



Regional Issues Brief:

RIGHTS OF WOMEN AND GIRLS

For the Asia-Pacific Regional Dialogue
of the Global Commission on HIV and the Law

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Download the Report of the Regional Dialogue and four accompanying Issues Briefs at:
<http://asia-pacific.undp.org/practices/hivaids/Publications.html>

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1. Introduction¹

This Regional Issues Brief has been written to provide an overview of an area of enquiry that the Global Commission on HIV and the Law is examining – issues of laws pertaining to rights of women and girls. It has been undertaken through a literature review of laws and documentation of their enforcement in the context of Asia and the Pacific. It serves as an information resource and complements the report of the Regional Dialogue for Asia and the Pacific that was held under the auspices of the Global Commission on HIV and the Law in Bangkok on 16 and 17 February 2011.

Legislation and law enforcement practices can contribute to or ameliorate gender inequality, particularly in areas related to violence protection, family law, property and inheritance. Lack of legal protections for the human rights of women and girls contributes to their lack of power in society generally and in their personal relationships. As a result, women and girls are often less able to insist on fidelity from their partners and less able to negotiate safe sexual practices including condom use effectively.

Many laws contribute to women's vulnerability to HIV, particularly laws that discriminate against women in such areas as family law and inheritance rights. Traditional practices, which may be recognized in customary and religious law, including patrilineal inheritance, polygamy, child brides and bride price can also contribute to the vulnerability of women and girls. Some new laws, policies and practices that have been adopted in response to the HIV epidemic may violate the human rights of women living with HIV, such as mandatory premarital HIV testing laws (e.g. in China and Malaysia) and the practice of non-consensual abortions and sterilization of women living with HIV.

Constitutional provisions in many countries of Asia and the Pacific provide important gender equality protections. However, constitutional provisions for equality are often not enforceable without additional legislation and mechanisms to enable people to claim their rights and to seek protection from human rights violations including violence against women. In much of Asia and the Pacific, women are unaware of their legal rights and lack the means to realize them.

Consultations conducted by UNDP on the Millennium Development Goals have found that one of the key challenges faced by women on accessing HIV services is stigma and discrimination. Women complain of breach of confidentiality and being denied medical services altogether, especially during delivery and postpartum care.² This underscores the need for legal protections from discrimination on the grounds of HIV status and sex.

A number of countries in the region have active women's organizations that have successfully advocated for the passage of laws to protect women's rights (e.g. India, Fiji). However, these laws are often not enforced consistently and women may not be aware of their rights or have the means to enforce them, especially in rural areas where traditions are deeply rooted.³

In 2010, UNIFEM East and South East Asia Regional Office developed a Handbook for legal reviews of country compliance with the *Convention on Elimination of all forms of Discrimination Against Women (CEDAW)*.⁴ This includes useful checklists to assess whether legal responses in areas such as health, violence against women and family law are consistent with human rights obligations. The assessment framework was pilot-tested in workshops conducted in Indonesia and Cambodia in 2009. Annex II reproduces the relevant checklists.

1 For relevant international obligations see: CEDAW General Recommendation No 15 (1990) *Avoidance of discrimination against women in national strategies for the prevention and control of AIDS*; CEDAW General Recommendation No. 24 (1999) (art 12 – women and health); ECOSOC Commission on the Status of Women, Resolution 47/1 (Women the girl child and HIV/AIDS) of 2003.

2 Personal communication, Nashida Sattar, UNDP (Colombo).

3 UNESCAP (2010) *Strengthening National Mechanisms for Gender Equality and the Empowerment of Women: Regional Study – Asia and the Pacific* p.6.

4 Chiongson R. (2010) *Do Our Laws Promote Gender Equality? A Handbook for CEDAW-Based Legal Reviews* Bangkok: UNIFEM. http://cedaw-seasia.org/docs/FINAL_CEDAW_Handbook.pdf

2. Sexual and reproductive health rights

2.1 Rights to access services

Many jurisdictions in the region place legal restrictions on women's access to sexual and reproductive health services. Women with little or no access to sexual and reproductive health services are generally also unable to access female and male condoms, HIV prevention information, HIV and STI treatment, and HIV testing.

Some countries have legislation that enshrines rights of access to certain categories of sexual and reproductive health services. The *Philippine Reproductive Health Bill 2010* provides an example of comprehensive legislation that aims to guarantee universal access to methods and information on birth control and maternal care. The bill includes measures to prevent and treat HIV, including condom distribution. The bill is opposed by the Catholic Church. It was approved by a committee of the Philippines House of Representatives in 2011 and still requires approval by the Senate.⁵

China's *Population and Family Planning Law 2001* guarantees access to certain reproductive health services and mandates the controversial 'one child' policy. Article 19 provides that the State shall create conditions conducive to individuals being assured of an informed choice of safe, effective, and appropriate contraceptive methods. Article 21 provides that couples of reproductive age who practice family planning shall be able to obtain technical services free of charge under the basic items as specified by the State.

In Indonesia, the *Law on Population Development and Development of the Family (2009)* states that every citizen has the right to obtain information and receive education related to their reproductive rights.⁶ The Law also states that the government is responsible for providing information, services, and technology for family planning and educational materials on reproductive health for (prospective) married couples and adolescents.⁷ Contradicting this law, Indonesia's *Criminal Code* criminalizes supplying information to people relating to the prevention and interruption of pregnancy.⁸ Amnesty International has criticized the *Criminal Code* provisions for compromising the ability of services to disseminate age-appropriate information on sexual health and reproduction, contrary to the state's duty to ensure sexual and reproductive health in accordance with international human rights law. Amnesty International argues that these provisions mean that a person giving written or other visual materials for the purpose of sex education or information about sexuality may be found in breach of the law.⁹

Indonesian activists interviewed by Amnesty International in 2010 stated that they felt at risk of being arrested for providing information on contraceptives such as condoms. They also expressed concerns about Indonesia's *Pornography Law*,¹⁰ which they feared could prevent them from disseminating information on sex education. The *Pornography Law* defines pornography to encompass material that "contravenes norms of community morality", and provides for punishment of between four and 15 years of imprisonment for those who produce, disseminate, fund or use such material.

The Indonesian *Health Law, 2009* states that every individual has the right to a healthy and safe reproductive life and sexual life free from coercion and/or violence (however this is only with a lawful partner) and the right to determine his/her reproductive life and to be free from discrimination, coercion and/or violence, subject to respecting noble values and religious norms. Religious norms must also not be contravened while enjoying the right to personally determine when and how often to reproduce in a medically healthy manner. The right also includes obtaining information, education and counselling regarding proper and accountable reproductive health. The *Health Law* obligates the Government to ensure the availability of human resources, infrastructure, equipment and medicines to provide family planning services that are safe, affordable and of good quality.¹¹

Thailand's *National Health Act, 2007* states that a woman's reproductive health shall be harmoniously and appropriately promoted and protected.

5 *Reproductive Health Bill Philippines*: See: Philippine reproductive health bill passes major hurdle. *IRIN News* 1 February 2011.

6 Article 5 of Law No. 52/2009.

7 Articles 20 to 29; See UNESCO (2010) *Education sector response to HIV, drugs and sexuality in Indonesia* Jakarta: UNESCO, p.27.

8 Articles 534, 535 and 283.

9 *Left without a choice: Barriers to reproductive health in Indonesia* (2010) London: Amnesty International.

10 No.44/2008.

11 Bhardwaj K., Divan V. (2010) *Sexual health and human rights - A legal and jurisprudential review of select countries in the SEARO region: Bangladesh, India, Indonesia, Nepal, Sri Lanka and Thailand* International Council on Human Rights Policy. p.145.

In Vietnam, the *Law on Gender Equality 2006* guarantees men and women equal rights in decisions related to the use of contraceptives, family planning and other measures for safe sex. The *Population Ordinance 2003* states that its underlying principles include to guarantee the initiative, voluntariness and equality of each individual and family in birth control and reproductive health care. The *Population Ordinance* enshrines citizens' rights to choose appropriate family planning measures and to access quality and confidential population services. It also requires state agents and officials to create and sustain favorable conditions for family planning, with priority given to marginalized and disadvantaged communities.¹²

The sexual and reproductive rights of women living with HIV may also be restricted by laws that criminalize HIV transmission and exposure (see the Regional Issues Paper on Criminalization) and laws that prevent young people from consenting to testing or treatment without parental consent (see the Regional Issues Paper on Children and Young People).

In relation to women's legal right to access abortion services, Cambodia, China, North Korea, Japan, Mongolia, Singapore and Viet Nam are legally permissive countries, while Bangladesh, Sri Lanka, Lao PDR, Malaysia, the Philippines, Thailand and most South Pacific island countries are legally restrictive.¹³ In Asia, the only countries in which women have legal rights of access to abortion on request are Vietnam, Cambodia, China, Singapore and North Korea. In Singapore, the *Termination of Pregnancy Act of 1974* guarantees women unrestricted access to abortion during the first 24 weeks of pregnancy.

Some countries permit abortions to protect a woman's health.¹⁴ Women living with HIV may be eligible to access abortion services on health grounds in these countries. People living with HIV sometimes face difficulties accessing sexual and reproductive health services. Legal protections from discrimination on the grounds of HIV status can help ensure that people living with HIV have non-discriminatory access to sexual and reproductive health services.¹⁵

2.2 Forced sterilizations and abortions

A study of discrimination in four Asian countries (India, Indonesia, Thailand and the Philippines) by the Asia Pacific Network of People living with HIV/AIDS found:¹⁶

- over 15% of all the females said they had undergone mandatory testing whilst they were pregnant or because of the illness of a child;
- almost one third of the sample (45% of females, 18% of males) was advised not to have children after diagnosis, but only one in five respondents was given information about prevention of parent-to-child transmission;
- a majority of the women who tested whilst pregnant (69%) were advised not to have children and 31% of these said they were coerced into an abortion or sterilization after diagnosis (10 women from India, 17 from Thailand and 5 from Indonesia of a total of 348 women interviewed).

It is unclear whether forced sterilizations and abortions in these three countries had a legal basis. Forced sterilization or abortion is a violation of women's autonomy and fundamental human rights. There are more recent reports from several locations in Indonesia of women living with HIV who are advised to undergo sterilization by their doctors in circumstances in which they feel compelled to comply.¹⁷

12 Cusack S., (2010) *Advancing sexual health and human rights in the Western Pacific*. International Council on Human Rights Policy. p.87.

13 For a summary of relevant laws see the WHO website on unsafe abortion: *Unsafe abortion* <http://www.wpro.who.int/sites/rph/data/abortion.htm>.

14 These jurisdictions include Cambodia, China, Japan, DPR Korea, Republic of Korea, Singapore, Thailand, Taiwan, Vietnam, India, Nepal and Pakistan.

15 See GNP+ (2009) *Advancing the sexual and reproductive health and human rights of people living with HIV: A guidance package*. Amsterdam: GNP+, p.32.

16 APN+ (2004) *AIDS discrimination in Asia*, Bangkok: APN+.

17 Sabarini P. (2010) HIV-positive women resent sterilization advice *Jakarta Post* 11 October 2010.

3. Violence against women and girls¹⁸

3.1 Sexual assault and domestic violence laws

Ratification of CEDAW and the *Convention on the Rights of the Child* obligates states to take legal measures to prevent sexual assault, to protect survivors of assault and to ensure prosecution of offenders. In 1996, the UN Special Rapporteur on Violence against Women recommended *A Framework for Model Legislation on Domestic Violence*.¹⁹ In 2010, the UN published a handbook that proposes an updated *Model Framework* for laws on violence against women.²⁰

The *Social Charter* of the South Asian Association for Regional Cooperation (SAARC)²¹ states that all forms of discrimination and violence against women are offences against human rights and dignity and that such offences must be prohibited through legislative, administrative and judicial actions. Similarly, ASEAN countries²² adopted the *Declaration on the Elimination of Violence in the ASEAN Region* in 2004. This instrument recognizes that that “violence against women both violates and impairs their human rights and fundamental freedoms, limits their access to and control of resources and activities and impedes the full development of their potential”.

A UNIFEM review published in 2009 found that 8 out of 10 ASEAN countries have domestic violence laws.²³ Of the ASEAN countries, only Myanmar and Brunei have not enacted domestic violence laws. The report recommends that comprehensive domestic violence legislation should include provision for:

- easy access for women to remedies, including dispute resolution mechanisms;
- support services for women;
- multi-sectoral coordination, collaboration and engagement;
- training of law-enforcement officials, service providers;
- public awareness campaigns as a preventive measure;
- counseling, as a preventive measure to prevent further violence; and
- monitoring and evaluating the impact of legislation.

Some countries have passed specific legislation addressing other forms of violence against women, such as the *Acid Crime Prevention Act* (2002) and the *Acid Control Act* (2002) of Bangladesh and section 304B of the *Indian Penal Code*, which criminalizes “dowry deaths”.

The following are examples of law reform and law enforcement initiatives to address violence against women:

(i) India

The *Protection of Women from Domestic Violence Act* (2005) directs the Central Government and every State Government to take measures to ensure that the provisions of the Act are given wide publicity through public

18 For an explanation of the relationship between violence against women and HIV, see: UNDP (2010) *Factsheet: Addressing HIV, Gender Equality, and Gender Based Violence*.

19 *Report of the Special Rapporteur on violence against women, its causes and consequences (1996) A framework on model legislation* E/CN.4/1996/53/Add.2. The Rapporteur recommended that laws should recognize domestic violence as gender-specific violence directed against women, occurring within the family and within interpersonal relationships; recognize that domestic violence constitutes a serious crime against the individual and society; create a wide range of flexible and speedy remedies; assure survivors the maximum protection; establish departments, programmes, services, protocols and duties to aid survivors; facilitate enforcement of the criminal laws by deterring and punishing violence against women; enumerate and provide by law comprehensive support services; 9) expand the ability of law enforcement officers to assist complainants and to enforce the law effectively in cases of domestic violence and to prevent further abuses; 10) train judges to be aware of the issue; 11) provide for and train counsellors to support police, judges and the survivors of domestic violence and to rehabilitate perpetrators of domestic violence; and 12) develop greater understanding within the community of the incidence and causes of domestic violence and encourage community participation in eradicating domestic violence.

20 UN Secretariat, Department of Economic and Social Affairs Division for the Advancement of Women (2010) *Handbook for Legislation on Violence against Women*. New York: UN.

21 *Social Charter* (2004). SAARC member states that signed the Charter are Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

22 ASEAN comprises ten countries: Burma, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam.

23 Jaising I, Basu A and Dutta B of the Lawyers Collective Women's Rights Initiative (2009) *Domestic Violence Legislation and its Implementation. An Analysis for ASEAN countries based on International Standards and Good Practices*, UNIFEM 2009. Cambodia: *Law on the Prevention of Domestic Violence and the Protection of Victims 2005*; Indonesia: *Law of the Republic of Indonesia Number 23 of 2004 Regarding Elimination of Violence in Household*; Lao PDR: *Law on Development and Protection of Women 2004*; Malaysia *Domestic Violence Act 1994 (Act 521)*; Philippines: *Anti-Violence Against Women and Their Children Act, 2004*; Singapore: *Women's Charter*; Thailand *Act on Protection of Victims of Domestic Violence 2007*; Vietnam: *Law on Domestic Violence Prevention and Control 2007*.

media, including television, radio and print media, at regular intervals.²⁴ The Act includes measures to protect women from physical, psychological and economic threats (such as dowry harassment).²⁵

(ii) Philippines

The *Anti-Violence Against Women and their Children Act* (2004) adopts a broad definition of unlawful violence, which includes cases of physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty. "Economic abuse" refers to acts that make or attempt to make a woman financially dependent. The Act provides for emergency protection orders. Village officials may issue temporary protection orders ex parte (i.e. the order may be made in the absence of the respondent to the complaint).²⁶ Persons able to apply for a protection order include: the survivor; parents, guardians, and relatives of the survivor; social workers; police officers; village officials; and lawyers, counsellors and healthcare providers of the survivor. Violation of a protection order is a criminal offence.

The Act also requires all agencies responding to violence against women and their children to undergo education and training on: the nature and causes of violence against women and their children; legal rights and remedies of complainants/survivors; services available; legal duties of police officers to make arrests and offer protection and assistance; and techniques for handling incidents of violence against women and their children.²⁷

The *Anti-Rape Law 1997*²⁸ expanded the definition of rape so that it is not limited to penetration of the vagina by the penis. Marital rape is penalized. Rape is reclassified from a crime against chastity to a crime against the person. A prosecutor may file a complaint even without the consent of the woman who has been raped. Rape crisis centres established under the *Philippine Rape Victim Assistance and Protection Act 1998*²⁹ provide free legal aid.

(iii) Indonesia³⁰

The *Law on Elimination of Domestic Violence, 2004* is gender-neutral while recognising that victims of violence in the household are mostly women. The Law states that it is based on principles of respect for human rights, justice and gender equality, non-discrimination and victim protection. Article 5 of the law prohibits physical, psychic and sexual violence and negligence of the household. The law entitles victims to confidentiality and protection of law enforcement, courts, health services, social workers and spiritual guidance. The law requires the government to provide special rooms at police stations, to provide health personnel, and arrange for the protection of witnesses and family members. Within 24 hours of knowing or receiving a report on violence the police are required to provide temporary protection (which may extend up to 7 days).

According to the Indonesian National Commission on Violence Against Women, reporting on domestic violence increased significantly since the enactment of the *Law on Elimination of Domestic Violence*, reaching more than 20,000 in 2007. The Commission reports that the law is being actively used by women's groups, police units and courts, although 30-40% of domestic violence cases are still being addressed through religious courts.³¹

(iv) Singapore

Measures to combat violence against women include evidentiary procedures protecting the privacy of victims, the 1997 amendment to the *Women's Charter* which broadened the definition of violence, and a multidisciplinary and inter-agency approach to victims of family violence involving the courts, police, hospitals and social service agencies.

The *Women's Charter (Amendment) Bill 1996* defines family violence to include:

- wilfully or knowingly placing or attempting to place a family member in fear or hurt;
- causing hurt to a family member by such act which is known or ought to have been known would result in hurt;
- wrongly confining or restraining a family member against his/her will; and
- causing continual harassment with intent to cause or knowing that it is likely to cause anguish to a family member.

²⁴ Article 11.

²⁵ *Protection of Women from Domestic Violence Act 2005* (India).

²⁶ Section 14.

²⁷ Section 42.

²⁸ *Republic Act 8353*.

²⁹ *Republic Act 8505*.

³⁰ Bhardwaj K., Divan V. (2010) *op cit* pp.86-87.

³¹ *Indonesia's compliance with the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Issues for Discussion with the Committee Against Torture, Submitted by National Commission on Violence Against Women, Jakarta, April 2008.*

The Court can issue a Personal Protection Order based on a finding “on the balance of probabilities” that family violence has occurred or is likely to occur (rather than the more onerous “beyond reasonable doubt” test).

(v) *Vietnam*

Vietnam has enacted a comprehensive *Law on Domestic Violence Prevention and Control* 2008.³² The perpetrator, depending on the severity of the violation, may be fined as a civil violation, disciplined or charged with a criminal offence and be required to compensate for damage caused.

The Law requires the State to allocate an appropriate budget for domestic violence prevention and control activities; encourage institutions, organizations and individuals to provide financial support for domestic violence prevention and control; develop domestic violence prevention models and assist the victims; encourage research and production of literature and art works on domestic violence prevention and control; and to organize and assist the training of officials involved in domestic violence prevention and control.

The State is required to encourage and facilitate individuals and organizations to establish domestic violence victim support and counseling facilities; provide financial support to some supporting and counseling facilities. The Law supports use of reconciliation at the family and village level to resolve disputes.

(vi) *Pacific region*

The Pacific Islands Forum Secretariat developed a model law (*Sexual Offences Model Provisions*) in 2005. The model provides that traditional forms of reconciliation are not to be taken into account by judges in sentencing an offender for a sexual offence. A subsequent review of case law from Vanuatu, where traditional reconciliation processes are taken into account, concluded that customary reconciliation gives rise to potential injustice to female victims.³³

An academic review by Forster in 2009 examined sexual offences provisions in 15 Pacific island countries.³⁴ The review found that all have laws addressing sexual assault, but retain outdated models, adopted from the colonizing countries, that are based on notions of morality rather than the protection of women and children. The exception is Papua New Guinea, which introduced a contemporary sexual offences framework in 2003³⁵. The review found that most criminal legislation in the countries reviewed did not uphold the autonomy, dignity and physical integrity of girls and women. Forster concluded that the introduction of a good practice model in Papua New Guinea coupled with a recent region-wide focus on violence against women provides a platform for law reform in Pacific Island countries. Since the review was conducted, Fiji has updated its sexual assault laws through the *Crimes Decree 2009*.³⁶

Forster observed that sexual assault frameworks in common law countries are still dominated by a three-tier approach to sexual offences provisions, consisting of penile rape, indecent assault and a series of ‘defilement’ provisions for offences against girls. This three-tier model is critiqued on the basis that it does not appropriately grade the range of violations that women and children typically experience and excludes many of the harmful contexts in which sexual assault occurs.

An earlier review of legislation in the Pacific islands recommended that laws for protection of women from sexual violence incorporate the following features:³⁷

- A range of offences should be defined, covering all the ways women are violated (not limited to penile penetration).
- There should be no exemption for marital rape.
- There should be no defence of honest and reasonable belief that the victim is of legal age.
- Consent should be comprehensively defined to include absence of threat or any form of coercion.
- Prior sexual conduct of the victim should not be taken into account.
- Domestic violence legislation should include restraining orders and specific offences.

32 Available at: http://www.unaids.org.vn/sitee/images/stories/documents_for_resources/domestic_violence_law__english.pdf

33 Swamy A. Customary Reconciliation in Sentencing for Sexual Offences in Vanuatu. *Journal of South Pacific Law* (2008)12(1).

34 The article examined all island countries except the French territories. Forster C., (2009) *Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards* Melb University Law Review 28.

35 *Criminal Code (Sexual Offences and Crimes against Children) Act 2002* (PNG), amending *Criminal Code Act 1974* (PNG).

36 Section 210.

37 Jivan, V. and Forster, C. (2007), *Translating CEDAW into law: CEDAW legislative compliance in nine Pacific island countries*, UNDP Pacific Centre and UNIFEM Pacific Regional Office.

(vii) Papua New Guinea (PNG)³⁸

PNG has extremely high incidence of violence against women, including violence perpetrated by police and military. The *National Gender Policy and Plan on HIV and AIDS* describes the situation:³⁹

“In the national study of sexual behaviour, 60% of men interviewed reported having participated in a gang rape, (known as line-ups), at some time in their lives, involving an average of ten men at a time. In a study of 82 male youth, 31% of males had participated in gang rape, the majority of them numerous times. Forty per cent had forced women to have sex when acting alone. Another study of youth found that 24% of males admitted to taking part in line-ups, and a 1997 study of police found that 10% had participated in a line-up in the previous week. Line-ups with sex workers or coerced girls were a very regular occurrence in the barracks...The police continue to treat wife-beating as a “family matter”; male-dominated village courts offer no protection to beaten wives and treat rape as a matter for compensation to the victim’s male relatives; the Health Department has no national policy or procedures on domestic violence, rape or child abuse; there are very few support services for women and children who have been beaten, raped or sexually abused and virtually none in rural areas; “safe houses” or “shelters” where victims and their children are almost non-existent outside Port Moresby; few workplaces have policies on sexual harassment; and VCT counsellors have minimal, if any, skills or referral systems for supporting clients dealing with violence.”

In response, comprehensive sexual assault legislation has been enacted. Sexual offences provisions are divided into penetrative and non-penetrative offences. Rape is broadly defined to include ‘sexual penetration’. A residual category of sexual assault is included for non-penetrative sexual violations, explicitly defined to encompass any sexual touching without consent and therefore not requiring use of force.

Forster notes that the rationale advanced when PNG’s *Sexual Offences and Crimes Against Children Bill* was presented to Parliament provides a strong basis for similar reform in the region.⁴⁰ The rationale for the Bill was:

- (i) the reforms created the opportunity to remove and replace the colonial origins of the previous law, which was not reflective of local culture and tradition;
- (ii) the reforms enabled PNG to meet some of the international obligations created by ratification of CEDAW and the Convention on the Rights of the Child (CRC) and at the same time provided the opportunity to introduce a contemporary human rights approach to sexual violations against women and children;
- (iii) such an approach had already been integrated into the criminal legislation of Commonwealth countries, including the former colonizers, and that the reforms provided PNG with an opportunity to join Commonwealth countries on an equal footing; and
- (iv) the reforms acknowledged the important role of Parliament in ‘shaping the changing values of PNG’ and ‘re-defining the limits of acceptable behaviour’.

Forster argues that benefits of other countries adopting good practice sexual offences provisions include that it would: remove the colonial origins of the current law, which is not reflective of local culture and tradition; enable states to meet their international obligations created by ratification of CEDAW and the CRC and to introduce a contemporary human rights approach to sexual violations against women; clarifying confusion in relation to the concept of consent; and provide a strong public statement of the value system that should govern sexual relations and send a clear message that sexual intercourse must be by free agreement and that the person seeking consent has the responsibility to take steps to ascertain consent exists.⁴¹

Although PNG has comprehensive laws for sexual offences, it lacks specific legislation to address domestic violence.

A review conducted for AusAID found that the following action is being taken to address violence against women:⁴²

- PNG’s *Law and Justice Sector Gender Strategy* (2006) aims to increase women’s access to justice. Activities include gender training for prosecutors and magistrates, piloting a court accompaniment program for survivors of rape, setting aside one day a week in the National Court to hear sexual offence cases, and updating Village Court policy to include family and sexual violence.
- The national Family and Sexual Violence Action Committee, provincial councils of women, and Stop Violence

38 See: Lewis, I., Maruia, B., Mills, D et al (2008) *Report on Links Between Violence Against Women and the Transmission of HIV in 4 Provinces of PNG*, PNG National AIDS Council Secretariat.

39 PNG National AIDS Council (2006) *National Gender Policy and Plan on HIV and AIDS 2006-2010*.

40 Forster C., (2009) *Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards*. *Melbourne University Law Review* 28.

41 Ibid.

42 AusAID (2010) *Scoping Study: HIV legal and policy enabling environment: PNG and the Pacific*. Canberra: AusAID Health Resource Facility.

Centres in hospitals engage in awareness activities to improve women's knowledge of legal rights to violence protection. National Department of Health is setting up Stop Violence Centres in hospitals to provide care and legal support to women to lodge court complaints.

- The Department for Community Development and UNIFEM are working together in a pilot program to educate communities, leaders, health service providers, legal aid organisations, the police and the judiciary about sexual violence legislation. PNG Government convenes a Family and Sexual Violence Action Committee, which coordinates Stop Violence Centres and the establishment of Family and Sexual Violence Action Committees at provincial centres.

A UNIFEM report in 2006 was highly critical of the response of Village Courts to violence against women:

- Village courts, responsible for protecting women and children at the local level, are frequently manipulated. Many of these courts are comprised of older men who are conservative, and un-informed on women's and children's rights. The Village Court ... has little or no impact on high levels of gender violence.⁴³

A study by Garap found that Village Courts in PNG discriminate against women:⁴⁴

- Court proceedings are intimidating, and women feel they cannot speak freely.
- Most of the magistrates are men, trained poorly or not at all, and sometimes not even properly appointed.
- A woman's word is often not accepted.
- The courts often do not give people, particularly women, the right to speak, nor do they always listen to both sides as they are supposed to.
- Male offenders are not punished. Sexual assaults are often referred to the village courts where they are resolved merely by compensation payments. Even when rape cases do go to the police, the accused are frequently granted bail.
- Women are often blamed for rape or marital problems because of traditional patterns of thought.
- The courts often enforce traditional attitudes and values which are oppressive for women and young people.

(viii) Fiji Islands

The Fiji Police Force has a 'no drop' policy for domestic violence complaints. This policy is designed to ensure that complaints of domestic violence are investigated by police and proceed to court, and to remove possible pressure on women to drop complaints. Police are not permitted to drop the prosecution even if the woman is unwilling to pursue a prosecution. The Fiji Police Force supports survivors of sexual assault through its Sexual Offences Units by taking statements of survivors, transporting survivors to hospitals and health centers for medical checks and treatment, and making referrals to agencies for services such as counseling and emergency housing.⁴⁵

The Family Law Court provides counseling and redress for women and children survivors of violence. Legal aid is available for women who have experienced violence. The Legal Aid Commission provides training to women and men at the community level on the *Family Law Act* 2003. Under the *Family Law Act* 2003 restraining orders may be issued to protect women and police have the power to arrest and detain a man for breaching an order for up to 48 hours before he is brought before the magistrate. A court may grant an injunction under the *Family Law Act* following an *ex parte* application by the complainant/survivor.

Fiji Women's Crisis Centre comments:

Implementation of the *Family Law Act* in Fiji has improved protection for women through the use of restraining orders. However, the overall approach taken by court counselors favors reconciliation, even in cases of extreme violence. This approach to resolving custody and maintenance disputes systematically undermines women's rights. Other challenges include lack of action and delays by all service-providers including the police in dealing with victims/survivors of violence, and a lack of enforcement of Family Court orders by the Police, some of whom remain unaware of the most basic provisions of the new legislation and their responsibilities for implementation.

There is no legislation specifically legislating against the use of customary or traditional forgiveness ceremonies affecting sentencing and punishment. Traditional forgiveness ceremonies are still implicitly used to legitimize violence, and justice agencies widely encourage forgiveness and reconciliation, both in the informal or village courts,

43 UNICEF (2006) *Families and children affected by HIV/AIDS and other vulnerable children in Papua New Guinea*. UNICEF PNG, p.48. http://www.unicef.org/eapro/PNG_Families_and_Children_affected_by_AIDS.pdf

44 Garap S. (1999) The struggles of women and girls in Simbu Province *Development Bulletin* 47-50. <http://devnet.anu.edu.au/DB50PDF/12garap50.pdf>

45 AusAID Office of development effectiveness (2008) *Violence against women: Fiji country report*. Canberra: AusAID.

or the national level courts which administer formal law. The effect of this is that there is either no prosecution, finding of guilt and punishment deserving of the crime or the forgiveness is used to lessen the punishment. Fiji Women's Rights Movement argues that sexual assault legislation should forbid the use of ceremonies of forgiveness, to influence prosecution, the trial and sentencing; and domestic violence laws should grant authority to trained 'authorized persons' in remote villages to give special temporary protection orders to women who are being beaten and make it illegal to use culture, custom or the payment of compensation as a defense to a prosecution or the granting of protection orders.⁴⁶

There is no specific domestic violence legislation in Fiji.

(ix) Australia and New Zealand

Australia and New Zealand have well developed domestic violence and sexual assault legislation. There are also protocols in place in relation to the rights of victims of sexual assault to access Post-exposure Prophylaxis (PEP) for HIV transmission if the circumstances of a sexual assault suggest a risk of HIV transmission may exist. A report commissioned by Government of Australia in 2009 provides a detailed analysis of domestic violence laws in Australia and New Zealand.⁴⁷

3.2 Marital rape

The rape offence in some countries does not apply to rape within marriage. Law reform to criminalize rape in marriage is sometimes opposed by male community leaders on the basis that wives are considered to be the property of their husbands, and forcing sex on them is consistent with traditional practices.⁴⁸

Jurisdictions that have made spousal rape a criminal offence include Australia, China, Fiji, Hong Kong, Malaysia, Nepal, New Zealand, Philippines and Taiwan.

Countries that have not yet made spousal rape a criminal offence include Afghanistan, Bahamas, Brunei Darussalam, India, Mongolia, Pakistan, and Sri Lanka (except in cases of separation). In India, there are civil remedies for spousal rape. Married women generally have no legal protection against domestic violence in jurisdictions where marital rape is not a criminal offence. Laws of Bangladesh and Sri Lanka provide an offence for rape in marriage only where the wife is below a certain age. In Bangladesh, marital rape is only recognised if the wife is below the age of 13 and in Sri Lanka if the wife is below the age of 16.

In Nepal, the Supreme Court has found that international conventions signed by Nepal require marital rape to be an offence. Interpreting marital rape as a crime, the Court held:⁴⁹

If an act is an offence by its very nature, it is unreasonable to say that it is not an offence merely because of difference in person committing the act...There is no justification in differentiating between the women who are wives and other women. Such discriminatory practice is against the provisions of the *Convention on the Elimination of All Forms of Discrimination against Women*... No law can be interpreted against provisions of the Constitution and treaties and international instruments to which Nepal is a party. Therefore, to exempt an offence of rape committed to one's wife by the husband is against recognized principles of justice.

3.3 Disclosure of HIV status and violence against women

A report of a UNAIDS/UNIFEM consultation in South Asia observed that violence can be both a contributing cause and consequence of women's HIV diagnosis. An HIV diagnosis may be associated with escalation of violence against women, especially by family members of the husband. This is especially so after the death of the spouse/partner. The practice of testing women accessing antenatal services means that women are often the first in the family to be diagnosed and can easily be blamed by the family. The consultation concluded that:⁵⁰

- there is a need for an emphasis on the principle of informed consent to testing and the respect for the right to information and confidentiality;
- policies on partner notification cannot be coercive. Notifying a partner may lead to escalation of violence and the woman being thrown out of the matrimonial home;
- the gender dimensions of policies relating to testing and confidentiality needs to be highlighted.

46 Shadow NGO Report on Fiji's Second, Third and Fourth Combined Periodic Report to the Committee on the Elimination of Discrimination against Women for submission to CEDAW's 46th Session 28th July 2009.

47 The National Council to Reduce Violence against Women and their Children (2009) *Domestic violence laws in Australia* available at: http://www.fahcsia.gov.au/sa/women/pubs/violence/np_time_for_action/domestic_violence_laws/Documents/Domestic%20Violence%20Laws%20in%20Australia%20-%20June%202009.pdf

48 Godwin J. (2010) *Enabling legal environments for effective HIV responses: a leadership challenge for the Commonwealth*. Brighton: International HIV Alliance and Commonwealth HIV and AIDS Action Group.p.21.

49 *Meera Dhungana for Forum for Women, Law and Development v. HMG/Nepal*, Supreme Court Bulletin, 2059 (2002), Vol. 5, p.13.

50 UNAIDS and UNIFEM (2005), *The gender dimensions of HIV/AIDS: challenges for South Asia*, New Delhi: UNAIDS.

4. Inheritance rights

4.1 Overview

There is great diversity in inheritance rights of women and girls across the region. Historically, inheritance laws disadvantaged females in most countries. Some jurisdictions have made recent efforts to promote gender equality through reform of inheritance laws. Legislation regarding rights of inheritance can ensure women are left with a fair share of the estate should their husband or partner die first. This can be important in the context of an HIV epidemic where women bear significant financial burdens in caring for and supporting their families should their husband die. A woman's HIV vulnerability may significantly increase if she is left financially destitute after her husband's death.

Many countries have constitutional guarantees of equality and non-discrimination on the grounds of sex. However, these constitutional protections are often subject to pre-existing customary laws in relation to personal legal matters, such as inheritance. Customary laws govern the lives of most people living in the Pacific islands and many communities in Asian countries, particularly in rural areas. Customary laws often legitimate male dominance in public and domestic affairs, rather than equality. Courts are often required to strike a balance between formal law and customary practices. With appropriate legal frameworks in place, courts can reconcile conflicts while preserving the operation of non-discriminatory aspects of customary law.

Two legislative approaches for ensuring that a widow has access to an adequate share of her husband's estate are:

- family provisions legislation, which can ensure that the widow is provided for out of the estate of her husband even if the husband's will has left the whole or most of the estate to others;⁵¹
- statutory legacies, which can ensure that a widow is left a substantial share of her husband's estate when there is no will.

4.2 Asia⁵²

(i) Bangladesh⁵³

The *Succession Act of 1925* provides equal inheritance between sons and daughters. According to Islamic law, daughters inherit half as much as sons. In principle, wives are entitled to half of the assets of a deceased husband. Under Hindu law, a widow inherits the same share as a son.

(ii) China

Under the *Inheritance Law*, women have equal inheritance rights. China has engaged in significant legal reforms to protect women's rights since the 1990s. The *Inheritance Law* guarantees the inheritance rights of widows.⁵⁴

(iii) India⁵⁵

The 2005 amendment to the *Hindu Succession Act, 1956* promotes gender equality. The Act addresses inequalities in relation to agricultural land; joint family property; parental dwelling house; and widow's rights. Hindu women's inheritance right in land is legally equal to men's, overriding any inconsistent state laws. Daughters are included as copartners in joint-family property, with equal rights as sons to shares, to claim partition and to become managers. All daughters have the same rights as sons to reside in or to seek partition of the family dwelling house. The amendment also removed the prohibition on widows from inheriting the deceased's property if they had remarried.⁵⁶ The Muslim population follows *Sharia* inheritance rules, under which daughters inherit half as much as sons.

(v) Nepal

Nepal reformed its inheritance and property law in 2002, conferring equal rights to men and women. Inheritance

51 Some Pacific island countries have family provision laws, such as Part VI *Wills Probate and Administration Act* (Cap 291) (PNG); Part IV *Administration Act* (Samoa); Part VII *Wills Probate and Administration Act* Cap 33 (Solomon Islands); *Inheritance (Family Provision) Act 1938* (UK) (may apply in Kiribati and Tuvalu).

52 OECD Social Institutions and Gender Index <http://genderindex.org/>; Swaminathan, H., Bhatla, N and Chakraborty S. (2007) *Women's Property Rights as an AIDS Response: Emerging Efforts in South Asia* International Center for Research on Women (ICRW); ICRW (International Centre for Research on Women) (2006), *Property Ownership & Inheritance Rights of Women for Social Protection – the South Asia Experience, Synthesis Report of Three Studies*, ICRW, Washington, DC; *The Status of CEDAW Implementation in ASEAN Countries and Selected Muslim Countries* IRAW Asia Pacific Occasional Papers Series No. 1.

53 <http://genderindex.org/country/bangladesh>

54 <http://genderindex.org/country/china>

55 See: Swaminathan H. et al (2007) *Women's property rights as an AIDS response: emerging efforts in South Asia*. ICRW.

56 Cheema, H., Cheema, S. (2009) Gender justice: reflections from Asia. *QLCian* 2009 pp.119-121. (Quaid-e-Azam Law College).

rights of daughters, widows and divorced women are now recognised. Implementation faces many challenges, as traditionally women held little property and inheritance practices were closely linked to marital status.⁵⁷

(vi) *Pakistan*

The *Married Women's Property Act, 1874*, entitles married women to separate property. Similarly, the *Transfer of Property Act, 1882*, confers equal rights upon women to engage in sale, mortgage, lease, gift and transfer deals of immovable property. However, gender inequality in ownership is the norm:

In reality, Pakistani women are deprived of their legitimate property rights. A combination of factors such as harmful customary practices, social inhibitions, distorted version of Islamic provisions on inheritance, and unequal power structures prevent Pakistani women from exercising their due rights.⁵⁸

For most of the population, inheritance practices are largely governed by Islamic *Sharia* law. Women's share is generally smaller than to which men are entitled. A daughter in a family inherits one third while son is entitled to two-third share of the property. Furthermore:

The social status attached to property and land often makes it difficult for widows and daughters to inherit even their entitled shares, as they may face opposition from the deceased man's relatives.⁵⁹

Islamic inheritance law can be revised through *ijtihad* (interpretation of Quranic injunctions on the basis of contemporary circumstances by Islamic scholars) to promote gender equality.

(vii) *Sri Lanka*

Sri Lanka's Constitution provides for equal inheritance rights for men and women. Sri Lankan women enjoy the freedom to exercise their right to property and inheritance. Based on the general law, they have the freedom to acquire, retain and dispose of property. They are also entitled to equal inheritance rights as men under the *Married Women Property Ordinance, 1923*. However, women in certain communities face restrictions in exercising their property rights. A Tamil woman requires the written consent of her husband to dispose of any immovable property (Matrimonial Rights and Inheritance, 1911).⁶⁰ In communities where Islamic law operates Muslim women are typically granted smaller inheritance shares than men and daughters inherit half as much as sons. UNESCO reports that males are also given precedence over females in inheritance of agricultural land.⁶¹

(viii) *Vietnam*⁶²

The *Civil Code* provides men and women with equal opportunities to write a will or inherit property. However, if a person dies without a will, the law requires an equal distribution of property among the next of kin. In practice, the general custom is for the eldest son to inherit the parental home and the largest portion of land. Younger sons will often inherit some land or other assets of value, while daughters receive only small symbolic items. Matrilineal customs prevail in some highland groups.

4.3 Pacific island states

Customary inheritance laws often favor men, and these laws are generally applied or taken into account by courts in the Pacific islands.⁶³ A review of nine Pacific island countries (Marshall Islands, Federated States of Micronesia, Fiji, Papua New Guinea, Solomon Islands, Samoa, Vanuatu, Kiribati and Tuvalu) found that these countries give constitutional status to customary law in relation to land, which may result in discriminatory outcomes for women in inheritance and property ownership.⁶⁴

Customary land comprises 97 per cent of Papua New Guinea. Members of the clan acquire ownership rights through inheritance. There are two customary tenure practices:⁶⁵

- Patrilineal: the ownership rights to land are inherited from the male ancestor and pass down the male lineage. When women marry they become entitled to use the husband's clan land.
- Matrilineal: the ownership rights to land are inherited from the female ancestor and pass down the female lineage. When men marry they become entitled to use their wife's clan land.

57 Ibid, and see <http://genderindex.org/country/nepal>.

58 Ibid (Cheema and Cheema).

59 Ibid.

60 Ibid.

61 <http://www.genderindex.org/country/sri-lanka>

62 <http://genderindex.org/country/viet-nam>

63 UNDP Pacific Centre and UNAIDS (2009) *Enabling effective responses to HIV in Pacific island countries: options for human rights-based legislative reform*. Suva: UNDP.

64 Jivan, V. and Forster, C. (2007) *Translating CEDAW into law: CEDAW legislative compliance in nine Pacific island countries*, UNDP Pacific Centre and UNIFEM Pacific Regional Office.

65 Department of Lands, PNG, see: http://www.lands.gov.pg/Services/Land_Administration/LA_Services/Land_Acquisition/Land_Tenure.htm

5. Family laws

5.1 Mandatory pre-marital HIV testing

Pre-marital HIV testing is a mandatory legal requirement in Malaysia and some districts of Yunnan Province of China. In 2006, the Yunnan provincial government enacted laws requiring mandatory premarital HIV testing in particular high prevalence areas.⁶⁶

In Malaysia, mandatory premarital testing began at the initiative of the Johor State Religious Department in 2001 and is required nationally since 2009. Marriage is allowed if a person tests positive. Serodiscordant couples are discouraged from marrying through counseling provided by the State Religious Department.⁶⁷

In Cambodia, the *Implementing Guidelines of the 2003 HIV/AIDS Law* give parents the right to insist on mandatory premarital testing. Although this is officially voluntary, OSI report that in practice HIV testing is widely mandated as a requirement by parents of prospective spouses in arranged marriage negotiations. OSI also reports that several states of India have debated proposals for mandatory premarital HIV testing.⁶⁸

Little is known about the health consequences of premarital testing and no regional or international guidelines exist.⁶⁹ OSI comments:⁷⁰

There is concern that mandatory premarital testing will not assist vulnerable populations, such as sex workers and people who use drugs. These groups are particularly concerned about their status and fearful of exposure, and may avoid being tested. Studies from China... indicate that fears about compromised confidentiality lead those most vulnerable to infection to eschew premarital testing... There appears to be a growing industry in fake HIV certificates showing a false negative status. Cases of couples offering fake HIV certificates have been documented in... Malaysia. HIV testing can carry risks for women, including violence and stigma. Rates of non-disclosure are especially high among women seeking antenatal care... Pregnant women who test positive for HIV may be subjected to abuse or discrimination by partners or health care providers. In Southeast Asia, between 3.5 to 14.6 percent of women reported a violent reaction from their partner following disclosure of their HIV status... In a study in India, 12 out of 52 women who disclosed their results to their partner were beaten or abused by their in-laws, and 18 of 52 were no longer allowed to do housework.

5.2 Other marriage and divorce laws

Marriage laws

Marriage laws of traditional and religious communities often perpetuate gender inequalities through recognizing child brides, polygamy and dowries/bride price. UNIFEM promotes marriage laws with the following features:⁷¹

- (i) women and men have equal rights to enter into marriage;
- (ii) an equal minimum age of 18 years for marriage;
- (iii) personal consent of both spouses required to a marriage;
- (iv) where parental advice or consent is needed, the consent of both parents is given equal weight;
- (v) bigamy, polygamy and dowry is prohibited;
- (vi) registration is required of marriage in an official registry;
- (vii) husband and wife are equal in the ownership, acquisition, management, administration, enjoyment and disposition of property.

66 Yunnan Provincial HIV/AIDS Prevention and Treatment Regulations 2006, reg.23. Health Policy Initiative (2008) *Assessment of the HIV Legal Environment: Yunnan, China October 13–30, 2008*. USAID HPI. p.11.

67 OSI (2009) *Mandatory premarital HIV testing: An overview*. New York: OSI.

68 *Public Health Fact Sheet Women and HIV Testing: Policies, Practices, and the Impact on Health and Human Rights*. New York: OSI Law and Health Initiative.

69 Burns K (2010) *Mandatory Premarital Testing: A gender analysis*. Poster presentation XVII International AIDS Conference. <http://pag.aids2010.org/PDF/5752.pdf>; and see *Premarital HIV testing bibliography* http://kelinkeny.org/wp-content/uploads/2010/10/premarital-hiv-testing-bibliography_20100513.pdf

70 OSI (2009) op cit.

71 Chiongson R. (2010) *Do Our Laws Promote Gender Equality? A Handbook for CEDAW-Based Legal Reviews* Bangkok: UNIFEM

The minimum legal age of consent to marriage varies across the region. The age of marriage is 18 years in the Philippines and Singapore, except where the marriage is contracted under religious law. In such cases, a boy or girl as young as 15 or 16 respectively can marry. In Fiji, Japan, Malaysia, the Marshall Islands, Papua New Guinea, Samoa and Vanuatu, the minimum age of marriage is 18 years for boys and 16 years for girls, and in Viet Nam the minimum age is 20 for boys and 18 for girls. Marriageable ages include the Cook Islands (16 years), Hong Kong (16 years), the Solomon Islands (15 years) and Tuvalu (16 years). China encourages late marriage (22 for boys and 20 for girls) subject to exceptions. Laws that specify the same minimum legal age of marriage for boys and girls help to discourage child marriage by helping to ensure that girl children are not prepared prematurely for marriage by being stereotyped into subordinate, childbearing or childrearing roles.⁷² It needs to be appreciated that laws alone will not prevent the practice of child marriage, which occurs throughout South Asia despite legal prohibitions. Bangladesh has rates of child marriage even though there are provisions for punishment of the persons involved in child marriages.

Several countries in the region prohibit polygamy under their secular laws, while permitting polygamy under customary laws (e.g. Kiribati, Papua New Guinea, the Solomon Islands and Tuvalu) or religious laws (e.g. Malaysia, the Philippines, and Singapore).⁷³ Bigamy is prohibited in India but under most personal laws it is not prohibited for Muslims. In Sri Lanka the *Muslim Marriage and Divorce Act, 1951*, recognises the right of Muslim males to enter into polygamous marriages. In Bangladesh, polygamy is allowed for Muslims and reportedly for Hindus.⁷⁴

In Indonesia, the *Marriage Law*⁷⁵ may perpetuate gender inequalities by stating that men are positioned as breadwinners and heads of households and women as managers of households. The Law prohibits the practice of polygamy except in cases where both women give their written permission and when a court has allowed the second marriage to take place. Polygamous marriages can only occur where the first wife either cannot fulfill her sexual obligations to her husband, or cannot conceive a child, or suffers from an incurable disease.⁷⁶

Divorce and relationship separation laws

Good practice is represented by 'no fault' divorce laws (eg *Family Law Act 2003* (Fiji)), and laws that guarantee women's equal rights to share in property after separation and recognize women's non-financial contributions to a marriage. Loss of financial security after marital breakdown can contribute to women's HIV vulnerability. Some women turn to sex work to supplement income or exchange sex for goods and services. Loss of property after divorce can cause great hardship if the wife has the added burden of caring for children or elderly relatives.

Women are disadvantaged in property disputes if legal title to property is in the husband's name and the law fails to recognize women's non-financial contributions to a marriage. Legislation regarding division of marital property after divorce should require recognition of a woman's non-financial contributions during a marriage, such as raising children, caring for elderly relatives and household duties.

Even where there has been legislative reform, such as in Vietnam, India and Nepal, actual access to property and inheritance rights is difficult for women and girls due to a range of factors including non-accessibility of legal services and the gendered nature of judicial systems.⁷⁷ An analysis of cases where people living with HIV accessed legal services indicates that, of the increasing proportion of women whose legal rights are affected by HIV status, the largest number were young, dependent and widowed at an early age. Many of them are thrown out of their marital homes and deprived of their property rights and maintenance.⁷⁸

In Cambodia, the 1989 *Marriage and Family Law* sought to eliminate gender discrimination in the law by giving women the right to choose a spouse, enter into and dissolve their marriage. However, the provision requiring a reconciliatory process to be undertaken before a divorce request can be granted has posed many problems for women, especially for those in abusive relationships seeking a divorce, due to the delay and cultural biases of the authorities.⁷⁹

72 Cusack S., (2010) *Advancing sexual health and human rights in the Western Pacific*. International Council on Human Rights Policy. p.35.

73 Ibid.

74 Bhardwaj K., Divan V. (2010) *Sexual health and human rights - A legal and jurisprudential review of select countries in the SEARO region: Bangladesh, India, Indonesia, Nepal, Sri Lanka and Thailand* International Council on Human Rights Policy. pp.72-73.

75 No.1, 1974.

76 Article 4.

77 UNAIDS and UNIFEM (2005) *The gender dimensions of HIV/AIDS: challenges for South Asia*, New Delhi: UNAIDS.

78 PWN+ (2005) *Positive Speaking: Voice of Women Living with HIV*. New Delhi: CFAR/PWN+/UNIFEM.

79 *The Status of CEDAW Implementation in ASEAN Countries and Selected Muslim Countries* IRAW Asia Pacific Occasional Papers Series No. 1

In Nepal, *Country Code Eleventh Amendment Act, 2002* eliminated many discriminatory provisions and recognizes women's property rights, right to abortion, rights in marriage and divorce. The Act:⁸⁰

- (i) Establishes a wife's equal right to her husband's property after marriage.
- (ii) Gives a woman the right to seek divorce from her husband if he harasses her physically or psychologically; if he establishes sexual relationships with other women; if he is incapable of producing children; or if he is affected by a sexually transmitted disease including HIV.
- (iii) Provides that in case of divorce, property must be partitioned between husband and wife. The wife does not have to return her property to the divorced husband, if she remarries with other man. However, if she does not have any child, she should return her property to her divorced husband's child or to her divorced husband.
- (iv) Provides that a divorced woman has the right to receive monthly alimony from her divorced husband on the basis of his property and level of his earning.
- (v) Grants the right to food, clothing, appropriate education, and healthcare is granted to daughters, as is the case for sons.
- (vi) Raises penalty for polygamy.
- (vii) Lifts the minimum age for marriage to 20 years, which is the same for both women and men wishing to marry without parental consent. A couple can marry at the age of 18 with parental consent.

In Vietnam, an amended *Law on Marriage and Family* took effect from 2001 and ensures that a wife has the same rights as her husband in acquiring, using and settling common property. In cases where the property is owned by both husband and wife, to protect women's interests ownership must be registered and the names of both parties must be written down in the ownership certificate.⁸¹ Common property of the couple is to be divided into two halves.⁸²

Most countries of South Asia, and Malaysia and Indonesia, have separate systems of family law for Muslims and non-Muslims (separate systems of family law also apply for other religious communities, such as Hindus in India). Muslim women may be disadvantaged by *Sharia* principles that often favor men in property disputes e.g. divorced women have very limited rights to financial support from their ex-husbands (three months) and rights to maintenance can be lost due to misconduct.⁸³

80 Available from Food and Agriculture Organization, Land rights database: <http://www.fao.org/gender/landrights/report/?country=NP>

81 Article 27.

82 Article 94.

83 Black A (2008) Window into shariah family law: Part 2—Aspects of divorce. *Family relationships quarterly* No.16.

6. Rights of women and girls in national HIV policies⁸⁴

6.1 India

India's National AIDS Control Organization (NACO) issued *Policy Guidelines on Mainstreaming Gender in HIV Programs* in 2008.⁸⁵ The Guidelines state that all HIV prevention and care interventions will be strengthened by:

- (i) supporting programmatic and legal interventions to address all forms of discrimination against women/girls and men/boys such as trafficking of women and girls, child labor, forced marriage, sexual and economic exploitation that increase their vulnerability and exacerbate the impact of HIV;
- (ii) assisting government stakeholders and duty bearers to effectively respond in a gender sensitive manner to human rights abuses, discrimination and gender based violence within the context of sexual health and HIV;
- (iii) promoting economic rights of women and girls, ensuring property ownership and inheritance rights and equal participation of men and women in income generating activities in the context of HIV.

6.2 Papua New Guinea

The National AIDS Council Secretariat of Papua New Guinea⁸⁶ has developed a comprehensive policy response to gender equality and HIV, as stated in:

- *National Gender Policy and Plan on HIV and AIDS 2006-2010*; and
- *PNG National HIV Prevention Strategy 2010-2015*.

These are well-developed policies that provide a model for other countries, although they face immense challenges in implementation. The *PNG National HIV Prevention Strategy* addresses the need for a legal response to reduce gender-related HIV vulnerability. A review conducted in 2009 found that since 2006, the integration of gender into the *National Strategic Plan on HIV and AIDS* has been weak and there has been little progress in implementing the *National Gender Policy and Plan on HIV and AIDS*. The review found that the government's lack of commitment in this area is a significant gap in the response, as indicated by lack of progress in mainstreaming violence against women initiatives across Government and that efforts relating to integrating gender into HIV activities are "still relatively weak. Few partner activities specifically engage in interventions to address gender-based violence, sexual coercion and rape, gender roles and relations, gender power differentials, and trans-generational sex."⁸⁷

The *PNG National HIV Prevention Strategy 2010-2015* requires the following actions

- Address the link between HIV and gender-based violence;
- Expand the availability of PEP for sexual assault cases;
- Ensure availability and access to a comprehensive package of emergency services for all who experience sexual violence;
- Encourage greater involvement of men and boys in HIV prevention and care;
- Address customary practices that create vulnerability to HIV for men, women, boys and girls;
- Address structural factors that contribute to transactional sex.

See Appendix 1 for further detail provided in the *PNG National HIV Prevention Strategy*, which may be a useful guide for other jurisdictions.

6.3 Cambodia

The Ministry of Women's and Veterans' Affairs and the National AIDS Authority collaborated to develop a *Policy on Women, the Girl Child and STI/HIV/AIDS (2003)*. It was reported that the key lessons learned in development of this policy was the importance of inclusion of men in programs that seek to empower women to protect themselves from HIV.⁸⁸ The *National HIV/AIDS Strategic Plan 2006-2010* states that gender equality is a guiding principle of the

84 Other relevant policies may include policy frameworks on children and HIV, reproductive health policy and in sectoral HIV policies (e.g. education).

85 NACO (2008) *Policy Guidelines: Mainstreaming Gender in HIV Programmes*.

86 Godwin J. (2010) *Support for Strengthening the HIV Legal and Policy Enabling Environment: Pacific/PNG*, Canberra: AusAID Health Resource Facility 2010.

87 Ibid.

88 Ek V., (2004) *Gender and HIV/AIDS policy in Cambodia XV International Conference on AIDS*, Bangkok, Thailand: abstract no. ThPeC7564.

Plan and that “gender inequalities need to be addressed for the national response to be truly effective.”⁸⁹

An assessment by the International Center for Research on Women found few examples in Cambodia of programs addressing HIV and gender-based violence in a holistic manner.⁹⁰ HIV/AIDS programs and gender-based violence programs were found to operate in isolation and many of the HIV/AIDS organizations had little understanding of gender based violence. At the time, many violence prevention organizations were not aware that there was a national policy on women and HIV, and there was little coordination and cross-dialogue.

89 *National Strategic Plan for a Comprehensive & Multisectoral Response to HIV/AIDS 2006-2010* P.8.

90 ICRW (2005) *Gender Based Violence and HIV/AIDS in Cambodia* <http://www.icrw.org/files/publications/Gender-Based-Violence-and-HIV-AIDS-in-Cambodia.pdf>; see also: *Violence Against Women 2009 Follow-Up Survey: Final Full Study Report* (2010) GTZ.

Appendix 1. Extract from PNG National HIV Prevention Strategy

Strategy 2.1.1: Address the link between HIV and gender-based violence

Sexual abuse of women and girls by males in positions of authority in workplaces and schools, and by the police, is common in PNG. Gender-based violence is both a cause and a consequence of HIV infection. Research in PNG and elsewhere has established that women who have experienced physical and sexual violence have higher rates of STIs and HIV. Women with HIV often suffer violent reprisals when they tell their partners or families of their status. There is a need to create multi stakeholder partnerships including key government departments, church based institutions and non-government organisations to develop appropriate gender sensitive responses in the health, justice, education, economic and social sectors.

Strategy 2.1.2: Ensure availability and access to a comprehensive package of emergency services for all who experience sexual violence

Addressing the link between HIV and gender-based violence requires specific strategies to break barriers to reporting violence. At a minimum this should include building an integrated network of support between health, schools, sports organizations, churches, police and community leaders; establishing referral protocols between health facilities and police; and providing PEP for victims of violence. Improved referrals and provision of medical, psycho-social and legal services will help survivors of violence to report and prevent such violence in the long term.

Strategy 2.1.3: Encourage greater involvement of men and boys in HIV prevention and care

The greater involvement of men and boys in HIV prevention and care is critical for addressing gender-related vulnerabilities, for shifting gender inequities, and motivating responsible sexual behaviour. It could be addressed by supporting programs to motivate men and boys to actively participate in prevention and care, such as setting up clinics for men and boys. At the same time, it is important to support research to understand male perceptions of sex, violence, sexual practices and relationships with women. This will help to develop strategic actions to enable men and boys to participate in the HIV response more meaningfully. Key actions may also include supporting programs that work with male clients of sex workers and men who control the contexts and circumstances of transactional sex to address the issues of risk and vulnerability and to promote safe and non-violent sexual practices. A key focus should be to identify and support appropriate male leaders to advocate for gender equality and the elimination of gender based violence.

Strategy 2.1.4: Address customary practices that create vulnerability to HIV for men, women, boys and girls

Cultural practices and customs can provide both opportunities for HIV prevention as well as increasing vulnerability to HIV. Cultural practices and customs that provide a protective effect should be incorporated into HIV prevention planning and implementation. However, many customary practices, such as those related to kinship, bride price, polygamy, and marital relationships contribute to power imbalance and inappropriate sexual dynamics that contribute to conditions of vulnerability to HIV. Better understanding of the cultural meanings and practices related to gender and sexuality in the context of rapid social change will inform relevant approaches for addressing factors of vulnerability. Key actions may also include supporting those cultural practices that may help prevent HIV vulnerability as well conducting research on how customary practices related to kinship, bride price, polygamy, and marital relationships interact with sexual risks, either supporting or inhibiting people's understanding of HIV risk and their ability to prevent HIV transmission. It is imperative that key messages and interventions be adapted to the local customs and culture while focusing on addressing the issues that create vulnerability to HIV for men, women, girls and boys.

Strategy 2.1.5: Address structural factors that contribute to transactional sex

Structural factors contribute to circumstances and situations where people engage in sex to meet economic needs. Alleviating conditions that create economic vulnerability requires strategic focus to reduce HIV risk. Micro-financing initiatives for women, universal free education for all children in PNG, and reducing the separation of families as a result of employment are just a few examples to addressing structural factors that contribute to the practice of transactional sex.

Strategy 1.1.7: Expand the availability of PEP for sexual assault cases

This strategy is directly linked to Strategy 2.1.2. In PNG there are high levels of sexual violence in urban and rural areas and the provision of post-exposure prophylaxis (PEP) services is a key strategy for preventing HIV transmission for victims of sexual assault, rape, and incest. PEP involves the short-term use of antiretroviral drugs to prevent HIV infection in individuals who may have been exposed to HIV. At present, ART to help prevent HIV infection in a person who has been raped is not widely available in PNG, and few people know about it even when it is available.

It is vital that PEP for rape victims be made universally available, and that the general public, especially women and adolescent girls, are informed about what it is and where to get it. Counseling for the victims of sexual assaults should also be available at the health facilities. Given that many assaults occur after hours when health facilities are closed, it is recommended that sites for services be established that are easily accessible to sexual assault victims.

Appendix 2. CEDAW legal indicators

UNIFEM East and Southeast Asia Regional Office: CEDAW indicators ⁹¹

Articles 1 and 2: Gender-based violence

Domestic Violence

- Is domestic violence defined by law to include all forms of violence (physical, mental, economic and sexual harm and abuse)?
- Does the definition of domestic violence include marital rape?
- Does the definition of domestic violence include all forms of coercion and deprivations of liberty?
- Is protection from domestic violence extended to spouses, former spouses, persons with a common child, persons living together, and other persons in intimate relationships?
- Does law provide for an immediate protection measure for victims of domestic violence? Does this measure prohibit the offender from committing further acts of violence? Does this measure prohibit the offender from contacting or harassing the victim or her family members? Does this measure allow temporary removal the offender from the dwelling of the victim, regardless of ownership of the dwelling? Does this measure allow for a decision on temporary custody of a child? Does this measure allow for payment of support to the victim? Does this measure allow for payment of medical expenses incurred due to the violence?
- Is domestic violence prohibited?
- Are immediate protection measures valid for sufficient time to enable the victim to ensure her safety and protection?
- Does the law allow for the issuance of immediate protection measures independent of the filing of a case (or whether or not the victim pursues litigation)?
- Are immediate protection measures issued by easily accessible authorities?
- Are immediate protection measures issued ex parte?
- Are immediate protection measures issued on the same day as the date of application for it?
- Does the law provide for rehabilitation services for domestic violence offenders?
- Does law require provision of counseling services to victims of domestic violence and their families?
- Does the law require provision of free or affordable legal assistance to victims of domestic violence?
- Does law require free or affordable medical services to victims of domestic violence?
- Does law identify the appropriate agencies to provide support services to victims of
- domestic violence?
- Does the law require the establishment of refuges or shelters for victims of violence?
- Is domestic violence punishable by a penalty commensurate to the gravity of the offense?
- Does the law require mandatory reporting of domestic violence to local authorities by health service providers, social workers, village officials and other appropriate public officials?
- Does desistance of the victim operate to discontinue the prosecution of a criminal case of domestic violence?
- Are domestic violence victims entitled to compensation?
- Are domestic violence cases not subjected to mediation?
- Does the law provide clear designation of responsibilities among State agencies in
- addressing domestic violence?
- Does the law mandate inter-agency cooperation in addressing domestic violence?
- Does law require the training of judicial and law enforcement officials, social workers and health providers on

91 Chiongson R. (2010) *Do Our Laws Promote Gender Equality? A Handbook for CEDAW-Based Legal Reviews* Bangkok: UNIFEM. http://cedaw-seasia.org/docs/FINAL_CEDAW_Handbook.pdf

domestic violence?

- Does the law mandate dissemination of information on domestic violence by a particular agency?
- Does law require the gathering of data and research on domestic violence?

Rape and other Forms of Sexual Assault

- Are rape and other forms of sexual assault prohibited?
- Does the definition of rape or sexual assault include insertion of the penis into the oral or anal openings of another?
- Does the definition of rape or sexual assault include insertion of objects into another's genitalia?
- Does law allow prosecution for rape even if there is no consent of the victim?
- Is prosecution for rape discontinued if there is desistance from the victim?
- Is marital rape an offense?
- Does the law allow the discontinuance of a criminal proceeding for marital rape if there is desistance or forgiveness by the spouse?
- Is there a prohibition of the use of prior sexual conduct to establish consent to sexual intercourse?
- Is there no legal requirement for a high degree of physical resistance by the victim to establish rape?
- Is there no legal requirement of corroboration of a victim's testimony to successfully prosecute rape?
- Does the law require the provision of services for the physical, psychological and social recovery of the victim?
- Does the law provide free or affordable legal aid to victims of rape?
- Are rape victims entitled to compensation?
- Does the law protect the identity and privacy of the victims of rape and sexual assault?
- Does law require courts to set up arrangements for non-face to face proceedings, such as video conferencing, in cases where the victim's safety or health is at risk?
- Does law provide for procedures for the protection of victims of rape and witnesses from potential retaliation or intimidation, e.g. victim or witness protection programmes?
- Does law require the training of judicial and law enforcement officials, social workers and health providers on rape and sexual assault, including on gender-sensitive ways of handling such cases?

Article 12: Health

- Does law guarantee non-discrimination and equal access to health care on the basis of sex/gender?
- Is there a specific guarantee of sexual and reproductive health care for women?
- Is there a law ensuring access by women to appropriate health-care services relating
- to pregnancy and maternity?
- Is there a law that requires free or affordable health-care services for poor women,
- indigenous women and other disadvantaged groups of women?
- Is abortion decriminalized?
- Are sex-selective abortion and prenatal sex-selection prohibited?
- Is there an absence of a law that restricts family size?
- Is there no requirement for spousal or family authorization for women to access health care services?
- Is there a law that prohibits discrimination in accessing sexual and reproductive health services on account of marital status?
- Is there a law that guarantees the right to free and informed choice in family planning?
- Is there a law that prohibits coercion, intimidation or undue influence in family planning programmes?

- Is there a law that guarantees access to affordable, effective and wide-ranging range of family planning methods?
- Is there a law requiring prevention and management of reproductive tract infections, including sexually transmitted infections, HIV/AIDS, reproductive tract cancers, and other gynecological conditions and cancers?
- Is there a law prohibiting discrimination against persons, including women, living with HIV/AIDS and other sexually transmitted infections?
- Is sexual harassment by health professionals prohibited?
- Does the definition of sexual harassment include physical, mental, verbal and visual forms of harassment?
- Does the law protect the identity and privacy of patients?
- Is there a law requiring the dissemination of information on health care, including sexual and reproductive health care?
- Does the law require the teaching of sexual and reproduction rights for children and adolescents?
- Does law require gender-sensitive courses on women's health and gender-based violence in the curricula of health workers?
- Does the law require establishment of measures to improve skills of traditional healers and midwives to enable them to provide safe, efficient and affordable health services?

Article 16: Marriage and Family

- Is there a legal guarantee of gender equality in the family and marriage?
- Does the law guarantee the same right to women and men to enter into marriage?
- Is there an equal minimum age of 18 years for marriage?
- Is registration of birth in an official registry required?
- Does law require personal consent of both spouses to a marriage?
- Where parental advice or consent is needed, is the consent of both parents given equal weight?
- Is bigamy/ polygamy prohibited?
- Is the use of dowry as a condition for marriage prohibited?
- Is there absence of any restriction on remarriage of widows?
- Does the law require registration of marriage in an official registry?
- Are both spouses (husband and wife) equal in the ownership, acquisition, management, administration, enjoyment and disposition of property?
- Is there absence of any restriction requiring spousal authorization for contraception or abortion?
- Do spouses have equal rights to choose and practice their profession?
- Do women and men have the same grounds and conditions for filing a case of legal separation, annulment or nullification of marriage or divorce?
- Does law provide for equal division of property and income acquired during marriage, in particular giving equal weight to both financial and non-financial (e.g. housework and childcare) contributions to the household and family?
- Does law provide for equal division of property and income acquired during a union without the benefit of marriage (de facto unions)?
- Does the law provide for payment of child support after divorce?

- Does the law provide for maintenance or support of a former spouse after divorce based on need, assets and earning capacity?
- Is marital property registered in the name of both spouses?
- Does the law require the consent of both spouses on all transactions encumbering or disposing marital property?
- Are custody and access and children based on best interest of the child, regardless of the marital status of parents?
- Does the law require both parents to support, care and educate the child, regardless of their marital status?
- Does the law provide for equal guardian?
- Does law provide for equal rights and conditions for women and men to adopt a child?
- Do women and men have equal inheritance rights?



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