RUDD/WID/EGM-WRHR/B-1

ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC

Expert Group Meeting on the Promoting
Women's Rights as Human Rights

7-9 August 1996
National Women's Education Centre, Ranzan, Saitama-ken, Japan

# WOMEN'S HUMAN RIGHTS

# AND

# LEGAL STATUS

# IN THE ASIA PACIFIC REGION*

---

This paper was prepared by Ms Savitri Goonesekere, Professor of Law, University of Colombo, Sri Lanka for the ESCAP Secretariat.

## 01. INTRODUCTION

The concept that human rights and fundamental freedoms should be available to men and women without discrimination on the basis of sex, was accepted from the very inception of a jurisprudence on human rights. This standard of gender equality is reflected in the Charter of the United Nations. (1945) and the Bill of rights which is comprised of the Universal Declaration of Human Rights (1948) and the two International Covenants (1966)1. The Convention on Elimination of All Forms of Discrimination against Women (1979) linked all these international standards and developed a new set of norms that specifically addressed women's issues and gender discrimination.

Nevertheless, these international standards were overlooked until very recently in developing initiatives at the international and national level to address problems of gender inequity and discrimination. This was partly due to the fact that women's movements in the West, which also influenced corresponding movements in the Asia Pacific region perceived the human rights discourse as irrelevant for women's experience. The focus at this time, was on the exploitation of women by men, and the oppression of patriarchy. Human rights instruments were considered as setting standards on non-discrimination that compared men with women, which did not address the particular context of women's subordination. Inevitably the human rights standards themselves were faulted for their male orientation and inspiration and for ignoring aspects such as gender based violence. Women's groups in some countries of the Asia Pacific region, confronted with the authoritarianism of the state, found it sometimes easier to gain acceptance for their agenda on women's rights without referring to the `politically incorrect' issue of human rights.

The linkage between women's rights and human rights has therefore emerged in the international and national scene on women's issues, comparatively recently. The focus on women's rights as human rights, and their inherent linkage has been underlined and repeated in all the major international documents of this decade. Women's groups themselves have been actively involved in the drafting and preparation of these conference documents, and they have ensured that problems of critical concern to them such as the issues of violence against women and reproductive rights have been stated in terms of realisation of human rights. For instance the U.N. Declaration on the Elimination of Violence Against Women (1993) affirms that `violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms.' The Declaration connects infringement of human rights to the issue of violence2. The Vienna Declaration and Programme of Action (1993) adopted at the World Conference on Human Rights states that `the human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights.' It affirms that `the human rights of women should form an integral part of the United Nations human rights activities including the promotion of all human rights instruments relating to women'3. These international commitments, articulated in the language of human rights can also be found in the statement of the International Conference on Population and Development, Cairo:(1994) which deals specifically with the issues of women's control over their fertility, reproduction, population and human development4. The World Summit for Social Development, Copenhagen (1995) has endorsed similar commitments that refer to women's human rights.5 The Beijing Declaration and Platform of Action adopted at the UN Fourth World Conference on Women, Beijing (1995) reaffirms commitments to the international human rights standards recognising `full implementation of the human rights of women and of the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms'6.

Scholarship on women's issues from the nineteen eighties anticipated these developments and explored the scope and dimension of women's human rights, attempting to redefine them, as well as the right discourse, in terms of women's experience.7 The international recognition of the ideology of human rights, expressed in terms of gender issues, has brought this discourse to the Asia Pacific region. Increasingly scholarship and analysis on women's issues from a human rights perspective can be found in countries of Latin America, Asia and Africa8. These regions face special problems internalising the human rights discourse, and working out its legal implications at the domestic level, both generally and specifically in the context of women's rights. This reality and the connected issues provide an essential background to an understanding of the legal status of women in the Asia Pacific region, and the prospects for integrating the international standards through domestic law, and national legal systems.

One point of view, that is often expressed by social scientists is that a human rights discourse with its emphasis on state responsibility is intrinsically alien to the Asian tradition and has little meaning unless civil society assumes an active role in internalising these standards. The `Statist' approach, and reliance on state institutions and mechanisms is considered unrealistic because of an ingrained hostility between the state and the people, especially women. This hostility is perceived as resulting in the rejection of law and legal strategies in realising rights9.

International standard setting is undoubtedly remote and unreal for women in Asia or any part of the world unless these standards impact on the quality of their lives as citizens of their own countries. Nevertheless, Asia is also a region that is confronted with the reality of a strong state, or a state that is under attack from various political forces within countries. In some countries, a strong state has brought political stability, high rates of economic growth and impressive social indicators in areas such as health and education. On the other hand these countries face problems of youth alienation and delinquency, as well as child abuse and domestic violence, and a continuous pressure from within for more participation in government. The disintegration of the centre in other countries has exposed men and women to anguish and suffering through private action that is as or more painful than any state action. Besides, international economic trends, privatisation and the withdrawal of the state from many areas of activity including health and education, are placing the vast majority of low and middle income citizens at special risk of neglect and economic deprivation. In this environment the challenge seem to be to recognise the need for an accountable state - a state that is made responsible for its actions nationally and internationally.

National laws and international Human Rights norms and procedures afford an important mechanism for promoting accountability of the state and the bureaucracy, and they can impact on interpersonal relations between individuals and communities. Legal systems and a state machinery must therefore be used to set standards and also enforce them. The role of the community and civil society is to promote that accountability through active participation, vigilance and awareness raising. Human rights under national and international laws are therefore a strategy for containing abuse of power by a range of vested interests that impact on the civil and political and socio economic status of all people. Women who confront abuse of power throughout their daily lives cannot afford the luxury of denying the relevance of a right discourse. Rather, they need to criticize and interpret it in terms that are relevant to their own experience. They must also know their rights and be able to hold the state accountable in whatever form that is available to them.

In focusing on the link between rights and women's status, it is also necessary in the Asian context to address the criticism that rights are alien to `Asian values'. It has been forcibly argued especially by countries in East Asia and the Pacific that Asian societies focus on duties and responsibilities to the community. In a duty based society, communitarian interests must prevail and take precedence over realisation of individual rights. The concept that individual rights are alien, leads to a further argument that they cannot be realised in any society unless they have cultural legitimacy10. Arguments based on cultural relativism and duty based interaction between people, communities and the state often impact on policy approaches to women at the national level.

Arguments centred on Asian values in regard to community interests have made an important contribution to the human rights discourse by moving the focus away from an exclusive concern with civil and political rights. East Asian countries have invariably provided resources for basic health and education, even though their record on civil and political rights has been criticised in international fora. In meeting their argument that socio economic and development rights of communities are more important than individual civil and political rights, the international human rights jurisprudence of today has come to recognise that both types of rights are important. It is therefore the East Asian experience in particular that has led to a recognition that both civil and political rights and socio-economic rights are important and that they are inter-related and interdependent. The Convention on Elimination of All Forms of Discrimination against Women (CEDAW) as well as the Convention on the Rights of the Child, which are the recent human rights treaties, adopt this norm of integration and independence, between civil and political rights and socio-economic rights, stating both as important standards. This analysis and approach to standards of policy formulation within countries is especially important for women since their inability to enjoy the important civil and political rights of equality, non-discrimination and freedom from violence is largely due to the fact that they do not have access to important socio-economic resources in critical areas such as health, employment and education. The concept that provision of basic needs is a state duty that creates rights is becoming increasingly accepted as an intrinsic dimension of human rights jurisprudence.

Cultural relativism and communitarian and duty based arguments continue to present a challenge to the recognition of the universality of international norms and standards on gender equality and non-discrimination. Arguments that women have duties in the community and the family in Asian societies which transcend individual rights often provide a rationale for perpetuating the status quo on abuse of power, in a situation where women are the weak and exploited section of a country's population. The exploitation can take the form of community tolerance of physical

abuse and domestic violence within the family and or denial of access to basic services such as in the area of general and reproductive health and education. In countries where family relations are governed by different regimes of law, depending on religion or ethnicity, women's rights in important matters that affect their lives will vary and even undermine the state norms on equal opportunity and personal security from violence. The impact of this reality on women's status will be observed in the course of discussions in this paper. These discussions will reveal the importance of realising a common and universal model of equality based on international standards within domestic legal systems and challenging relativist positions.

In many countries of the region the colonial experience as well as global economic trends have led to political and socio-economic changes, and resulted in state policies that have undermined traditional institutions and values in families and communities. Consequently, it is difficult to find an immutable and sacrosanct tradition that is still linked to the past. A normative framework that is discriminatory and prejudicial to women has often been the product of colonial policy initiatives that have never been reviewed in post independence decades. They have acquired legitimacy in local legal systems simply because they have never been questioned. The process of change that has gone on for centuries therefore justifies further reviews and change to conform with currently acceptable universal norms of international human rights jurisprudence. In this context it becomes important to review the approaches in national legal systems to women's status and their human rights and the problems that will be faced in moving towards the internationally recognised norms on gender equality.

## 02. THE RECEPTION OF THE GENERAL NORMATIVE STANDARDS ON GENDER EQUALITY IN INTERNATIONAL LAW IN NATIONAL CONSTITUTIONS AND INTERNATIONAL MONITORING.

There is an explicit reference to non-discrimination between men and women and gender equality in many national constitutions in Asia. Thus Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka in South Asia, and China, Mongolia, Republic of Korea, Philippines, Japan, (Indonesia), Papua New Guinea, Thailand, Vanuatu and Vietnam in the East Asian and Pacific region have incorporated a specific guarantee on gender equality in their constitutions. The Malaysian Constitution is unusual for this region in not specifically referring to gender equality in its general article on equality before the law11.

Many constitutions refer to the negative duty of the state when they state that `the state shall not deny' equality before the law. The Philippines Constitution by contrast, which was drafted with the involvement of women's groups in 1986 declares that `the state recognises the role of women in nation building and shall ensure the fundamental equality before the law of women and men'12. This constitutes a positive statement of the general norm of gender equality.

These constitutional standards reflect commitments which are the very foundation of the international human rights standards. Not surprisingly sixteen countries have ratified the Women's Rights Convention (CEDAW). Pakistan, Malaysia and Singapore from the Asian region are amongst the few countries that have not ratified the Conventions as of January 1994. The issue of ratification was raised in Pakistan, before the Fourth World Conference in Beijing in September 1995, with Non-Governmental Women's Groups calling on the government to take on a commitment to ratify the Convention before the Conference13. It is of interest that only ten countries in Asia that have ratified CEDAW have also ratified the two International Covenants on Civil and Political Rights and Social and Economic Rights which form the core of the international Bill of Rights14, while a total of twenty one have ratified the most recently adopted UN Convention on the Rights of the Child (1989)15. Afghanistan has ratified the International Covenants on human rights but has not ratified the Women's Rights Convention or the Convention on the Rights of the Child which incorporate a clear standard on gender equality16.

Many of the countries that have ratified CEDAW in South Asia adopt a `dualist' approach to international law, since they have been influenced by the English Common law value system in the colonial period. Consequently ratification of an international instrument does not result in an automatic reception of the international standards as enforceable domestic standards on gender equality. The government has an obligation under the treaty to bring its laws, policies and practices in line with the standards of the ratified treaty. Nevertheless until the government takes this initiative, the international standards cannot be enforced in the domestic legal system. In this environment, other

strategies must be pursued to stimulate political will in incorporating the international standards on gender equality within the country. This becomes vitally necessary if the process of standard setting at the international level is to help create a universal ethic on equality and improve the legal status of women within countries.

Incorporating and re-enforcing the general international norm of gender equality in national constitutions and in national policy documents can become one strategy for motivating political will on the part of governments. The process of restatement of these norms as general standards gives them some legitimacy as a policy framework, and an intrinsic feature of the local legal systems. It also helps to undermine the sense that these are foreign or external standards. An even more important strategy is an effective international procedure for monitoring the performance of countries that have undertaken an obligation to realise international standards domestically through the act of becoming parties to a multilateral treaty, CEDAW. Monitoring procedures under CEDAW have a bearing on the current legal status of women in domestic legal systems.

International Monitoring

International monitoring under CEDAW has to take place according to the procedures provided by this international treaty. CEDAW has provided for regular elections of country nominees to an International Monitoring Committee of experts. Once elected they serve in their personal capacity. CEDAW mandates and authorizes the Committee to scrutinise the reports submitted by states parties at regular intervals and make their comments on the status of women in the country. The Committee may obtain information from sources other than the official report and evaluate the country situation. Areas for intervention and the need to take account of and eliminate gender disparities that surface can be highlighted through the reporting process.

Despite this procedure, governments in the Asian region have been slow to introduce much needed legal changes. This is partly due to the fact that some countries have introduced reservations to the international standards even as they have ratified a treaty17. For instance Bangladesh has declared in its reservation that the government of Bangladesh does not consider itself bound by "article 2, 13 (a) and 16.1(c) and (f) as they conflict with Sharia law based on the Holy Quaran and Sunna". The Republic of Korea has also entered reservations to article 16 (1)(g) and Article 9, which deals with equal rights in the area of rationality. Thailand has declared that in matters concerning national security and public order its ratification of CEDAW is subject to its right to apply the standards in Article 7 and 10 of the Convention within the limits of its national laws and practices. Thailand has entered other reservations which affect standards set by articles 9 and 16.

The Convention itself provides for a procedure by which other countries can object to such general reservations which dilute the international standards. Thus the governments of Mexico, Sweden and the Federal Republic of Germany objected to Bangladesh's reservations on the ground that if they were implemented they would undermine the basic intent of the Convention which is to prevent discrimination against women on the basis of sex18. Nevertheless in the absence of definitive provision in CEDAW that prohibit this type of reservations, the impact of ratification is qualified by these sweeping reservations. The CEDAW article on reservation merely reiterates the position in the Vienna Convention on the Law of Treaties (1969) which declares that reservations `incompatible with the object and purpose of the treaty' shall not be allowed. However in the absence of an absolute prohibition on reservations or even a provision like that in the Convention on Racial Discrimination which permits other states parties to vote by majority for rejection of a reservation, countries have been entering reservations to CEDAW and the later Convention On The Rights of the Child which has standards relevant to gender equality.

It can be forcefully argued that this weak international procedures on reservations in CEDAW has legitimised the dilution of the international standards of this multilateral treaty, and encourages indifference or apathy instead of political will and commitment to realising standards at the national level. The Monitoring Committee on CEDAW has also made a general recommendation that states parties should review their reservations periodically and also justify the need for entering reservations19. Nevertheless the practice of entering reservation continues and is a hindrance to promoting universal conformity with CEDAW standards and government accountability in translating the international standards into national law.

Certain countries like Philippines and Sri Lanka have ratified CEDAW without entering reservations. Nevertheless the procedure of monitoring country reports has not impacted to promote significant legislative and policy

changes in Sri Lanka in the post-ratification period. Discussions of area of substantive law in this paper will indicate that Philippines has a better record in this respect.

It is also clear that the internal structures for preparing and presenting country reports in this region are weak, and that the Committee has not succeeded in breaking through this barrier to obtaining good reports. For instance, Sri Lanka's report to the CEDAW Monitoring Committee has been considered inadequate on several occasions, but the Committee has been sympathetic rather than critical20. Sri Lanka's subsequent reporting has continued to be weak and sometimes late and there has been little advanced planning or constructive effort to produce a comprehensive and useful report. There is very little coordination between the foreign office which is the key focal point for reporting to International Committees and the sectoral ministry and other governmental agencies responsible for women's affairs. It is not surprising that the act of ratification of international standards has not been a catalyst for consistent and comprehensive efforts to bring domestic law and policy on gender in line with the international standards.

Clearly, improvement in monitoring procedures under CEDAW is a necessary dimension for ensuring action on women's rights within countries in the region. The CEDAW Committee, like other monitoring committees encourages NGO's to submit alternative reports on the country situation. This process should be used in countries where NGO's function in an open political environment to prepare and submit an alternative report to the Committee. This strategy can help to keep government aware of the need to meet their obligations under the treaty, and the need for regular and serious reporting on country performance. International agencies concerned with gender equality should also help to strengthen the capacity of internal government agencies and focal points on women's issues to prepare country reports. The experience of Vietnam in preparing its country report on the Convention on the Rights of the Child suggests that such assistance can help a country to take its obligations under CEDAW seriously and also perform well on its reporting commitments.

It is also important to ensure that women's rights are brought into the mainstream of human rights by using the proceedings under other major human rights treaties. Issues involving violation of women rights and discrimination can be brought before the Human Rights Committee, the prestigious international body that monitors performance of countries that have ratified the International Convention on Civil and Political Rights. The fact that an issue is raised before this Committee and a response elicited can serve to draw the attention of governments to the need to review national laws and policies in their own country context in the light of the interpretation of human right standard. An Optional Protocol to this Convention has been adopted, and if ratified, by a state party provides for an individual complaints procedure. CEDAW does not have an Optional Protocol, as yet, and this means that individual women's complaints of discrimination and infringement of gender equality cannot be brought before the relevant international forum. State Parties that ratify an Optional Protocol voluntarily surrender their sovereignty so as to enable an individual citizen who has exhausted local remedies to lodge their complaint before the international forum. The Committee on CEDAW, as well as the Beijing Platform of Action have highlighted the need for adopting such a Protocol. A draft has already been prepared and will be placed before the UN Commission on the Status of Women early this year. Such an expansion of procedures will strengthen both the national and international process for monitoring performance of states that have ratified CEDAW21.

Similarly, regional mechanisms should, and have not been used, in situations where the majority of member states have ratified the international human rights standards. SAARC and ASEAN, the two regional organisations representative of South and South East Asia respectively have expert groups or focal points that deal with gender and development issues, but they have not been effective in generating an interest in collaboration and cooperation in internal assessment of country situations. South Asian countries including India and Pakistan sometimes borrow legislative provisions or even statutes, and modify them in their local context. The process of borrowing and adaptation becomes particularly useful in a context where many countries within regions have a shared British colonial tradition, or an undiscovered common base of traditional or customary law22. A formalised system for collaboration in producing model codes, in place of the current ad hoc borrowing, through research and study of comparative legal approaches in regions can be a cost effective method of initiating law reform in line with ratified international standards.

The European regional system on Human Rights has proved to be effective in creating a regional jurisprudence on rights that has helped countries within the region to move towards a common internal agenda on rights, including gender equality. The European Convention on Human Rights is an instrument that sets the standards and also creates an institutional mechanism for enforcement. Restatement of international standards through regional

instruments in Asia at this point of time can be controversial, and create a risk of the duty vs. rights debate and culturally relativist perceptions diluting standards accepted in multilateral treaties that many countries have already ratified. The African Charter on Human and Peoples Rights recognises some `group' rights or communitarian rights, and the individual's duties towards the family and community, and sets some standards based on traditional African values23. This type of formulations if it finds its way into Asian regional instruments can effectively be used to undermine standards on gender equity accepted by ratification of international instruments. The concept of community rights, individual duties and `Asian values' may be used to legitimise state inaction in addressing hard issues of gender inequality in the region. Consequently, it seems important to avoid the adoption of distinct regional instruments on human rights and women's rights at this juncture, though there is a case for developing an institutional structure for collaboration and cooperation in realising CEDAW and other human rights standards.

The absence of familiarity with international standards among lawyers and judges and the absence of political will on the parts of governments in incorporating these standards locally will be seen in discussion of aspects of substantive law dealing with gender. The experience in this regard reflects the disadvantages of not having a regional jurisprudence on human rights. The European Commission and Court of Human Rights, the organs set up to enforce the European Convention for the Protection of Human Rights and Freedoms, have emerged as an effective catalyst in the incorporation of common standards on human rights in national policy and legal systems24. Though Asian countries have contributed to the jurisprudence of human rights in general by their critique of some European legal and jurisprudential concepts, they have not created institutional mechanisms within the region to develop a local body of jurisprudence in regard to the international standards they have accpted by ratifying CEDAW and other multilateral treaties.

## Using Constitutional Standards

Since international law and domestic law are generally considered two different systems, ratification of CEDAW does not incorporate its standards automatically into national systems in the absence of direct incorporation by legislation and administrative regulation or indirect incorporation through judicial interpretations in court cases. Direct reception has rarely taken place, and there has been no concerted effort to bring CEDAW standards into domestic systems. Sri Lanka's recent Women's Charter 1993, and Torture Act 1994, represent efforts at direct reception. The Charter has restated and developed on CEDAW standards in a policy document, while the standards of the International Torture Convention (1984) have been incorporated in local legislation. The Torture Act 1994 in Sri Lanka may be used in cases of gender based violence against women, since the definition of torture includes infliction of severe pain by or with the complicity of a public officer or person acting in an official capacity; `for any reason based on discrimination' or as `intimidation'25.

Since direct reception is uncommon, the Constitutions of some countries which state general norms on gender equality can and have been used to create an ethos supportive of human rights and gender equality. Constitutional jurisprudence within countries can provide a link to international jurisprudence on human rights so as to re-enforce the latter within domestic legal systems. Constitutional developments are thus a vital dimension of realising gender equity at the national level.

## Developments in Constitutional Jurisprudence on Gender Equality

CEDAW as well as national constitution, articulate the norm of equality in terms of an absence of difference. Consequently the traditional interpretation of equal rights means that men and women must have `equal rights and responsibilities' as citizens of a country. Nevertheless international human rights law, as well as national constitutional jurisprudence recognise that different policies may be formulated and applied even in respect of men and women, in order to realise substantive rather than purely formal gender equality.

The Human Rights Committee, interpreting the meaning of equality in the International Covenant on Civil and Political Rights has in General Comment 18 stated that `not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose

which is legitimate under the Covenant.'26. This concept of `reasonable classification' has been accepted by the Supreme Court in South Asian countries, in interpreting the constitutional standard on equality. The courts have emphasised the importance of establishing an objective and non-arbitrary basis for a classification27. Consequently legislation on maternity leave for working women, or protective legislation that excludes them from certain types of work, recognises social realities and concerns that are critical for women's health and economic productivity in a work environment that is not exploitative. On the other hand the concept of `protective' legislation as well as differential policies developed according to a standard of reasonable classification must be scrutinised carefully so as to ensure that the concept of classification is not used by courts of law legislators or policy to create what some courts have described as a situation of `hostile discrimination'28.

The international standards set by CEDAW can thus be used in countries that have ratified the Convention to interpret the meaning of gender equality and reasonable classification in constitutional jurisprudence so as to strengthen the position of women. This concept of `reasonable classification' also provides a basis for challenging arbitrariness in interpreting provisions in some Constitutions which authorise the reservation of employment, posts and services for one sex, which are considered `unsuited' for the other29. Administrative decisions to send only male employees on transfer can be challenged in the same manner as a decision to deny a senior woman public servant a promotion to the highest post in her Ministry, because she is a woman30. In a leading Indian case31, the Supreme Court declared unconstitutional, administrative regulations that authorised the termination of the services of an air hostess on first pregnancy. While conceding that air hostesses faced a service that was restricted to women, the court decided that terms of service of this nature were a denial of equal treatment in employment. Somewhat curiously the Court failed to also strike down a regulation that authorised termination on marriage within four years of recruitment. In Pakistan, the superior courts have held that advertising jobs only for men is illegal32. The comparative constitutional interpretation in court cases in countries of the region can be useful in preparing briefs and making arguments in regard to interpretation of the constitutional guarantees on gender equality, so as to create a legal value system that addresses the need for realising substantive rather than formal equality.

Some constitutions in the region also provide specifically for `affirmative action' or special policy interventions on behalf of women, treating them as a disadvantaged group. Affirmative action introduces the criterion of disadvantage, rather than difference in interpreting the concept of non-discrimination. The constitutions of many South Asian countries group women with disabled persons and or children on behalf of whom special policies may be adopted, without infringing the constitutional guarantee of equality. A similar provision can be found in the Constitution of Papua New Guinea. A provision recognising special policies to promote the welfare of women has been incorporated in the Constitution of the Republic of Korea33.

These constitutional provisions have been used to introduce quotas in favour of women, in representation in national parliaments, local government bodies and in educational institutions. The quotas for women in the national assemblies have been retained in Bangladesh but removed under the existing constitution, in Pakistan, though it has been argued that they should be retained34. One third of the seats in local level Panchayats in India have been reserved for women35. Such reservations as well a other policies such as leniency in granting bail in the case of women, have been considered valid under the Constitution36. Quotas for women in educational institutions have been considered legal in India, and affirmative action policies in the area of education have been adopted in Bangladesh on behalf of women students and girl children37.

Affirmative action, and the adoption of quotas to ensure access for women as a disadvantaged group is controversial within the region. For instance, Sri Lanka's Women's Charter (1993) does not provide for adoption of quotas in regard to access to educational institutions or political participation. While participation rates for women in education are impressive, there is very poor representation of women in the national legislature and in local bodies. Nevertheless the merit criterion is considered appropriate in both cases. The Supreme Court of Sri Lanka has also considered adoption of ethnic quotas for promotion as unconstitutional38. A similar point of view is reflected in a landmark decision in the Pakistan Supreme Court interpreted equality of access to medical education, as conferring a right to compete for admission with men on merit39. The relevant article on affirmative action in CEDAW, recognises the need for such policies as purely temporary measures to realise substantive equality, and envisages that they will be discontinued `when the objectives of equality of opportunity and treatment have been achieved'40.

Quotas are often criticised as leading to token female participation without impacting on the situation in regard to gender discrimination. Indeed the location of women with disabled persons and children as categories that need special policies fosters community perception on the need to protect them as the `weaker sex' rather than fostering an ethos supportive of their treatment as citizens of the country with equal rights and privileges. Adoption of a system of quotas can re-enforce the sense of women's inadequacy, while promoting a male backlash and resistance to values of gender equality.

Clearly, constitutional provision which refer to women as a category similar to children and disabled persons need to be amended to reflect the concept that the rationale for advancing women's progress is to ensure that they enjoy equal rights as autonomous citizens in the country. Nevertheless, a country situation may require affirmative action to redress an obvious gender imbalance in selected areas such as education, employment or political participation. Such policies in the area of employment and political participation may be a necessary response where qualified women are being denied opportunities for promotion or being denied an opportunity to participate in national or local politics because of their gender. It is significant that in many countries of both South and South East Asia women are poorly represented in decision making positions at the highest levels, whether in politics or employment.' A recent report has pointed out41 that in Singapore `where women constitute 40% of the workforce and 61% of women workers have at least a secondary education, women continue to be under-represented in the upper echelons of the workplace ... while women constitute 51.4% of government employees, none are Permanent Secretaries and a mere three have reached Deputy Secretary Status'.

This scenario is not untypical of other countries in the region despite the fact that the region has more women heads of states and women who hold high political office in the Cabinet of ministers than in any other Continent. It is well known that the Nordic countries where a high percentage of women occupy decision making positions, adopted a quota system for many years. The non-visibility of women in certain areas of public life despite international standards and constitutional guarantees suggests that some rethinking is required on the controversial subject of quotas. The strongest argument for introducing them is in respect of areas where competent and experienced women are available, but are not surfacing in decision making positions and political assemblies whether national or local.

Even if quotas and reservations are not accepted, a broadening of constitutional jurisprudence to include an interpretation of equality that encompasses disadvantage, rather than difference can help to forge a more effective model of gender equality42.

Policies and laws meant to treat women equally and without difference may in fact impact differently on them, precisely because their situation in a country context is very different. The standard or norms of gender equality must recognise that reality and be formulated so as to ensure that a disadvantaged situation does not continue and foster abuse of power. The Canadian Supreme Court has moved beyond the similarity/different approach to interpreting equality, and determines the issue of discrimination on the basis of an impact of law or policy in continuing or creating a disadvantage43. This type of test also enables a Court to determine an issue of discrimination on the basis of an objective assessment of unfairness and arbitrariness, even in the absence of evidence that there is another person who is being treated differently. In recent years Sri Lanka courts have also developed a constitutional jurisprudence on equality which recognises that evidence of discrimination does not require proof that someone else has been treated differently44. This is a significant contribution to the usefulness of constitutional remedies in the area of gender equality. A woman litigant can now challenge an administrative decision or state policy on the ground that it creates an unfair disadvantage for her, even if there is no evidence that it imposes some benefit on a male in a comparable position.

The shift towards a wider model of equality that takes into account disadvantage rather than merely difference is especially relevant for realising gender equality in those countries where ethnic and religious identity becomes a basis for questioning the universality of the standards on gender equality adopted in CEDAW and other international treaties or national constitutions. Many countries in Asia have minority communities with different religious and ethnic identities. Some countries are theocratic rather than secular states. In this situation, some argue that there is an irreconcilable conflict between the norms on equality that are valid for minority groups or a theocratic state, and the so called `universal' norms on equality developed in international law and national constitutions. The conflict surfaced at the World Conference on Women in Beijing where some Muslim delegations argued that Islam's model of equality, recognised the importance of gender difference and that this was ignored in the international standards on equality. They, therefore, demanded that the word `equality' should be replaced by the word `equity' in the Beijing Platform for

Action. This argument obscured the point that a model of equality that takes into account the reality of women's disadvantaged position in practically all societies, must move beyond eliminating differences to ensuring non-arbitrariness and fairness in law and policy. Equality if it is to have substantive rather than a purely formal relevance must include the concept of equity. The `either equality or equity' discourse has little relevance if it is recognised that a model of equality must recognise not merely difference but arbitrariness, unfairness and disadvantage.

Cultural Relativism and Constitutional Norms on Gender Equality

Constitutional standards on equality that are interpreted in the light of international standards can help to develop the concept of core norms that cannot be undermined, on the basis of custom, ethnicity or religion. Developments in regard to family law in the last few decades show how religious fundamentalism and a strong sense of ethnic identity pose a challenge to women's advancement because they undermine the idea of core norms or universal legal values that must apply to determine relations between the individual and communities and the State.

Countries in South and South East Asia have faced a special challenge in this regard. Some countries have been former British or French colonies and therefore recognise core standards set in statute law, even before post independence constitution articulated the norm of gender equality. There statute laws apply to all citizens, irrespective of their ethnicity or religion. Consequently, Penal laws on personal security and violence, guardianship, family support and maintenance, and the disposal of property by will reflect a common legal value base. Policies against restraints on child marriage have been articulated in uniform marriage laws that specify an age of marriage45. Besides, the process of reform of personal law has ensured that values derived from English law or Western legal systems or other policy considerations have impacted on codified personal law.

This is illustrated from codified statutes on Muslim law and Hindu law in the subcontinent and in Sri Lanka46. The process of modification of traditional laws has also taken place in Thailand, Vietnam and Burma where laws influenced by Buddhist values on the marriage relationship and matrimonial property have been replaced or modified through the influence of the Asian religions, Hinduism, and Confucianism, as well as the Code Napoleon and British law or laws familiar to the Anglo-American jurisprudential tradition47. Nevertheless post colonial nationalism and a sense of ethnic and religious identity has contributed to a resurgence of concern with retaining the `purity' of personal or local laws and Asian family values protecting them from what are perceived as alien `Western' influences. In recent years, this trend has been re-enforced by politicised religious fundamentalism which has misused arguments on the need for tolerance in a plural society, to forge a militant resistance to any change, particularly in the area of laws impacting on gender relations.

The impact of religious revivalism often manifesting itself as militant fundamentalism or conservatism in judicial interpretations in court cases is seen in several countries, and has been documented in research and writing in the past few years48. In Pakistan, the constitutional guarantee on gender equality has been qualified by Presidential decrees promulgated during the period of martial law in 1977-1985 which over-ride the Constitutional guarantees. Consequently the Hudood Ordinance 1979 and the Qanun-e-Shadat 1984 have created a series of sexual offences, and introduced principles in the law of evidence that displace the uniformly applicable codes. Religious authorities claim that these ordinances introduce Islamic law, while women argue that they distort Islamic law and are enforced so as to create and foster gender bias in the administration of criminal justice. For instance a Pakistan girl under the age of consent who would be protected by the English law based Pakistan Penal Code on rape, now commits the offence of Zina (illicit intercourse) when she makes an allegation of rape which is not proved in proceedings under the Hudood Ordinance49. In India, the famous case of Shah Bano50 provided an opportunity for the Indian Supreme Court to reaffirm that a divorced Muslim woman could claim maintenance under the Indian Criminal Procedure Code, a uniformly applicable statute. However, it is now well known that legislation referred to as Muslim Women's Protection of Rights on Divorce Act (1986) was a legislative intervention to prevent women having access to the uniform law on maintenance, so that they were required to claim only the limited maintenance under Islamic law in the `iddat' period. In a case dealing with Christians, the Indian Courts had already refused to recognise that provisions which provided separate grounds of divorce for men and women were discriminatory and violated the Constitutional right of gender equality. Arguments based on reasonable grounds for the adoption of different policies in regard to marriage and divorce have been used in this case and another case involving challenges to differential treatment of men and women in the criminal law which makes adultery a punishable offence51.

In Bangladesh too the Constitution has been amended in 1977 and 1988 to indicate a movement away from secularism towards the concept of an Islamic State52. Though Bangladesh Courts have pronounced some decisions in the intervening years which interpret Islamic law so as to recognise gender equality, the High Court has taken a position that prevents women having access to the uniform law of maintenance as set out in the Bangladesh Criminal Procedure Code derived from British colonial law53. A similar ambivalence is seen in decisions of the Supreme Court of Sri Lanka in the area of maintenance and adoption where the Courts have pronounced decisions which interpret the obligation of Muslims in terms of Islamic law and Tamils in terms of personal law norms that are different to the uniformity applicable General law of Sri Lanka54.

The issue of introducing legal norms that conform with international standards has become significant because the differences in personal law helps to perpetuate and rationalise gender discrimination and can thwart any national efforts to move towards a common goal of gender justice within countries. Religious lobbies in these countries can politicise religion in order to perpetuate existing discrimination against women. In countries such as the Philippines, religious beliefs impact on family issues such as marriage, divorce and reproduction and create the same kind of tension between international standards and national laws and policies.

In this environment the drafting of common civil codes and laws which link constitutional and international standards on gender equality can place before people a normative framework of values for all people, in certain core areas, reducing to a minimum those areas in which people can opt by choice to regulate their relationships by different norms.

National Constitutions sometimes give the superior courts the power to strike down laws that violate constitutional guarantees including the guarantee on gender equality55. Where the power of judicial review is restricted, as in Sri Lanka56, personal laws clearly cannot be challenged in the courts. However, even when the power of judicial review is wide, it may be argued that discriminatory personal laws derived from religion or ethnicity cannot be challenged since this would conflict with another basic right, the fundamental right to profess religious belief and adhere to cultural practices57. Though the ground of public order or morality is sometimes stated as a ground that can restrict this right, judicial interpretations generally perceive intervention as justified when it relates to a usage custom or practice rather than a religious belief or doctrine. Alternatively it may be argued that the power of judicial review extends only to legislation regulation and custom and not to systems of personal laws58. Not surprisingly personal laws that contain discriminatory provision based on religion which infringe the constitutional article on gender equality or even equality as between women have not been struck down as invalid by the superior courts59.

Nevertheless increasingly the idea of developing a uniform civil code or uniform laws on some key aspects that impact on gender which people can choose to govern their legal relations has been perceived as a way out of the difficulties placed by the conflict of constitutional guarantees on equality, religion and culture. Women in South Asia are increasingly lobbying for a uniform civil code or codes and this campaign has gained momentum in the period before and after the World Conference on Women in Beijing.

The National Commission for Women in India has taken steps to introduce a consolidating Marriage Bill that will apply to all Indians. Previous efforts at introducing a uniform secular adoption law have not been successful, and opinions are sharply divided on this issue particularly in the aftermath of the experience in the Shah Bano Case. While critics of uniformity consider such intervention an infringement on religious freedom, the legislation that followed the Shah Bano case suggests that there can be antipathy to even the concept that people should have a right to opt out of their personal law. On the other hand, those who argue for a uniform civil code are distrustful of an effort to collate principles from different systems of personal law, envisaging that this will result in an unhappy amalgam that loses sight of the need to realise the important goal of gender equality60. The Supreme Court of India has also pronounced a judgment supportive of uniformity, in four cases where Hindu women challenged polygamous marriages contracted by their husbands after conversion to Islam and declared the second marriages void. In Mudgal v Union of India (1995)61 the court analysed the problems that surface when different systems of personal law, with different norms govern an important relationship like marriage within one country, and the undermining of women's rights that can occur when a husband can unilaterally change his regime of personal law by conversion. The Court highlighted the importance of Article 44 of the Indian Constitution which declares a directive principle of state policy that the state shall `endeavour to secure' the adoption of a uniform civil code for all citizens. Though this is a constitutional principle that does not create legal rights and cannot be enforced, the Supreme Court has used it to ask for accountability from the executive on this

matter. The Supreme Court requested the government of India to file an affidavit by August 1996 indicating the efforts it has taken to introduce a uniform civil code. In Pakistan, twenty women's organizations have very recently requested the government to draft a common civil code that reflects the constitutional values of gender equality62.

Sri Lanka's efforts in this regard have also not been successful. In Attorney General v Reid (1967)63 a case which the Indian Supreme Court cited but did not follow in 1995, the Privy Council recognised the validity of a convert's polygamous marriage on the basis that he had a right to change his religion, and so, unilaterally change his personal law. This decision, which seriously undermines the first wife's matrimonial rights has been criticised but there has been no divorce law reform, or a change in the legal position. The Mudgal decision now encourages a review of Reid's Case in the courts.

In recent years, there has been resistance to `interference' with personal law. A political lobby is suspicious of working towards uniformity and indeed affording a choice to opt out of personal law, arguing that this is an interference with the constitutional right to freedom of religion. A Personal Laws Review Committee appointed in 1986 that was mandated to work towards uniformity and minimise if not eliminate pluralism in family law could not undertake this work because of objections to a multi religious and multi-ethnic group outside each tradition attempting the task of law reform. More recent proposals to expand the uniformly applicable criminal law on statutory rape to coincide with a common age of sixteen years was not accepted by the Minister of Justice so that the law on statutory rape for Muslims continues to be the original age of 12 years if the girl is married to the man. The laws on marriage, which originally set the minimum age as 12 years were amended to raise the age to 18 years for both girls and boys. This amendment was in line with a policy document, the Women's Charter 1993 drafted with the participation of Muslim Women Group. Despite this the amendment to marriage laws in line with the Women's Charter excluded Muslims. Even in the neighbouring Muslim countries, Pakistan and Bangladesh, uniformly applicable marriage legislation restrains child marriage and sets a higher minimum age of marriage than Sri Lanka for Muslim girls64.

Though there has been resistance to the concept of introducing uniform civil codes or even as in Sri Lanka an erosion of concept of uniformly applicable criminal law in the recent amendments on statutory rape, efforts by women's groups to draft such codes on the basis of a consensus among communities should continue. The idea that evaluation and reform must continue only within a particular tradition can be resisted by making use of constitutional and international standards on equality and human rights to argue for entrenching core norms on issues such as violence, guardianship of children, family support and economic rights. Constitutional and international standards on the human right to life, basic needs and protection from violence and personal security, can be used as the core norms of uniform codes. It is important for women's groups to emphasise that a particular area of legislative intervention by a civil code or criminal law that reflects constitutional and international standards is so basic and crucial that there cannot be any issue of application of different standards to different communities even in a plural society, or a right to choose whether or not to be governed by state laws. The concept of religions and cultural relativism and multiculturalism can be accepted justifiably to permit an exercise of choice only in regard to the application of limited aspects of personal law, where they do not infringe these core norms.

Such core norms can be found in areas that deal with the fundamental right to protection from violence and inhuman treatment and the right to life. Thus the practice of widow immolation or Sathi has already been recognised in India as a criminal offence, and no religious or customary justification can be used to provide a rationale for the violence and infringement of personal security that is inherent in the practice65. Similarly no religious practice can deny a woman's right to receive an education in a state school, if it is considered an inherent aspect of the right to life. In India the constitutionally guaranteed right that life and personal liberty shall not be deprived without due legal procedures has been recently interpreted by the Supreme Court as something more than mere right to survival. The Court has held that it creates a right to protection from violence and a right to education66. The stage is therefore already set for moving towards uniform legal values and core norms, even when they conflict with religious practice.

Countries in East Asia such as China and Vietnam have already introduced compulsory education laws, while other countries and also Sri Lanka in South Asia have provided access to health and education for their people. If these socio-economic needs have now assumed the character of basic rights they have crated core standards that cannot be deviated from and indeed provide the value base for laws and policies. Malaysian experience also shows that where socio economic rights of women have been realised, religion is less likely to be used oppressively. In Malaysia, which is a predominantly Muslim country, it has been possible to introduce uniform laws which can be used by choice67.

It is important that countries especially in South Asia that have not provided access to basic services in the area of health and education, forge a concept of basic needs as basic rights so as to compel government allocation of resources in these important areas. This will create an environment which is conducive to moving towards uniformly applicable civil codes based on constitutional and international standards on gender equality. Sri Lanka's uniform legislation on age of marriage for all non-Muslims enacted in 1995, raising the age of marriage was uncontroversial perhaps because policies of free health and education had already created a situation where the average age of women was as high as twenty four years. India, Pakistan and Bangladesh had already enacted more progressive legislation on restraint of early marriage68. However, in the absence of compulsory education policies, or facilities for marriage legislation, these laws have not contributed to the creation of an ethos supportive of delayed marriages for girls.

Pluralism can be undermined and a uniform approach to equality fostered by developing constitutional guarantees to accommodate a concept of enforceable basic socio-economic rights. In addition the guarantee on a right to life and freedom from torture and degrading treatment can be used to introduce a human rights approach to the problem of violence against women. The Declaration on Violence against Women 1993 which has expanded CEDAW standards on violence does not adopt a relativist approach to violence and infringement of personal security and liberty through violence. This document conforms with the approach of the Supreme Court of India which has already pronounced judgements which recognise that violence gainst women is an infringement of the constitutionally guaranteed right to life or protection from torture and inhuman and degrading treatment, where the violence originates from or with the complicity of state officials69. If this approach can be pressed successfully in the Pakistan and Sri Lanka superior courts through arguments based on the constitutional provisions on right to life or protection from torture and inhuman treatment, it will help to undermine the current legal perspective that Muslim personal law can justifiably reflect a different approach to the disturbing and common problem of violence against women. At the moment the Hudood Ordinances of Pakistan as well as the law on statutory rape in Sri Lanka reflect values on violence that do not conform with the international and constitutional standards on violence against women. It is therefore the move towards uniform civil codes and core norms linking constitutional and international standards that can create a legal environment and ethos in which countries can be pressurised to withdraw reservations that they have entered to CEDAW that conflict with the core standard of equality in national constitutions and CEDAW.

Activists and academics in South Asia who stress the need to recognise multiculturalism and plural religious and ethnic identities in their societies often challenge the need to develop a common agenda or vision. Egalitarianism and commitment to a liberal tradition is sometimes transformed into cultural relativism that is tolerant towards even aberrations such as widow immolation (Sathi) and female circumcision. The central government which necessarily has to assume a role in settling controversies and disputes between powerful communities is viewed with suspicion, and the human rights discourse is perceived as a manipulated ideology that only re-enforces state power. In South Asia in particular it has become fashionable to argue that the concept of the secular state is an alien Western ideology, and that pluralism must be entrenched so that each community, ethnic or religious group evolves laws and policies suitable to its own historical growth and progress. The experiences of failures in moving towards an agenda on gender equality based on a western human rights model in South Asian countries is seen as a justification for promoting cultural relativism rather than a human rights approach to realising gender justice70. This view has been re-enforced by activists who also refer to the apathy and ineffectiveness of governments in realising gender justice through legal processes. They question the relevance of law and the human rights discourse in the context of the social realities of developing countries, arguing that gender justice can only be achieved by women's and community empowerment and by engaging with the state in confrontational or adversarial action71.

All these different views combine to erode confidence in the relevance of a human rights strategy in Asia. They tend to romanticise the family and the ethnic or religious community, perceiving them as benevolent, supportive social groups, very different from the oppressive state. They discount the reality of the impact of global market economic policies and forces of consumerism that have undermined both the sense of family and community. The problems of child abuse, juvenile delinquency and domestic violence and the abuse of the elderly that have surfaced in the newly industrialised countries in the region suggest that Asian communitarian values have not been sustained in the face of these economic changes. Indeed, the oppression of individuals in general and women in particular that occur within the family in the South Asian countries is a living reminder that cultural relativism and challenges to the human rights discourse will not assist the disempowered. Besides the challenges to the human rights discourse on cultural

relativist premises in fact legitimises Asian governments and fundamentalist groups that reject an agenda of civil and political rights, and seek to legitimise state authoritarism.

Human rights is about abuse of power. Arguments on the Eurocenticism of rights and the indigenous Asian communitarian values on social responsibility and duty tend to mask the reality of abuse of power against the disempowered sections of society. Women and children, especially girl children, invariably belong to the disempowered sectors of their societies, in relation to some or many areas of their lives. It is in this context that a common model of equality as reflected in human rights jurisprudence, forged from the common historical experience of abuse of power, has special relevance for the countries of Asia. The critical problem of violence against women which has been either ignored or trivialised or seen at best as a problem that calls for protection, acquires a new dimension when it is recognised as a violation of the human right to freedom from torture degrading and inhuman treatment. This particular right, unlike some other rights, cannot be qualified by the state according to norms of human rights jurisprudence. The linkage of issues of violence to this core human right can therefore make for accountability on the part of state actors and also impact as we shall see, on private relations.

Constitutions that invariably reflect these international norms and are indeed aspirational must be strengthened, rather than undermined by relativist intellectual arguments. Women, especially women of low income communities know the reality of oppression from the State, the community and the family. They experience in their daily lives, the anguish of displacement, internal conflict and violence that results from the disintegration of the State, and the breakdown of law and order. They cannot afford to do without the State. They need an accountable State, and a State that will also use the resources available to strengthen the capacity of families and communities to care for individuals, intervening when necessary to protect them from abuse and exploitation even within these social groups. The constitutional standards on human rights and effective remedies to enforce them by linking with international norms promotes accountability at the national and international level, and can be a powerful strategy for creating an ethos supportive of the right to gender equality.

The ineffectiveness of law as a strategy to realise gender equity in the visible instances is used by activists to question the relevance of the human rights discourse and legal strategies, especially in the developing countries of South Asia. Nevertheless constitutional and international human rights standard setting in particular can create an ethos of accountability that has an invisible impact. Women who do not wish to or cannot have access to the legal system, nevertheless benefit vicariously when administrative decisions and law enforcement procedures are scrutinised and challenged by others successfully. Consequently the effectiveness of these processes must be evaluated according to the invisible successes as well as the visible failures. The relevance of the human rights discourse for realising gender equality should be accepted and combined with an awareness of constraints and the spaces for improving and developing it to realise gender equity.

## 03. LIMITATION OF CONSTITUTIONAL APPROACHES AND THERELEVANCE OF SUBSTANTIVE AND DOMESTIC LAWS

In some countries limitations intrinsic to the constitutional remedy restrict its usefulness. For instance, Sri Lanka's Constitution requires that the action is brought within the very short period of one month after becoming aware of the infringement72. The power of judicial review is wide in some countries, and the courts may question any law by reference to the Constitutional standards; the right to the remedy itself is a fundamental right73. However, judicial review is restricted in the constitutions of other countries74.

The experience of South Asia indicates how the Indian courts have contributed to the development of human rights jurisprudence through constitutional interpretation. These developments are also intrinsic to the basic constitutional principle that the Indian courts have a right to monitor government performance in realising the fundamental rights of citizens. The fact that the jurisdiction has been exercised creatively in India has provided a strong argument for replicating this experience in other countries which have chapters on fundamental rights. When governments profess commitment to constitutional norms and international standards, such experiences can be used to lobby for amendments to Constitutions or activist judicial interpretations. The jurisprudence developed is one country in Asia can therefore have an important impact in furthering gender justice.

The basic norms of traditional human rights jurisprudence incorporated into national constitutions suggest that rights can be asserted by citizens only against state action, and only by a victim of a violation. These norms have impacted negatively, especially in the area of gender justice. Constitutional and human rights standards are invariably violated by private employers or individuals. It may be impossible to find an identified victim because women lack the resources to assert their rights, or more importantly they are pressurised not to come forward and claim equal and non-discriminatory treatment. Women who have been denied maternity leave, or failed to obtain visas for their foreign spouses have been unwilling to come forward and bring their cases to court, despite the availability and offer of free legal aid.

The Indian superior courts have developed the concept of state inaction to enable the constitutional remedy for violation of fundamental rights to reach private action. This development has been followed recently in the Sri Lanka Courts75. In addition, the Indian Supreme Court has developed a broad concept of locus standi, so as to enable concerned individuals and activists to present a writ petition challenging a violation of fundamental rights even in the absence of an identified victim who is before court76. This concept of `social action litigation' has also encouraged the involvement of a wide range of professionals and non-governmental organisations in a collaborative effort to obtain intervention through the courts where there has been a violation of fundamental rights. These ideas have been picked up by the judiciary in other countries of South Asia, and this is reflected in a greater willingness to incorporate the international human rights standards, in decision making, and use the equality standard in interpreting national laws77. Constitutional amendments to widen locus standi and recognise the phenomenon of public interest litigation, and introduce a widened concept of judicial review are part of current proposals for constitutional reform in Sri Lanka. These proposals have been clearly influenced by the Indian experience and will constitute an important expansion of the remedy. The scope for strengthening and expanding the linkage between constitutional rights and international standards and creating an ethos for recognition of the human rights of women is particularly important for Asian countries with written Constitutions stating norms of governance and basic rights. However, all countries have domestic laws and policies that impact on gender relations which are located outside constitutional jurisprudence. A sharing of comparative experiences in this regard and a focus on key issues of critical concern in formulating legislation and policy can facilitate law reform and a consistent legal framework supportive of gender equality. An understanding of comparative judicial approaches is also helpful in understanding the problems of reform and the opportunities for creative judicial decision making.

The key areas of family law, economic rights, violence and reproductive rights impact on discriminatory treatment of women, and must attract policy intervention within countries in the region.

Family Law

Most countries in the region have laws on nationality and domicile that reflect norms on family relations which perceive the man as the head of the unit. Consequently, nationality laws discriminate against women and do not permit them to transfer nationality to their children, or deny equal status to spouses in acquisition and or loss of nationality, either in legislation or administrative regulations. Arguments against dual nationality because the wife or children may acquire another nationality through the husband are used to maintain the status quo and overlook the obvious gender discrimination against women nationals78.

Reforms have been introduced in a few countries, and India has amended the law on nationality as recently as 199279. Since nationality is the very basis for claiming legal rights, the assumption of dependence on males in nationality laws and in laws on domicile that determine the judicial forum in which private rights can be asserted, should reflect the human right standard of gender equality. A recent decision of the Supreme Court of Sri Lanka which distinguished a long standing precedent by recognising that a married woman could acquire an independent domicile80 enabled a Sri Lankan woman married to an Indian to obtain a dissolution of marriage in the Sri Lanka Courts. Discriminatory laws on nationality and domicile strike at the core of legal rights of women in domestic jurisdictions. Sri Lanka's Women's Charter 1993 states a standard on domicile and nationality that conform with both constitutional and international standards. However, lobbying efforts have not been consistent or effective to ensure amendment to the discriminatory nationality laws81.

The issue of pluralism, discussed earlier, has provided a rationale for domestic legal systems continuing to discriminate between men and women in crucial areas that impact on their legal status as spouses and children. In addition, the `male head of household and breadwinner' concept continues to pervade even generally applicable state laws on maintenance and family support during a subsisting marriage, even though equal responsibilities are sometimes recognised on dissolution of the marriage82.

Discrimination is inherent in English law influenced guardianship laws which concede limited custodial rights to the mother, but recognise the father as the preferred or `natural' guardian83. The reality that women are single parents or that they are often the main breadwinners for children is ignored because the legal system perceives the male or the head of the household and the breadwinner.

Discrimination is inherent in laws which distinguish between marital and non-marital family relationships, matrimonial rights and inheritance on the basis of religion or ethnicity84. When, as in Japan and Sri Lanka, secular and uniform, or generally applicable legislation deals with this matter, it seems easier to move towards legislative reform which articulates an egalitarian approach to the rights of men and women85. Piecemeal reform of `traditional' laws sometimes results in an eclectic process which leads to erosion of positive values and a reaffirmation of traditional values negative to women86. Some efforts at reform of family law from within a tradition have improved the position of women87 but these efforts can also encourage complacency and destructive comparison, degenerating into arguments that a religious or customary law which gives women half their brother's portion provides more security and is better than one that gives them nothing88. Secular law reform, such as the Indian Succession Amendment Act 1991 has gone further than the reformed religious and ethnic laws of India or Sri Lanka in recognising equality89.

In countries with a colonial experience such as the Indian subcontinent, Sri Lanka, Malaysia and Singapore, the conceptual framework of some aspects of maintenance and guardianship law derived from colonial British law have not been reviewed in the post colonial period. In countries such as Thailand, Burma and Vietnam, egalitarian values derived from the Buddhist tradition, which helped to introduce concepts such as consensual divorce or divorce for marriage breakdown, community of property and equal and separate property rights have been transformed by colonial legal values or the influence of Confucianism and Hinduism90. Islamic countries recognise a man's right to practice polygamy. Islamic law also recognises divorce by a man's pronouncement of repudiation of his wife or wives. Matrimonial laws influenced by British colonial law sometimes adopt different approaches to spouses in regard to adultery, and permit the husband to bring an action for `restitution' of his conjugal (marital) rights.

The unilateral right of a man to repudiate his wife, contract polygamous marriages claim conjugal rights and change his personal law represent a challenge to developing a model of equality that does not result in prejudicial discriminatory treatment. National policies and court cases in Asia reflect a range of approaches and solutions.

The unilateral repudiation of women creates the phenomenon of child divorcees in countries where child marriage has social and or legal legitimacy. Recent newspaper reports suggest that the right of unilateral repudiation is being challenged for violation of constitutional rights in the Indian Courts91.

Laws in some countries differentiate between men and women in regard to what is considered the matrimonial offence of adultery, and an exclusively male right to restitution of conjugal rights. This remedy is claimed by a husband when grounds for divorce are not proved by the wife. These laws remain unchanged and continue to discriminate. The fact that they like other laws originate in antiquated English law remedies rejected long ago in England has not been recognised, and the Supreme Court has not accepted constitutional arguments on discrimination to strike down these laws92. It is of interest that a century ago, a Sri Lankan court rejected the Roman Dutch law actions for adultery and restitution of conjugal rights describing the latter remedy as imposing on one spouse a `loathing' partner93. These remedies are completely contrary to the ideology of marriage as a partnership reflected in the international human rights standards on the family by CEDAW and the Convention on the Rights of the Child and the constitutional standards discussed on equality and violence.

Some countries place constraints based on the Islamic tradition, on polygamy. These protect the interests of women but do not address the issue of discrimination resulting from unilateral conversion and change of personal law, that was considered in a recent decision of the Indian Supreme Court94. The Supreme Court refused to recognise unilateral male conversion to Islam followed by the solemnization of a polygamous marriage. The Court decided that

the marital status of the first wife, could not be prejudiced and held that the later marriage was void94. By contrast a decision of the Privy Council in a Sri Lankan case has considered a convert's subsequent polygamous marriage valid recognising the first wife's right to file for a divorce for adultery under the system of law applicable to the first marriage95! Visvalingam's case96 involving a Malaysian woman of Sri Lankan origin, demonstrates that in Malaysia by contrast, the first marriage is deemed to be dissolved by operation of law by the husband's unilateral conversion to Islam. The difference in approaches impacts on women. For instance if Ms. Visvalingam had initiated action for divorce in Sri Lanka, under Sri Lankan general law, according to which she had solemnized the marriage, she would have had a right of divorce on the ground of her husband's adultery in contracting a polygamous marriage! In fact a divorce on the ground of the `husband's unreasonable behaviour' was available to her when she filed a petition in England where she resided and the courts assumed jurisdiction. These cases indicate that the issue of unilateral conversion should be addressed in all countries by a rational legislative policy that provides for dissolution of the marriage on the ground of breakdown of the marriage rather than fault or conversion.

Child marriage is another crucial area in which contrasting policy approaches show the importance of adopting a consistent value system. In Sri Lanka and in South East Asian countries, state initiative in providing access to education and facilities for registration of birth have contributed to raising the age of marriage for women. In the subcontinent of South Asia the exploitation of the girl child, the phenomenon of child brides and child widows has been a continuing phenomenon despite legal reforms on restraint of early marriage. These laws are ineffective without the supportive policies on access to registration of birth and marriages, and education, and a consistent legal policy. For instance even the restraint on marriage laws set minimum ages of marriage and yet recognise the validity of underage marriage. In the process a legal system that prohibits child marriage confers legal rights on the husband/guardian of a child bride97!

These different approaches to common problems of gender discrimination in the family suggest that it is vital to use the international human rights standards and constitutional standards in reforming critical areas of family law. Legislative and judicial approaches in comparative cases can be shared profitably both to sharpen awareness of anomalies, and promote creative reforms. It is sometimes argued that denial of access to women in public life is because of the societal assumption that a woman's sphere of activity is the home rather than the market place. Women in both the developed and nearly developed countries of Asia have a different experience. They have, in the main been working outside the home in peasant agriculture and a range of other activities. Many women occupy positions of importance in public life and have access to upward mobility through some economic changes that have impacted on their lives. Nevertheless the unwillingness or lack of political will in bringing antiquated family laws in line with social reality undermines efforts to create an ethos of non-discrimination at all levels, and perpetuates prejudices. Consequently, changes in family law in accordance with international standards on human rights and national constitutions must be an intrinsic priority in strengthening their position in other areas. This argument can be supported by considering some instances where the values of family law and policy have impacted on women in the context of reproduction, economic rights and violence.

Reproductive Rights

Many countries in the region adopt a strict attitude to abortion, despite the fact that women face risk of death and illness from septic back street abortion, and there are problems of child abandonment, infanticide, and suicide due to unwanted pregnancy. The approach in Asian countries with strict abortion laws98 is re-enforced by the family laws which discriminate against women and children of non-marital unions. These laws assume that the woman must shoulder the exclusive parental responsibility for such children as their natural guardian. Even as non-marital birth carries a stigma that is re-enforced by the law, no effort is made to recognise the reality of sex outside marriage. Consequently efforts to introduce law reform based on non-discriminatory values in other areas of public law such as employment or political participation or health are undermined by the legal values on non-marital relationships in family law. The status of `illegitimacy' often derived from perceptions of early colonial law, re-enforced by some religious norms99, has not been re-assessed in general by reference to the constitutional or international norm of equality, or the specific standards on gender equality.

Even those countries such as Thailand, Malaysia and India that have introduced reforms in abortion laws, and recognise the concept of abortion virtually by choice100 do so within this framework of family law. Since policies have been formulated in an ad hoc manner for demographic or other reasons, the liberalisation of abortion law has, as in

India, been used to re-enforce gender discrimination. The phenomenon of sex selective abortion of female foetuses has attracted a recent legislative response in India. The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 disallows the use of pre-natal diagnostic techniques for the purpose of detecting the sex of the foetus.

A recent amendment to the Penal Code of Sri Lanka that proposed legalisation of abortion in strictly regulated circumstances in the case of violence through rape and incest and on the ground of grave foetal defects was withdrawn by the Minister in Parliament. On the other hand a regulation introduced in the public sector from 1995 denies maternity leave to unmarried women unless they can prove rape101. Sri Lanka's Penal Code, like statutes in other countries in Asia which have strict abortion policies, incorporates the idea of legal termination of pregnancy on the ground of risk to the life of the mother102. However this provision has not been interpreted as a broad health ground, and so fosters the incorrect impression that any abortion is illegal.

These laws and policies reflect the perception re-enforced by family law that the non-marital child and the mother have lower status even as there is no restraint against their access to employment as public sector workers. The concept of protecting the right to life of the foetus appears to have received precedence over concern for the woman. On the other hand an analysis that uses the rights discourse in constitutional law and international standards can compel a review of policy on the basis of a balancing of the interests of the unborn foetus and the pregnant woman. Constitutional guarantees on the right of `a person' not to be deprived of life, have as we have seen been interpreted as something more than a right to survival. At the moment the word `person' appears to be interpreted as a person born alive, since legal systems do not recognise the concept of legal rights in the unborn. However, modern scientific development recognise a reassessment of the issue in terms of balancing of conflicting rights rather than a policy of narrow interpretation of legal personality.

Family laws on male spousal authority as the head of a household and laws on non-marital-relationships justify policies on the right of the male spouse to deny access to contraceptive services, and policy makers in their decision not to provide free contraception advice and services to unmarried couples in state hospitals or family health bureaus103. If the international standards governing women's right to reproductive health and non-discrimination, and children's right to care and nurturing, which most Asian countries have ratified lead to a reassessment of family laws, family planning policies can be developed with more consistency.

It would seem therefore that changes in the key areas of abortion and access to contraceptives require the adoption of a totally different approach to the status of the non-marital union in family law. The rights discourse in regard to women, men and children has not been used in policy making in the area of abortion or access to contraceptives. The surfacing of a rights discourse can motivate holistic policy planning based on a critical understanding of the need to minimise the conflict between recognising different interests of men, women and children in the marital and non-marital family, based upon the norm of non-discrimination. When a single dimension, such as demographic needs is used in policy planning, it is possible as in India, to embark on liberal policies on abortion without any regard to the need to review other implications.

Economic Rights

Many countries in Asia have made efforts through laws and policies to give women access to employment, in industry and in subcontracting, equal remuneration, credit and also expanded access to maternity leave. These initiatives are important, and cannot be undervalued. Nevertheless the absence of reappraisal of approaches in laws governing family relations results in an undermining of the woman's status in economic activities.

Laws on marital property which provide for a wife's independent control of her separate economic assets, and some pooling of economic resources so that there is equitable distribution of property on dissolution of marriage by death or divorce, have not been introduced, resulting in inconsistency between the values of family law, and new policies on gender and development. Countries such as Burma, Sri Lanka, Thailand and Vietnam have traditional legal concepts which recognise two types of marital property - separate property acquired before marriage, and a common pool of property acquired after marriage, that was shared equally on devolution104. A few countries such as Singapore, Japan, Republic of Korea, provide for some form of co-ownership of matrimonial assets, but in general, legal systems do not ensure that matrimonial assets acquired after marriage are shared equitably. Sri Lanka has uniform General law statutes on matrimonial property that recognise a woman's right to hold and use separate property and inherit equal

portions on the death of her spouse. Sri Lanka's indigenous laws recognised the concept of distinct marital rights of spouses in property acquired after marriage, on the basis of a pooling of gains, but these traditional concepts have not fertilised the personal ethnic laws, or the general law that governs the majority of Sri Lankans105. In countries in South Asia where the giving of dowry is prohibited, women do not have equal rights of inheritance or marital property. Where they do have equal rights, dowry is not prohibited106. Similarly, traditional customary practices on the giving of dowry on marriage from a girl's side to man, have qualified the Islamic law principles on mahr, or the wife's marriage position107. The orientation of family law on parental and spousal obligations of financial support have already been referred to.

In a context where women's position in the family has not changed in marital and family property and family support laws, employment law which has a family dimension does not seriously address the special situation of women workers. Several East Asian countries do not have minimum wage laws. Even when such laws do exist, devices such as payment of wages to a spouse or casual employment can still be used to deny women equal remuneration which is required by legislation. Employment legislation is meant to cover the private sector, which is usually outside the protection of constitutional standards108.

Even countries which grant maternity leave, consider this an employment `benefit' to pregnant women workers. This leads to a situation where maternal leave laws give various periods of leave, instead of conforming to international labour (ILO) standards. The amount of leave varies depending on whether it is taken by public or private sector workers, or new recruits, while enforcement can be weak. It is as if employers are being compelled to grant an unnecessary `welfare' benefit because they have employed women workers. Philippines and Indian maternity law is unusual, in conforming to international standards set by ILO and CEDAW. Philippines and Indian law treats maternity leave as a worker right, and a management responsibility, so that the employer is reimbursed for giving full paid maternity leave, through a social security system. Maternity leave is therefore perceived in the Philippines and in India as a social security policy regarding workers with family responsibilities, which must be recognised in the interests of the community109.

The same scenario prevails in regard to both legislative intervention and legislative apathy in the area of occupational health hazards faced by women workers in Asia who are absorbed into the industrial production sectors within and outside investment promotion zones. A protective welfare `benefits' rather than a worker rights and management obligation approach is adopted. Night work for women has been legalised on the rationale of giving access to employment. As in the case of maternity leave, management obligation to ensure a safe working environment does not feature in collective bargaining agreements or contracts made by unions with management110.

In countries of South East Asia, and a few countries of South Asia, laws on compulsory education and access to training have clearly helped to realise gender equity in the area of economic activity. Nevertheless this aspect of human resource development has not been followed through by supportive laws and policies on women's status in the family. In South Asia in general, compulsory education policies have not been introduced yet, though women and development policies of the last decade have focused on providing support for women's economic activities. In recent years we have noticed that Constitutional provisions on equality of access to training have sometimes been used in India and Pakistan by women to obtain educational opportunities111. This may result in commitment to allocating resources for compulsory education, and training.

The exclusive focus on giving access to employment is clear in most countries in the area of overseas migrant work. Women have generally been encouraged to take employment abroad, but little has been done to provide a supportive legal context for recognition of their rights as individuals entitled to a fair employment contract. There is hardly any support system for families left behind. Women workers must cope with family breakdown and abuse of children when assistance in extended family relationships is not available. While the law on domestic workers within sending countries is weak, the laws in host countries vary in the protection given resulting in financial loss and physical and sexual abuse. Hongkong is a country which gives migrant workers an enforceable and equitable contract but other countries do not afford the same employment rights to migrant workers112. There are no bilateral agreements between countries in regard to migrant workers or workers in industry, and the UN Convention on Migrant Workers has not been ratified by most countries. Reforms in the area of employment law have thus been initiated in a context where law and policies have not been changed in regard to family relations. Changes in the global economy have provided greater opportunities and worker laws may have moved in the direction of a more enlightened policy on the status of women

workers. Nevertheless the inconsistency in the legal values on family relations and those regulating labour and economic status does not help to create the ethos that is so essential for effective policy change and even law enforcement.

04. The Special Problem of Women and Violence

Most legal systems in Asia treat the subject of violence gainst women in substantive laws on crime or family law that trivialise the violence. This has resulted in an undervaluing of the significance of this type of conduct as criminal conduct amounting to violence against personal and bodily security, and influenced the legal system's response to the phenomenon. Even CEDAW standards focus only on removing discrimination in penal laws and preventing exploitation of women in trafficking and prostitution. The UN Declaration on Violence against Women (1993), though only a Declaration which is not legally binding, adopted for the first time a new perspective, when it declared violence against women an infringement of an important human right to personal security and personal liberty. The appointment of a Special Rapporteur on Violence against Women, the submission of her first report, and the internationalisation of the issue of violence against women has helped to give the problem the prominence that it deserves as an area for new legal interventions.

We have observed that Constitutions of the South Asian region in general place an absolute and unqualified responsibility on states to guarantee the right of citizens to life and freedom from torture and degrading treatment, restating the standard on civil and political rights found in international human rights laws113. Sometimes an article on freedom from degrading treatment and torture is qualified, especially by including a right of privacy114. This can limit the usefulness of the Constitution in the area of violence against women, since the privacy argument is used to deny the state's right to interfere when violence takes place within the family. The constitutional standard has been recently used in the Courts of South Asia to give relief in respect of custodial violence by the Police or private action that take place with the collusion or complicity of state actors. Sri Lanka's Torture Act (1995) which attempts to incorporate the international standards of the Torture Convention into domestic law includes violence for the purpose of `intimidation' and `discrimination' in the definition of the crime of torture. This new law provides for the imposition of heavy minimum sentences and can in future be used in cases of gender based violence against women through official action or complicity with private actors115.

The development of the jurisprudence in this regard can make an important contribution towards promoting accountability on the part of state officials who do not prosecute crimes of violence against women or actively participate in the commission of acts such as rape and sexual assault of women in custodial situations. Sexual harassment can also be challenged on the basis of gender based discrimination or exposure of employees to inhuman and degrading treatment116. The constitution, with its linkage to international human rights standards thus presents an important legal process for addressing the problem of violence against women, both by private and state action. In this area too, a successful action, which requires the perpetrator to pay compensation to the victim in his personal capacity can help to promote accountability. Even individual women who do not utilise this process may be assisted vicariously by the development of Constitutional law as a legal process to promote accountability in law enforcement in the area of violence against women. Women's groups in many countries complain that weak law enforcement and the unwillingness of officials like medical personnel to report violence and the police to prosecute male spouses or lovers, contributes to the high incidence of domestic violence. Development of constitutional law so that such apathy can be challenged as `inaction' contributing to an infringement of fundamental rights seems to be one way of impacting through legal procedures on the violence of private action.

The legal concept that violence against women is an infringement of the human rights of women must also be used to question the assumption that Penal Codes cannot infringe on customary or cultural practices that are inherently violent or infringe personal integrity. Penal Codes in South Asia for instance, do not reflect the concept that multiculturalism requires different norms on personal violence to be adopted in the case of different ethnic groups. Consequently, these codes have recognised a concept of statutory rape in the case of girls under the age specified by laws that restrain early marriage. Thus, sexual intercourse by a man with his wife, who is below the age specified for capacity to marry, is considered rape irrespective of whether it is with or without her consent. Rape laws therefore tend to re-enforce marriage laws on restraint of early marriage. These laws assume that the legal norms can undermine cultural practices on restraint of marriage, and this approach is reflected in other legislation that criminalises religious or

customary practices117. Sri Lanka's recent Penal Code Amendment Act (1995) unfortunately departed from this policy by refusing to extend the law raising the age of statutory rape to Muslims who continue to be governed by the earlier law on statutory rape, which is consistent with their personal law. The criticisms of this legislative approach have passed unheeded, partly because there was no articulate challenge to this policy. Unless this type of effort to dilute criminal law standards in the name of multiculturalism is resisted, there is a risk that, as in the case of Pakistan's Hudood Ordinances 1979 penal laws themselves will, in violation of constitutional and human rights standards be brought under separate personal law regimes. Vigilance and action is required to prevent this destructive trend. Many years ago, Justice Brandeis stated that at one point in American history `men feared witches and burnt women'118. The Roop Kanwar case119 indicates that deification can result in the same outcome. The phenomenon of dowry violence and witch burning in South Asia as well as the practice of widow immolation, demonstrate eloquently that customary rituals and beliefs based on fear consumerism and deification must be rejected absolutely in Penal laws that conform with international human right standards.

Since many legal systems adopt `protective' rather than a `right to personal integrity' approach to violence, it has become easy to trivialise sexual violence, and enable other considerations to prevail. The idea that `women are the weaker sex' and require `protection' from violence, resulted in a rejection of recent proposals in Sri Lanka to permit abortion in the event of rape and incest. The `protective' rather than rights approach contributed to a failure to accept an amendment that would have recognised a woman's right to choose whether or not to terminate a pregnancy caused by violence. Reform of antiquated Penal Codes to accommodate new forms of sexual and other violence against women must be accompanied by a shift towards recognising that violence is an infringement of the human rights of the victim. Several countries in Asia do allow termination of pregnancy for incest and rape120. These laws should provide a model for legislative change in countries with strict abortion laws.

The discriminatory facets of family law also re-enforce criminal laws that fail to address problems of domestic violence, and sexual harassment in the workplace. Since the right of women to be treated as equal partners in marriage or as economic contributors in the community is not recognised, and divorce is not often permitted on the ground of breakdown of the marriage, Criminal laws can reflect these perceptions. Criminal law sometimes trivialise sexual violence treating it as a matter of family or workplace privacy. Not surprisingly, some Asian countries do not consider rape an offence against persons but against chastity. Even when sexual violence is recognised, it is restricted to an offence of vaginal penetration121. Penal Codes do not sometimes treat incest as a sexual crime, perceiving it as attracting a limited criminal penalty for violation of marriage laws regulating prohibited degrees of marriage122. These codes reflect the approach of the old English common law. The incest law has been reformed only recently, in 1995 in Sri Lanka, by an amendment to the Penal Code123.

There is a similar reluctance to accept marital rape as a serious offence, even in circumstances where the marriage has broken down irretrievably, and the spouses are living separately. Marital rape, when recognised is usually restricted to situations where the spouses are separated under a judicial order which legalises the separation124. Cruelty is recognised in some countries as a ground for divorce or legal separation. However restricted divorce laws based on fault and legal remedies for restitution of conjugal rights that are available only to the husband125 create an impression that domestic violence must be resolved and reconciliation effected without interference from the State. The legal concept of restraining and exclusion orders preventing a man having access to the matrimonial home or his wife and family in situations of violence has not been recognised in South Asia in general. Infringement of personal security is undervalued so that even state hospitals that treat victims are not required to report these incidents as criminal offenses. Though the offence of statutory rape of a child bride is recognised by law, the validity given to the marriage itself, in many South Asian countries makes the offence an intrinsically non-prosecutable crime126.

The procedural laws on violence against women are also weighted against women in evidentiary rules which require proof that intercourse was `against a woman's will' or independent evidence corroborating the victim's evidence that the sexual act took place127.

Some of these rules have been modified by legal reforms which shift the burden of proving consent to the accused and courts convict on uncorroborated testimony128. Similarly, Sri Lanka's recent amendment to the Penal Code has dropped the requirement that intercourse should be `against the woman's will' and clarifies further that evidence of resistance and bodily injuries is not necessary to prove a charge of rape. The Supreme Court of India has also decided that absence of evidence of resistance is not necessarily evidence of consent129.

Facilities to hold rape trails in Camera, and in an environment where adversarial cross examination of the accused does not take place have not received adequate attention. Inevitably this is an in-built disincentive to using legal processes to prosecute offenders even in violent sexual crimes such as gang rape. Sentencing policies also indicate the difficulties women who do make police complaints face in obtaining prosecution. The concept of minimum sentences which limits judicial discretion has been introduced in some countries in the absence of guidelines to the judiciary on sentencing, and can help to prevent the trivialisation of sexual violence130.

One of the most disturbing recent forms of violence that has surfaced is the violence unleashed on women's activists. The recent unsuccessful assassination attempts against Pakistan women lawyers Asma Jehagir and Hina Jilani and the gang rape of Indian village level activist Bhanwari Devi have received press publicity131. In the latter case the state courts acquitted the accused. The case is likely to go up in appeal but these incidents are symptomatic of the violence generated against human rights activists all over the world. Continued international concern vigilance and monitoring can be the only way to contain if not eliminate such violence.

NOTES

1 Charter of the United Nations Preamble and Arts. 8, and 55; Universal Declaration of Human Rights (1948), Preamble and Arts. 1 and 2 in particular; International Covenant on Civil and Political Rights (ICCPR) (1966) Art. 2 and 3 in particular; International Covenant on Economic Social and Cultural Rights (ICESCR) (1966) Preamble and Art. 3.

2 Preamble Arts. 5, 11 and Art.3.

3 Para 14 and Part II.

4 Ch. II Principle 4 and Ch.IV. Ch. VII Para.7.3.

5 Commitment 5 (i) and (k).

6 Para 8 and 9.

7 Charlesworth Hilary `What are Women's International Human Rights' in Cook Rebecca (ed.) Human Rights of Women, University of Pensylvania Press (1994) 58 at 59 note 4.

8 Medina, Cecilia `Towards a More Effective Guarantee of Employment of Human Rights by Women in the Inter American System.' ibid at 257, and other essays in the publication; Schuler M. ed. Freedom From Violence UNIFEM New York (1992).

9 See Coomaraswamy Radhika ` To Bellow like a Cow: Women, Ethnicity and the Discourse of Rights' ibid 39.

10 An Nain, Abdullahi Ahmed `State Responsibility Under International Human Rights Law to Change Religions and Customary Laws'. ibid 167.

11 Afghanistan, Constitution Art.28; India Constitution Art.14 Pakistan Constitution Art 25(1) (2) Nepal Constitution Art 11(2) Bangladesh Constitution Arts.27,28; Sri Lanka Constitution Art. 12(1); Constitution China, Arts 33, 48, Mongolia Constitution Art 84, Republic of Korea Constitution Art 10, Indonesia Constitution Art 27; Malaysia Constitution Arts 8, 12(), Thailand Constitution (1974); Papua New Guinea s. 55(1) Constitution Japan (1947) Art.14 para () Philippines Constitution (1986) Art 11 section 14; see Achievements of the United Nations Decade for Women in the Asia and Pacific. ESCAP (1987) ST/ESCAP/ 434 p.9; Women's Rights Human Rights: Asian Women's Profile, Asia Pacific Forum on Women Law and Development, Malaysia (1993); Asian and Pacific Women's Resource and Action Series: Law, Asian and Pacific Development Centre, Kuala Lumpur (1993).

12 Ibid Art. 11 Sec: 14; Asian and Pacific Women's Research and Action Services: Law ibid 191.

13 Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) has, (as of 21 Jan. 1994) been ratified by Bangladesh, Bhutan, Cambodia, China, India, Indonesia, Japan, Lao People's Democratic Republic, Maldives, Mongolia, Nepal, Philippines, Republic of Korea, Sri Lanka, Thailand, Vietnam. Source: Status of International Instruments UN Doc. ST/HR/S/ cited Cook Rebecca ed. Human Rights of Women op.cit. Appendix A; on Pakistan, report by Qudssia A Khalaque, Islamabad, IPS Report, in Sri Lanka Daily News 19 August 1995.

14 Cambodia, Democratic People's Republic of Korea, India, Japan, Mongolia, Nepal, Philippines, Republic of Korea, Sri Lanka, Vietnam.

15 Bangladesh, Bhutan, Cambodia, China, Democratic People's Republic of Korea, Fiji, India, Indonesia, Lao People's Republic, Maldives, Mongolia, Myanmar, Nepal, Pakistan, Philippines, Republic of Korea, Sri Lanka, Thailand, Vietnam, ibid; Singapore and Malaysia have subsequently ratified the Convention on the Rights of the Child.

16 Cook Rebecca op. cit. Appendix A.

17 UN Doc. CEDAW/SP/1992/2 at 9; Women's Rights, Human Rights: Asian Women's Profile, op.cit.

18 ibid p.1.

19 See generally on reservations, Cook, Rebecca, `Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1991) 30 (3) Va. J. International Law 643.

20 Goonesekere S. The UN Convention on Women and the Sri Lanka Legal System, Centre for Women's Research Colombo (1991) 5; International Women's Rights and Action Watch (IWRAW) `CEDAW No 11' Report, August 1992.

21 See for a general discussion of international procedures for monitoring, Byrnes, Andrew. `Towards More Effective Enforcement of Women's Human Rights through the Use of International Human Rights Laws and Procedures' in Cook Rebecca ed. Human Rights of Women op.cit 189.

22 See discussion of substantive law infra.

23 Art. 27, 17, 18 and group rights, Art. 20, 22, 24.

24 Human Rights in Britain, Foreign and Commonwealth Office, U.K. (1991).

25 Women's Charter (1993) [National Policy Statement], Torture Act (1994) (Legislation).

26 UN. Doc. CCPR/C/21/Rev.1/ Addl 1 para 13 (1989) as discussed Cook Rebecca, Human Rights of Women op. cit. 11.

27 State of West Bengal v Anwar Ali 1952 S.C.75, State (Delhi Administration) v Shukla 1980 SC 1382 (India) Weligodapola v Secretary, Ministry of Women's Affairs 1989 2 Sri LR 63 (Sri Lanka).

28 State (Delhi, Administration v Shukla ibid.

29 eg. Bangladesh Art. 29 (3) (c) Pakistan, Art 27(1) proviso 11.

30 Interview with official, on Proceedings before Sri Lanka Commission on Elimination of Discrimination, 1992, (transfers) Denial of promotion to senior woman public servant, as reported in Thai newspaper, The Nation October 25 1995.

31 AIR v Nargesh Meerza 1981 SC 1829.

32 Jilani H `Legal Status of Women' Country Study Pakistan (unpublished) ESCAP (1993).

33 India Art 15 (3), Pakistan Art 25(3), Bangladesh Art 28(4), Nepal Art 11(3), Sri Lanka Art.12(4), Papua New Guinea Art. 55(2)/Art 34(3) 32(4).

34 Chowdhury N. `Women in Politics in Bangladesh' in UN Decade for Women, Situation of Women in Bangladesh, Ministry of Social Welfare and Women's Affairs, Dhaka (1985) 253; Patel R. Social Economic and Political Status of Women and Law in Pakistan, Faiza Publishers Karachi (1991) 5 - 11; Barriers to Women's Participation in Parliament, Report of the Commonwealth Women Parliamentarians Group Task Force, Seventh Meeting of the Commonwealth Women Parliamentarians Group October 1995, Colombo, Sri Lanka 17.

35 Report of the Commonwealth Women Parliamentarian Group ibid.

36 Choki v State AIR 1957 Raj. 10 (bail) Datattreya v State of Bombay, AIR 1953 Bom 311 (representation in local authorities).

37 Sagar v State AIR 1968 AP 165, 174, (India), Ahmed Zahida, in Female Education in Bangladesh in UN Decade for Women, Situation of Women in Bangladesh op.cit. 157; `Educating Women and Girls: A Moral Imperative, UNICEF (1992).

38 Women's Charter Sri Lanka (1993); Ramupillai v Festus Perera 1991 1 Sri LR11.

39 Jilani op.cit. Patel op.cit. 16-17.

40 Art 4.

41 Report of the Commonwealth Women's Parliamentarian Group op.cit 11.

42 See Cook Rebecca; Human Rights of Women, op. cit. 11-12.

43 Andrew v Law Society of British Colombia 1989 1 SCR 143. cited ibid 12.

44 Lankage v University of Kelaniya (1994) (unreported).

45 Penal Code, India (1860) Pakistan, Bangladesh (1860) Criminal Procedure Codes (1862) India amended (1973) S.125, Pakistan, Bangladesh, Criminal Procedure Code 1898 S.488, Sri Lanka, Maintenance Ordinance 1889 as amended 1972 S.2; Wills Ordinance Sri Lanka(1844); Child Marriage Restraint Act India (1929) amended 1978, Nepal's Civil Code 1963 as amended 1975, Sri Lanka Marriage Registration Ordinance (1907), Guardian and Wards Act (1890) applicable in India, Pakistan and Bangladesh.

46 The Muslim Family Law Ordinance (1961) applicable in Pakistan and Bangladesh; Kandyan Law Ordinance (1938) and Jaffna Matrimonial Rights and Inheritance Ordinance 1911 Sri Lanka, Hindu Minority and Guardianship Act 1956 India, S 13 (1) introducing concept of `best interests of the child' from English Law.

47 My Van Tran, `The Position of Women in Traditional Vietnam:Some Aspects' in de Silva K.M. and others ed. Asian Panorama, Vikas Publishing House, New Delhi (1991) 274,281;Chatsri Bunnag and Varee Nasakul, `Thailand'in Law Asia Family Law series Volume I Law Asia Singapore (1979) 197; Gledhill Alan `Community of Property in the Marriage Laws of Burma in Anderson JND ed. Family Law in Asia and Africa, George Allen and Unwin Ltd, London (1968) 205.

48 Kirti Singh, `Obstacles to Women's Rights in India' and Hossein Sara, `Equality in the Home - Women's Rights and Personal Laws in South Asia in Cook Rebecca ed. Human Rights of Women, op.cit. 375 and 465; Goonesekere Savitri, `Realizing Gender Equity through Law: Sri Lanka's Experience in the Post Nairobi Decade' in Facets of Change, Women in Sri Lanka 1986-1995, Centre for Women's Research, Colombo (1995) 6; Patel R. op.cit 22-41; Jilani H. `Whose Laws, Human Rights and Violence' in Schuler M ed. Freedom from Violence UNIFEM (1992) 63; Asian and Pacific Women's Resource and Action Series: Law op.cit. 28, 77-88.

49 See e.g. Jehan Mina v State (1983) [rape of 13 year old girl] cited Asian and Pacific Women's Resource and Action Series: Law ibid 29.

50 Mohomed Ahmed Khan v Shah Bano AIR 1985 SC 945.

51 Bhai v Mathews AIR 1953 Mad. 792 (divorce) Sumithri v U.O.I. AIR 1985 SC 1618 cited in Kirthi Singh op. cit. 387. (Indian Penal Code S.497).

52 Hossain op.cit 48, citing Proclamation Amendment Ordi-nance 1977 and Constitution Eighth Amendment Act 1988.

53 Ibid 478 - 482 citing Abdul Khaleque v Selina Begum DLR 450 (1990).

54 Ummul Marzoona v Samad (1977) 79 NLR 209, Burhan v Ismail (1978-1979) 2 Sri LR 218, (maintenance/Muslims), Ghouse v Ghouse 1988 1 Sri LR 25 (adoption/Muslims); Wigneswaran v Thambipillai (1983) unreported, cited Goonesekere op. cit 51 on Tamil Tesawalamai law.

55 Indian Constitution Art 13. Nepal Constitution Article 88; Pakistan Constitution Art 8. Bangladesh Constitution Art. 26(1).

56 Constitution Art 126 and 16.

57 e.g. India Art 25, 26 (religion) Art 29(1) (culture) Pakistan Art. 20 (religion) Bangladesh Art 39,41, (religion) Nepal Art. 12 (2) (religion) Art. 18 (1) culture.

58 Seervai H.M. Constitutional Law of India Vol. 1 NM Tripathi, Bombay (1983) 236, 237; Hossein op. cit 474.

59 Ibid 900-906; Madhu Kishwar and others v State of Bihar 1992 1 SCC 102 [A Challenge to discriminatory inheritance laws]. Mahendran v Secretary Travancore Devason Board AIR 1993 Ker 42. [temple entry for women of different ages].

60 Dhagamwa Vasudha `Towards the Uniform Civil Code,' Indian Law Institute, New Delhi 1989.

61 Sarla Mudgal and Others v Union of India and others Writ Petition (Civil) No. 1017 of 1989; Report India Today June 5 1995 54.

62 News item, Sunday Island Sri Lanka, 28 January 1996.

63 (1964) 67 NLR 25 (P.C.)

64 Women's Charter Art. 8(1) Penal Code Amendment Act 1995 s. 363 (e); Marriage Registration Amendment Act 1995 and Kandyan Marriage Registration Amendment Act 1995; Muslim Family Law Ordinance (1961) specifies 16 years.

65 Roop Kanwar Case (1987) which led to Anti Sathi Ordinance, Rajasthan and Indian Commission of Sathi Prevention Act 1987 discussed in Asian and Pacific Women's Resource and Action Series: Law op. cit 34-35.

66 Art 21 as interpreted in Unni Krishan v State of Andhra Pradesh, Judgments Today 1993 474 and Mohini Jain v The State of Karnataka 1992 3 SCC 666. [education] Saheli Women's Resource Centre v Commissioner of Police Delhi AIR 1990 SC 513. Padmini v state of Tamil Nadu 1993 Cri.LJ 2964 (Mad) [personal violence with official complicity).

67 Salim R. `Domestic Law: The Malaysian Experience' in Romero FR ed. Women and Law, Asia Foundation Philippines (1963) 77, Reddy Rita, A Handbook of Law for Malaysian Women, Penebit Fajar Malaysia (1992).

68 India Child Marriage Restraint Act (1929) amended (1978) specifies 18 years: Muslim Law Ordinance (1961), Bangladesh and Pakistan specifies 16 years.

69 Note 66 supra.

70 See discussion in Coomaraswamy Radhika in Cook Rebecca op.cit 40; Nandy Ashis, `The Making and Unmaking of Political Cultures in India' in Nandy Ashis ed. At the Edge of Psychology Oxford University Press, New Delhi (1980) 47.

71 See Kelkar Govind, India, Stopping the Violence against Women: Fifteen Years of Activism in Schuler M. ed. Freedom from Violence op. cit. 75.

72 Art 126 (1) (2), 17. Saman v Leeladasa 1989 1 Sri LR 1, Gamaethige v Siriwardene 1988 1 Sri LR 384.

73 India Art 13, 32, Bangladesh 26, 44 Nepal Art 88, 23;

74 Sri Lanka Art 16, Pakistan, Art 270 A Constitution Eighth Amendment 1985 giving superior status to Presidential decrees and therefore qualifying the Constitution Art 8 which in itself restricts judicial review.

75 Saheli Women's Resource Centre v Commissioner of Police Delhi AIR 1990 SC 513. (India) Mohomed Faiz v Attorney General SC Application 89/91 19. 11. 1993.

76 Baxi U. `Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Tiruchelvam N. and Coomaraswamy R. ed. The Role of the Judiciary in Plural Societies, Frances Pinter London (1987) 32, Pieris G.L. Public Interest Litigation in the Indian Sub Continent: Current Dimensions 1991 40 International and Comparative Law Quarterly 66.

77 Sri Lanka Supreme Court rules. Pakistan, Constitutional Petition No. 1 of 1988, State v Inspector General of Police Punjab (1991) (unreported) Begum Rashida Patel & others v Federation of Pakistan Petition 515 of 1987 cited Patel op.cit at p 42; Inaugural Address of Chief Justice of Pakistan as President of SAARC Law in Colombo as reported Sri Lanka Daily News 16 September 1993.

78 Sri Lanka Citizenship Act 1948 and administrative regulations 1956; Bangladesh, Pakistan Citizenship Act (1951) as continued by Bangladesh Order (1971); Pakistan Citizenship Act (1951) Malaysia Constitution (1957) Art 14; Malaysia Law Reform (Marriage and Divorce Act 1976 SS 48, 49, incorporates the concept of the wife's dependent domicile; Singapore Nationality law, see KWO Swan Sik ed. Nationality and International Law in Asian Perspective, Martinus Nijhoff Netherlands (1990); Thailand, as discussed Rayanakoru R. Report Thailand, unpublished study for Asia Pacific Forum on Women Law and Development, Kuala Lumpur (1992).

79 Japan Nationality Law (1950) as cited Achievement of the United Nations Decade for Women in the Asia Pacific (ESCAP study) (1987) 114; Philippines Constitution ibid; India Citizenship Amendment Act 1992.

80 Maheshwary Asokan v Krishnan Asokan CA Revision application No.494/93 DC Colombo 19.01.1994.

81 Women's Charter Sri Lanka Art.4.

82 Maintenance Ordinance (1889) Sri Lanka amended (1972) Civil Procedure Code (1889) amended (1977) S. 618; Criminal Procedure Code India as amended (1973) S.125 Criminal Procedure Code Bangladesh and Pakistan (1898) S.488; Malaysia Married Women and Children's Enforcement Act 1968 and Law Reform Marriage and Divorce Act 1974 discussed Reddy op.cit.

83 Goonesekere Savitri, `The Best Interests of the Child, A South Asian Perspective' in Alston P ed. The Best Interests of the Child, Clarendon Press Oxford (1994) 117; Guardians and Wards Act (1890) applicable in India, Bangladesh and Pakistan.

84 Goonesekere ibid; Indonesia Marriage Law 1974 Achievements of the UN Decade for Women op cit 105; Malaysia, Guardianship of Infants Act (1961); Hindu Succession Act, India (1956), Islamic Law of Succession based on Koranic rights of inheritance, discussed in Mullas Principles of Mahomedan Law 18 ed. Tripathi Bombay reprint (1986); Muliki Ain Nepal (1963) Kandyan Law Ordinance Sri Lanka (1938).

85 Married Women's Property Ordinance (1876) and Married Women's Property Ordinance (1927) Sri Lanka; Civil Code Japan (1980).

86 Sri Lanka, Kandyan Law Ordinance (1938) Jaffna Matrimonial Rights and Inheritance Ordinance (1911).

87 e.g. Muslim Family Law Ordinance 1961 applicable in Bangladesh and Pakistan. Hindu Marriage Act (1955) Hindu Guardianship and Minority Act (1956) and Hindu Succession Act (1956) India;

88 Senior advocate Daniel Latif, as quoted in `Striking Down a Right': Uniform Civil Code. India Today June 15, 1995 p.54 at p 55.

89 Gender Justice Reporter, National Law School of India University, Vol.1 (1995) 15.

90 See note 47 Supra.

91 Allahabad High Court decision as reported, A.P. in The Nation 25.10.95.

92 Kirthi Singh, in Cook Rebecca op. cit 375 at 387. citing Sumithri v U.O.I AIR (1985) SC 1618 and AIR 1984 SC 1562.

93 Karonchihamy v Angohamy (1904) 8 NLR (adultery) Andres v Bastiana 1860-62 Rama 133, followed in Wright v Wright 1903 9 NLR 31 (restitution).

94 Sarla Mudgal and Others v Union of India cited note 61 supra; See also on restrictions on polygamy, Muslim Family Law Ordinance (1961), Muslim Marriage and Divorce Act Sri Lanka (1951); Reddy op cit p.70, discussing the law of polygamy in Malaysia, though requirements are less stringent in some states; Indonesia Achievements of the United Nations Decade for Women op.cit 105.

95 Attorney General v Reid note 63 supra.

96 Visvalingam v Visvalingam 1980 1 MLJ (C.A.) 898.

97 Goonesekere, note 83 and note 68 supra.

98 Penal Code of Pakistan and Bangladesh (1860) Penal Code Nepal, and Penal Code Sri Lanka (1883).

99 Mulla's Principles of Mohamedan Law note 84 supra; Guardian and Wards Act (1890), India, Bangladesh and Pakistan. Guardianship of Infants Act (1961) Malaysia, Sri Lanka law of guardianship, Goonesekere Law of Parent and Child, M.D. Gunasena, Colombo (1987).

100 India, Medical Termination of Pregnancy Act (1971), Thailand, as cited in table, Asian and Pacific Women's Resource and Action Series: Law op cit 123. Abortion has according to this table been liberalised in Hongkong, Japan, South Korea, North Korea and Taiwan; Singapore and China permit abortion on request.

101 Public Administration Circular No.17/195 of 13 June 1995.

102 Note 98 supra, Penal Code Sri Lanka s 303-305.

103 Sri Lanka, discussions at workshop UNFPA, and Department of Social Services, Kandalama, Sri Lanka January 1996; Maternal mortality from abortion is referred to in Soysa Priyani E. `The Health and Nutritional Status of Women' in Facets of Change op.cit 58 at 81.

104 See note 47 Supra. recognised, discussed Kirti Singh op.cit] Sri Lanka no restitution of conjugal rights but cruelty can be a basis for divorce under General Law, Kandyan Law and Muslim law; Malaysia, Divorce for cruelty under Law Reform Marriage and Divorce Act 1976.

105 Sri Lanka, Kandyan Law Ordinance 1938, Jaffna Matrimonial Rights and Inheritance Ordinance 1911, Married Women's Property Ordinance 1923; Japan Civil Code 1980, Civil Code 1977 as amended, Republic of Korea, Women's Charter 1961 Singapore.

106 Dowry is prohibited in India, Pakistan and Bangladesh by Dowry Prohibition Acts enacted and or extensively amended in 1986, 1976 and 1984 respectively. Dowry is not prohibited in Sri Lanka, which has egalitarian inheritance laws, see note 105 supra.

107 Sri Lanka, Goonesekere S. `Status of Women in the Family Law of Sri Lanka' in Women at the Crossroads Vikas Publishing House New Delhi (1990) 153; Jilani, H. Legal Status of Women, unpublished Country Study Pakistan ESCAP (1993).

108 Equal Remuneration Act India 1976 discussed in Swaminathan P in Kaneshalingam v ed. Women and Development in South Asia Macmillan New Delhi (1989) 122 at 127. Some countries have equal employment opportunities law which enable women to equal worker benefits: Japan, (Law 1985), South Korea [Act 1988] and Philippines [Act of 1989]. Sri Lanka does not have an Equal Remuneration Act but Labour Codes and Minimum Wages Acts that apply in some sectors mandate payment of equal wages; The Women's Charter 1993 (a policy document) requires management to pay wages to women; Malaysia and South Korea do not have wage laws, Reddy op. cit 116; Asian and Pacific Women's Resources and Action Series: Law op.cit. 139 140.

109 Malaysia, Reddy op.cit. 116-117 [Employment Act 1955, 42 days Civil Service, 60 days Private Sector] Sri Lanka 12 weeks for first two pregnancies for all, but six weeks for new recruits public sector and other pregnancies and more difficult for non-marital pregnancies under Public Administration Circular note 101 supra; Bangladesh Maternity Benefits Ordinance 1939 12 weeks but less for new recruits, India Maternity Benefits Act 1961 amended 1988, 12 weeks with insurance under Employers' State Insurance Scheme, Hong Kong Maternity Ordinance 1981 10 weeks, Philippines Social Security Act 1954, conforms with CEDAW Art 11(2) and ILO Convention No.103 1952 on Maternity Leave and Recommendation No.95, 1952; See also ILO Convention on Workers with Family Responsibilities No.158 of 1982.

110 Colonial Factories Acts, Workmen's Compensation Acts, Shop and Office Employees Acts found in India, Bangladesh, Pakistan and Sri Lanka discussed in Jilani op. cit. Goonesekere S. `The Law and the Economic Status of Women' - Women in Development, Monograph Series (1), Institute of Policy Studies Colombo (1990), Hossein H. and others, `No Better Option? Industrial Women Workers in Bangladesh' University Press Limited Dhaka (1990).

111 Omana Oomen v FACT Ltd. (1991) cited in Kapur R and Crossman B. `On Women Equality and the Constitution' in Feminism and Law (1993) 1 National Law School Journal 1 at 23; See Pakistan and India cases on education notes 66 and 39 supra.

112 Heyzer N and others ed. The Trade in Domestic Workers, Asian and Pacific Development Centre Kuala Lumpur (1994); Heyzer N. Daughters in Industry, Asian and Pacific Development Centre Kuala Lumpur (1988).

113 Sri Lanka Art 11 (torture) India Art 21 (Life) Nepal Art. 14(4) (torture) Art 12(life) Bangladesh Art. 35 (5) (torture) 32 (1) (Life) Pakistan Ar. 9 (Life).

114 eg. Pakistan Article 14.

115 Faiz v Attorney General SC Application 89/91 19.11.1993 (Sri Lanka); Saheli v Commissioner of Police Delhi AIR 1990 SC 513; Padmini v State of Tamil Nadu 1993 Cri. L.J. 2964 (Mad.) Torture Act Sri Lanka (1994).

116 WMK de Silva v Chairman, Ceylon Fertilizer Corporation 1989 2 Sri LR. 393 (a Sri Lankan case, though the conduct was not considered to satisfy the constitutional standard of inhuman degrading treatment. Fernando v Director General Medical Services Sri Lanka. Reported Sri Lanka Daily News 3 July 1993 (suspension from medical internship for making allegations of rape, settled out of court and relief granted).

117 Penal Code India S.375; exception Penal Code Amendment Sri Lanka (1995) S. 363 (e); Penal Code Bangladesh; Sathi Prevention Act 1987 note 65 supra.

118 Whitney v California 274 U.S. 357, 365.

119 note 65 supra.

120 Hongkong, India, Japan, South Korea, North Korea, Malaysia, Thailand as cited Asian and Pacific Women's Resource and Action Series: Law op.cit 123.

121 Rape defined exclusively as vaginal penetration in Penal Codes India, Sri Lanka (until amendment 1995), Bangladesh and Malaysia as amended (1989); Philippines law, considered rape an offence against chastity until a recent proposal House Bill No.32497 as discussed by Women's Legal Bureau Inc. Quezon City, Philippines (n.d.).

122 India, Bangladesh, Pakistan, and also Sri Lanka, until amendment of 1995.

123 Sri Lanka Penal Code Amendment Act (1995) S. 364 A.

124 India Penal Code S. 376 A, Malaysia Penal Code as amended 1989 S.375, Sri Lanka Penal Code as amended (1995) S. 363(e).

125 e.g. Marriage Acts India [divorce for cruelty but restitution of conjugal rights

126 Restraint of Marriage Laws in India, Bangladesh and Pakistan consider the marriage valid and impose penalties for the solemnization contrary to law. Sri Lanka's General and Kandyan law consider the marriage void, but it is valid even if the children are under 12 years under Muslim Marriage and Divorce Act (1951).

127 Penal Code Sri Lanka S.363 until amendment of 1995 which has dropped this requirement. Penal Codes, Bangladesh and India.

128 India, Criminal Law Amendment Act 1983 (shifting Burden of Proof); State of Maharashtra v Chandraprakash 1990 1 SCC 550 Karunasena v Republic of Sri Lanka 1975 78 NLR 65 [Conviction on uncorroborated testimony of victim].

129 S.363 as amended 1995 and Explanation (11) Sri Lanka State of Maharashtra v. Chandraprakash ibid, India.

130 Sri Lanka Penal Code Amendment Act (1995), India Criminal Law Amendment Act 1983.

131 e.g. Women and Law, Frontline December 29, 1999 102.