based on use of force and death threats by the husband, rather than marital rape based on lack of consent of the wife.</p> <p>22. The Committee requests the State party to enact legislation criminalizing marital rape, defining such rape on the basis of lack of consent of the wife. (CEDAW/C/MYS/CO/2)</p>
Philippines	<p>51. The Committee urges the State party to review its domestic legislation in order to penalize all forms of abuse, including sexual abuse, neglect, mistreatment and violence against children and to clearly define these crimes against children, including incest. The Committee recommends to the State party that it take effective measures to prevent and protect children from sexual abuse and exploitation in the framework of religious institutions, including by investigating the magnitude of such cases</p>	<p>16. The Committee recommends that the State party undertake measures to increase awareness of all forms of violence against women, including domestic violence, marital rape and incest, and the unacceptability of all such violence. It recommends that the Anti-Rape Law of 1997 be reviewed with a view to repealing the provision pertaining to the extinguishing of the criminal action. It calls on the State party to enhance data collection on</p>

and by ensuring that the perpetrators of such abuse are brought to justice and that officials of religious institutions are held accountable in these cases of sexual abuse and the exploitation of minors.

52. The Committee urges the State party to conduct timely and adequate investigations of all cases of child abuse and violence with full practice of the rights of the child victim in legal proceedings, for example by allowing videotaped evidence, in order to bring perpetrators to justice and to ensure that child victims of violence and abuse have access to adequate counselling and multidisciplinary assistance with recovery and reintegration.
(CRC/C/15/Add.259)

Thailand

44. While acknowledging the efforts made by the State party and noting Section 53 of the Constitution of Thailand (1997), the Committee is deeply concerned about increasing reports of cases of domestic violence, child abuse and neglect in the country. It expresses its concern at the notable deficiencies in the domestic legislation as regards penalizing all forms of abuse, neglect and mistreatment, including sexual abuse (for example, the provisions of the Penal Code only protect female victims of rape). It also expresses its concern at the lack of a national data collection system on cases of violence against children.

45. The Committee urges the State party to:

- (a) Review its domestic legislation in order to penalize all forms of abuse, including sexual abuse, neglect, mistreatment and violence against children and to define clearly these crimes against children;
- (b) Conduct timely and adequate investigations of all cases of child abuse and violence and to ensure that child victims of violence and abuse have access to adequate counselling and multidisciplinary assistance for recovery and reintegration;
- (c) Establish or expand services available for the physical and psychological recovery and social reintegration of victims of sexual abuse as well as any other child victims of

various forms of violence against women, especially domestic violence. It urges the State party to conduct research on the prevalence, causes and consequences of domestic violence to serve as the basis for comprehensive and targeted intervention and to include the results of such research in its next periodic report.
(CEDAW/C/PHI/CO/6)

24. The Committee urges the State party to accord priority attention to the adoption of comprehensive measures to address violence against women and girls in accordance with its general recommendation No. 19 on violence against women and the United Nations Declaration on Violence against Women. The Committee encourages the State party to proceed expeditiously with the completion and enactment of the “draft Act on the Prevention and Resolution of Domestic Violence” and to ensure that women and girls who are victims of violence have access to immediate means of redress and protection and that perpetrators are effectively prosecuted and punished. The Committee also calls upon the State party to amend the definition of rape in the Penal Code by deleting the exemption for marital rape so as to make it a criminal offence. The Committee recommends gender-sensitivity training for law enforcement personnel, the judiciary, health service providers and teachers to ensure that they are sensitized to all forms of violence against women and can respond adequately to it. The Committee also calls on the State party to take measures towards modifying

abuse, neglect, ill-treatment, violence or exploitation;

(CRC/C/THA/CO/2)

those social, cultural and traditional attitudes that are permissive of violence against women.

(CEDAW/C/THA/CO/5)

Recommendations for Lawmaking: Drafting Child Friendly Legislation on Domestic Violence (Check List):

Ensure Protection for all Children in the Household

As this section shows, in relation to domestic violence, there are efforts to redefine the family to cover all children living in the household or extended household. Law reform in this area should cover all children in the household and not just children within a narrow or idealized vision of what should constitute a family. A child should include not just the daughters and sons of the parties in question but any dependent child including any child domestic workers.

Provide Adequate Services for Children

Very few domestic violence laws include safeguards and services for children caught up in situations of domestic violence. The establishment of child friendly programmes, services, protocols and duties, including but not limited to shelters for women and children, counselling programmes for women and children, educational, mental health and special programmes for child victims of domestic violence must be made a priority.

In this effort, the legal framework must provide comprehensive support services, including but not limited to:

- Emergency services for victims of abuse and their families
- Support programmes that meet the specific needs of victims and their families with special attention to children exposed to violence.
- Therapeutic programmes for the victim and the family with a focus on children exposed to violence.
- Crisis intervention services which include protection of the victim and children
- Immediate medical attention to victim and children who may be directly or indirectly affected by violence.
- Emergency legal counseling and referrals
- Crisis counseling to provide support and assurance of safety to victim and family members with special focus on children.
- Confidential handling of all contacts with victims of domestic violence and their families.
- Counseling programmes must be designed to help the victim as well as the children of the victim or the children of the family in which violence has taken place.
- Establish comprehensive gender-sensitive, and child friendly programs for the recovery, rehabilitation and reintegration of child victims of violence in the areas of education, employment, and the greater community.

- Implement residential care, child placement, educational assistance, livelihood and skills training and other community- based services which are responsive to the specific needs and problems of the victims/survivors and their families.
- Ensure intergovernmental agency responses to address violence against women and children.
- Develop gender responsive and child responsive documentation of data
- Establish rehabilitation centers that provide specific services for child placement, educational assistance, livelihood and skills training and community- based services which are responsive to the specific needs and problems of child victims of violence.
- A special sexual assault unit must be created for victims of child abuse and rehabilitation centers which focus on specifically on the girl child
- Provide sensitivity training to police, prosecutors, judges, social workers and inspectors on sensitivity to child victims of violence and children exposed to violence.
- Victim support networks must collaborate with the police, the social welfare department, the department of justice, the department of education, hospitals and NGO's.

Develop Child Sensitive Policies, Programmes and Protocols

- Develop protocols for Child Protective Services and domestic violence service organizations for intervention with families in which both domestic violence and child maltreatment are present.
- Domestic violence policies must require training for staff on child protection issues and how to handle child abuse cases. Training must also be given to teachers, child care workers, health care providers, on domestic violence and its impact on domestic violence.
- Develop policy interventions to address the prevalence and effect of childhood exposure to domestic violence and the risk factors
- Develop effective prevention programs to address the underlying causes of domestic violence as a way for the legal system to respond to child victims of exposure to violence.
- Develop more research studies on children's exposure to domestic violence

Strengthen Inter-agency Collaborations

- Forge alliances between domestic violence service providers and child protection services and create a bridge between both systems.
- There must be greater collaboration between domestic violence prevention advocates and child protection workers. Provide public funding for community based services for battered women and their services

- Provide domestic violence specialists in child welfare offices.
- Link support for battered mothers with clinical services for their abused children. Assistance must include counseling, assistance with housing, referrals for legal and medical issues. Because children do not always have access to battered women shelters, identify services for children in other services such as health care institutions.
- Courts must consider in their decision making the best interest of the child and the potential impact on the child of ongoing exposure to violence.

Child Sensitivity Training for the Judiciary and Law Enforcement Agencies

- Expand the ability of law enforcement officers to assist victims and children and to prevent further incidents of abuse.
- Train judges to be aware of the issues relating to child custody, economic support and security for the victim and family members including children.
- Provide for and train counselors to support police, judges, victims of domestic violence and their family members, including children.
- Train child welfare workers on domestic violence.

Restraining Orders

A restraining order may be issued on the application of a victim of violence in circumstances where the defendant chooses not to appear in court or cannot be summoned because he is in hiding.

In cases where children are involved, the restraining order must pay special attention to this factor and stipulate the following:

- Compel the offender to vacate the family home
- Regulate the offender's access to dependent children
- Restrain the offender from contacting the children in school or at play
- Compel the offender to pay children's health and medical bills; tuition bills, and other expenses relating to the children.

Protection Orders

Protection orders must take into consideration the children involved in domestic violence and must include but not be limited to the following:

- Restraining the offender/defendant from causing further violence to the victim/plaintiff, her dependents including her children.
- Regulating the defendant's access to dependent children;

In Camera Hearing

- Conduct hearings in camera to protect the privacy of the parties especially where children are involved

Victim Protection Laws

Witness protection programs are set up to protect the lives, physical integrity and health of the persons who have acquired the position of protected witnesses. In the context of children this is an important but under-neglected area of the law. Child sensitive provisions must ensure at a minimum the following:

- *Use of screen while recording statement of victim* – In many cases, especially cases relating to women and children, victims are hesitant to speak freely in the presence of offenders. In its 172nd Report (2000), the Indian law commission has recommended the insertion of a proviso where, if the evidence of a person below 16 years who is alleged to have been sexually assaulted is to be recorded, the court may take appropriate measures to ensure that such a person is not confronted by the accused. Recently, the Supreme Court of India applied the above mentioned recommendation of the Law Commission in *Sakshi vs Union of India*.²¹² In certain criminal trials where children give evidence about sexual abuse, a screen is allowed to be erected between the witness and the defendant. **Sections 16 to 33 of the U.K. Youth Justice and Criminal Evidence Act of 1999** require the court to consider special measures of various kinds for protection of vulnerable and intimidated witnesses.
- *Recording of statement through video conferencing*: This is another method by which a victim may avoid direct confrontation with the accused while giving testimony. Recording of evidence by way of video conferencing has been held to be permissible in a recent decision of the Supreme Court in *State of Maharashtra vs Dr Praful B. Desai, 2003*.²¹³ When a statement is recorded through this method, the victim would be more comfortable and thus give answers with less fear or pressure.²¹⁴ In the UK, video recorded evidence is used in cases of offences of cruelty to persons under the age of 16 years and offences under the Sexual Offences Act, 1956 and 1967, Indecency with Children Act, 1960, Protection of Children Act, 1978.
- *Cross-examination through questions handed over by the defence to the judge*: The Indian Supreme Court in the *Sakshi* case referred to the need for greater sensitivity to and protection of victims of child abuse. The court recommended that in such cases cross examination be conducted via written questions in language that is child sensitive.
- *Providing physical and other protection to victims/witnesses* – If necessary, victims/witnesses may be provided with protective services of different types, including physical protection. To provide such protection, witness/victim protection programmes must be established with special consideration for child witnesses. Under such a programme, police protection to victims and family members, the provision of new places for residence, monetary support, transport facilities and other facilities may be provided.
- *Providing Safe Spaces for Child Victims and Witnesses*: In Iceland, special Children's Centre, which was opened in 1998 under the auspices of the Ministry of Social Affairs provides a one stop center for the child go to one place for the statement, a medical examination, and subsequent treatment in the event of violence or sexual abuse. In addition, special facilities have been prepared at the Reykjavík District Court for questioning children and taking statements from them. These

212 2004 (6 SCALE 15).

213 4 SCC 601.

214 See also Portuguese Act, No. 93/99, (1999) (Port.).

facilities are more suitable than the regular courtroom for taking statements from children. The Children's Centre provides a wide range of services in connection with investigations and the taking of children's statements. They include counselling in the initial stages of cases such as sexual offences involving children, the taking of statements, medical examinations, etc.

- *Rape shield laws*: Many countries have established rape shield laws to protect a victim of rape from questions about her past character. Given the special sensitivity, these provisions are important in cases concerning child victims of rape.

Media and Education

Develop appropriate measures in the field of education and the media to raise awareness of domestic violence and develop child and gender sensitive reporting on domestic violence

Conclusion: Human Rights-Based Law Making

This chapter has examined ways in which a gender and child rights perspective can enrich holistic and comprehensive law making in the areas of gender equality in employment, property, family relations and domestic violence. The legal basis for the integration of the dual values of women's and children's rights into lawmaking must rest on international treaties which articulate the need for the harmonizing of national laws with the core human rights treaties.²¹⁵ The objectives for any lawmaking or law revision project should be to develop a comprehensive legislative framework in compliance with human rights standards. A dynamic law drafting process should bring together a forum for exchange of good practices, updates of legal developments and function as a platform for discussion of the development of an effective law by different civil society and government agencies working on human rights issues with a special focus on women and children. Any law meant to promote equal opportunities for men and women that are in the best interest of the child should be based on rigorous research that identify the impact of current laws and policies on women and children and identify the gaps and lacunas in those policies. The impact and sustainability of laws safeguarding the rights of women and children depends to a great deal on the collaboration of all stakeholders and the strength of collaboration between women's and children's rights constituencies. Once a draft is prepared, comments from both women's and children's rights constituencies must be solicited as widely as possible.

While law making and law reform provide a strong legal framework for achieving international human rights guarantees, the challenge all over is to ensure that once the law is enacted it is implemented. Some of the major problems that have hamstrung lawmaking in most countries are the lack of clarity, ambiguity and at times ambivalence in the language of the law. Inconsistencies that plague different laws in the same legal system and inadequate implementing regulations and mechanisms to operationalize the law are further impediments to a coherent and consistent set of legal norms. Lack of remedies for the vindication of the law and an adequate budget to put in place those remedies most often limit the scope of even the strongest laws on the books. The primary goal of a law should be the vindication of a right rather than a mere compilation of aspirational and hortatory regulations that have no teeth.²¹⁶ Similarly, laws that grow out of political expediency or a desire for short term fixes often have little sustainability or impact.²¹⁷

Ideally, a law must also make provision for capacity- building for institutions responsible for implementing the law. Regular collection of gender-sensitive and children's needs data and needs assessment studies must be built into the scope of any law aiming to advance the rights of women and children. A gender equality audit must go hand in hand with a children's needs assessment and ensure that gender equality has a positive impact on men, women and children. As much as gender equality in law reform is critical to the advancement of children's rights, gender equality thrives in an effective child rights agenda.

Monitoring the implementation of the law is one of the most important aspects of lawmaking. Integrating both these human rights norms in judicial decision making and forging partnerships with NGO's and civil society organizations to monitor the implementation of law reform is the only way to sustain law revision in

215 At the operational level, the core principles that follow from a rights-based approach have been identified as: Equality and Non-Discrimination (all human beings are equally entitled to their rights regardless of gender, age, race, religion, etc.); Participation and Inclusion (particular attention must be paid to the empowerment of vulnerable groups so that they can claim their own rights); and Accountability and the Rule of Law (rights can only be upheld if there are mechanisms to enforce the duty-bearers' obligation to meet the claims of right-holders).²¹⁵ These principles must be inherent to all lawmaking and along with the CRC, CEDAW other human rights conventions be used as interpretive tool to guide implementation initiatives.

216 For example, the Kyrg Gender Equality Law of 2005 provides for a set of norms that cannot be applied in a court of law.

217 The recent revisions of the Shariah law in Pakistan which attempt to dismantle honor crimes and revise rape laws have little impact given that crimes of retribution on Qisas and Diyat are still part of the criminal law.

favor of women and children. The appointment of Child Rights Attorney a position similar to a Gender Equality Attorney would be an innovative step towards implementation and monitoring of children's rights.
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Another initiative that should dovetail or correspond with law reform is a National Action Plan or implementation guidelines that provide for training programmes for law enforcement, judicial officers, adjudicators, prosecutors, etc. For example, the Equal Opportunities Act in Sweden is accompanied by a comprehensive Equality Plan. Sweden's Equality Plan addresses sex stereotypes among other things by measures aimed at breaking down stereotypes with respect to the career choices of both men and women. Much criticism of recent law reform initiatives have again and again brought up the need for effective enforcement of laws. More attention must be paid now to measure the implementation of a crop of gender sensitive laws that have come into operation in the last decade. An innovative way in which a law can be implemented is to develop a code of practice under the law which will give practical guidelines to public authorities on how to implement laws and how to meet the general obligations under the law. This chapter is aimed as a Call to Action to those engaged in protection of the rights of women and children to join forces in addressing the intersections of women's and children's rights lawmaking. The serious work of transforming laws on gender equality and children's rights into reality begins and does not end with the drafting of a law.

218 The Gender Equality Attorney has the right to review "all cases of gender rules violations, cases of gender discrimination against individuals or groups of individuals committed by government bodies, other bodies or public authority, employers of such bodies, employers or other legal and physical persons." Law No. 2004/2 6.6 on Gender Equality in Kosovo. Furthermore, the Welsh draft Gender Equality Scheme of 2007 makes provisions for the appointment of Equality Champions in each government department who are to meet regularly to ensure the implementation of the Gender Equality Scheme. Another novel implementation provision would be the appointment of a National Gender Attorney and Child Rights Attorney. In Kosovo for example, the monitoring of the Gender Equality Law is conducted by a Gender Equality Attorney who has experience in human rights and gender equality.

BASIC CHECK LIST FOR DRAFTING LEGISLATION THAT INCORPORATES A CHILD RIGHTS AND GENDER PERSPECTIVE

STEP ONE: REVIEW LAWS TO IDENTIFY DISCRIMINATION, BIAS AND GAPS IN THE LAW

- ▶ *Review laws impacting both women and children that are on Statute the Books: What are the gaps in the law?*
- ▶ *Review laws in practice: What are the institutional barriers? How do these laws impact women and children?*
- ▶ *Use International Standards Including the CRC and CEDAW as Good Benchmarks*
- ▶ *Collect Data: Use quantitative and qualitative data as well as women's testimonies and children's testimonies*
- ▶ *Action Research: Example: when women in Thailand organized to draft a domestic violence law, a task force of women from different organizations conducted a study of the ten previous constitutions to understand what protections were missing for women and children*
- ▶ *Establish an expert group of women and children's specialists to revise or draft law*

STEP TWO: DRAFTING LEGISLATION

- ▶ *Collect international best practices on effective laws for women and children*
- ▶ *Adapt and contextualize international law and practice to fit local circumstances*
- ▶ *Develop strong implementation mechanisms that are gender-sensitive and child-friendly*
 - ▶ *Ensure remedies for both women and children in the event of the violation of the law*

STEP THREE: PASSING LEGISLATION

Form alliances with groups and individuals working on women's and children's initiatives. A successful example is from Korea, where the movement for legislation on domestic violence galvanized broader social support by expanding beyond women's coalitions to create a Citizen's Coalition for Domestic Violence Legislation.²¹⁹

219 See Heisoo Shin, *CEDAW and Violence against Women: Providing the "Missing Link,"* in *The Circle of Empowerment:*

- ▶ *Build alliances to establish broad support for the law*
- ▶ *Identify academic and scientific studies that support the need for the law*
- ▶ *Humanize the law by putting a face to the issue and using narratives of children and women who will be affected by the law*
- ▶ *Develop community action plans that support the implementation of the law*
- ▶ *Build relations with the media and train the media to report on violations of children's and women's rights*
- ▶ *Organize a task force of women's and children's advocates to see the law into action*
- ▶ *Provide access to relevant background materials*

STEP FOUR: IMPLEMENTING LEGISLATION

- ▶ *1) Institutional framework: Is there an institution or mechanism responsible for overseeing implementation of the law? What are the accountability mechanisms in place? Are the separate institutions well-coordinated? Are civil society groups (including women and children's rights advocates) engaged in monitoring the law?*
- ▶ *2) Budget: Ensure adequate resources to implement the law.*

Example: In the Dominican Republic the budget set aside for the care of domestic violence survivors was \$15,000, although estimated needs totaled \$10.5 million.

- ▶ *3) Training and Building Broad Support for the Law: To ensure that laws are actually put into practice it is important to train the judiciary, police and social service sectors to respond to women and child victims.*
- ▶ *4) Community-Based Initiatives: Expand partnerships and collaborations between and among governmental, non-governmental, grassroots, and professional organizations focused on women's and children's rights.*

Twenty Five Years of the UN Committee on the Elimination of Discrimination Against Women, 223-233 (Hanna Beate Schöpp-Schilling et al., eds., 2007).

Appendix

Index of Legislation

1. Albania: Assembly Law on an Equal Gender Society, 2004.
2. Australia: Family Law Reform Act, 1995.
3. Australia: Sex Discrimination Act, 1984.
4. Bosnia and Herzegovina: Law on Gender Equality, 2003
5. Botswana: Citizenship Act, 1984.
6. Bulgaria: Act on Equal Opportunities for Women and Men, 2002.
7. Cambodia: Law on Marriage and Family, 1989.
8. Cambodia: Law on the Prevention of Domestic Violence and the Protection of Victims, 2005.
9. Canada: Charter, 1982.
10. Canada: Human Rights Act, 1985.
11. Cayman Islands: Domestic Violence Law, 1992.
12. Chile: Article 1749 of the Legal Code.
13. China: Constitution, 1982.
14. China: Law on the Protection of Women's Rights and Interests, 1995, revised 2005.
15. China: Marriage Law, 1980, revised 2001.
16. China: Rural Contracting Law, 2003.
17. Croatia: Gender Equality Act, 2003.
18. Denmark: Act on Equal Treatment of Men and Women, 2002.
19. Egypt: Amendment to Family Law, 2002.
20. Egypt: Law No. 25, 1920; revised as Law No. 100, 1985, on Child Custody.
21. Estonia: Act on Gender Equality, 2004.
22. Estonia: Act on Parental Benefit, 2004.
23. European Union: Council Directive on Parental Leave, 1996.
24. Finland: Act on Equality between Men and Women, 2004
25. Hong Kong: Domestic Violence Ordinance, 1986.
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27. Iceland: Act on the Equal Status and Equal Rights of Women, 1985.

28. Iceland: The Prohibition on Redundancies due to Family Responsibilities Act 2000
29. India: The Prohibition of Child Marriage Act, 2006.
30. India: Child Marriage Restraint Act, 1929.
31. India: Hindu Minority and Guardianship Act, 1956.
32. India: Hindu Succession Act, 1956.
33. India: Protection of Women from Domestic Violence Act, 2005.
34. Indonesia: Family Law.
35. Indonesia: Law Regarding the Elimination of Violence in the Household, 2004.
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37. Iraq: Constitution, 2005.
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41. Korea: Family Law, 1994.
42. Korea: Special Act for the Punishment of Domestic Violence and the Prevention of Domestic Violence, 1997.
43. Korea: Victim Protection Act, 1997.
44. Kosovo: Law of Gender Equality, 2004.
45. Kyrg Republic: Law on Gender Equality in Labour, 2003.
46. Liberia: Domestic Violence Law, 2007.
47. Malaysia: Domestic Violence Act, 1994.
48. Maldives: Family Code, 2001.
49. Mali: Code of Marriage and Guardianship, 1992.
50. Mauritius: Act to Provide Protection to the Victims of Domestic Violence, 1997.
51. Morocco: Family Law, 2004.
52. Mozambique: Family Law, 2003
53. Nepal: Constitution, 1990.
54. Nepal: Country Code 11th Amendment, 2006.
55. New Zealand: Domestic Violence Law, 1995.
56. Nigerian: Northern Nigeria Penal Code.
57. Norway: Gender Equality Act, 2005.
58. Pakistan: Prevention of Domestic Violence Bill, 2005.
59. Peru: Law for Protection from Family Violence, 1993.
60. Philippines: Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore, and for Other Purposes, 2004.
61. Philippines: Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations and for Other Purposes, 2003.
62. Santa Lucia: Domestic Violence Law, 1995.
63. Singapore: Singapore Women's Charter, 1996.
64. Slovenia: Law on Equal Opportunities for Men and Women, 2002.
65. South Africa: Promotion of Equality and Prevention of Unfair Discrimination Act (Domestic Violence Law), 1998.
66. Sri Lanka: Act to Provide for the Prevention of Any Act of Domestic Violence and for Matters Connected Therewith, 2005.
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70. Tanzania: Bill of Rights, 1977.
71. Thailand: Domestic Violence Law, 2007.
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73. Tunisia: Personal Status Code, revised 1993.
74. Turkey: Civil Code, revised 2001.
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81. United Kingdom: Youth Justice and Criminal Evidence Act, 1999.
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85. Yemen: Personal States Code, 1992.

