

## Chapter 6

# Domestic Violence

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### Objectives

This chapter focuses on the issue of domestic violence in the target countries, i.e. its symptoms, causes and legal and other responses by state organs to address domestic violence. The aim is to sensitise and enable judges and other stakeholders to make informed and human rights compliant decisions when dealing with cases of domestic violence.

This chapter consists of four sections. Section 6.1 focuses on domestic violence (DV) in Cambodia, i.e. its symptoms, causes and legal and other responses by state organs to address DV. Section 6.2 focuses on DV in India, i.e. its symptoms, causes and legal and other responses by state organs to address DV. Section 6.3 focuses on DV in Pakistan, i.e. its symptoms, causes and legal and other responses by state organs to address DV. Section 6.4 focuses on DV in Thailand, i.e. its symptoms, causes and legal and other responses by state organs to address DV.

The most common form of violence experienced by women and girls around the world is physical violence inflicted by an intimate partner. On a global average, at least one in three women is beaten, coerced into sex, or otherwise abused by an intimate partner in the course of her lifetime.<sup>1</sup>

Women and girls are often in great danger in the place where they should be safest: within their families. For many, 'home' is where they face violence at the hands of somebody close to them – somebody they should be able to trust. Those victimised suffer physically and psychologically. They are in many cases unable to make decisions, voice their own opinions or protect themselves and their children for fear of further repercussions. Their human rights are denied and their lives ruined by the ever-present threat of violence.<sup>2</sup>

Across the Asia Pacific, as elsewhere, domestic violence includes violence perpetrated by intimate partners and other family members, and is manifested in a number of ways:

- Physical abuse which includes slapping, beating, arm twisting, stabbing, strangling, burning, choking, kicking, threats with an object or weapon, and murder. It also includes traditional practices harmful to women such as child, early and forced marriage and

wife inheritance (the practice of passing a widow, and her property, to her dead husband's brother);

- Sexual abuse which includes coerced sex or sexual acts through threats, intimidation or physical force;
- Psychological abuse which includes behaviour that is intended to intimidate and persecute, and takes the form of threats of abandonment or abuse, confinement to the home, surveillance, threats to take away custody of the children, destruction of objects, isolation, verbal aggression and constant humiliation; and
- Economic abuse which includes acts such as the denial of funds, refusal to contribute financially resulting in denial of food and basic needs, and controlling access to health care and employment.<sup>3</sup>

Acts of omission are also a form of violence against women and girls. Gender bias that discriminates in terms of nutrition, education and access to health care amounts to a violation of women's rights. It should be noted that although the categories above are listed separately, they are not mutually exclusive. Indeed, they often go hand in hand.<sup>4</sup>

About 35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence. According to one estimate, of all women killed globally in 2012, almost half were killed by intimate partners or family members, compared to less than six per cent of men killed in the same year.<sup>5</sup> The most common perpetrators of sexual violence against young women are current or former husbands, partners or boyfriends.<sup>6</sup>

In the past few years, many countries across Asia have stepped forward to adopt laws tackling domestic violence. In many cases these are directly linked to their implementation of obligations under CEDAW, the Beijing Declaration and the PFA.<sup>7</sup>

## 6.1 Cambodia

### 6.1.1 Domestic violence

Domestic violence remains the single most prevalent form of violence against women and girls in Cambodia.<sup>8</sup> In 2015 the World Health Organization conducted a national study on the impact of violence against women and girls in Cambodia. In that survey, a representative national sample of 3,568 women were interviewed on their experiences of violence. It was found that violence by intimate partner was the most frequent form of violence with just over one in five women reporting physical and/or sexual violence by their intimate partner at least once in their lifetime.<sup>9</sup> Of the 21 per cent of

women who had experienced sexual and physical violence, 75 per cent were subjected to severe violence. One in three women surveyed reported being subjected to emotional abuse.<sup>10</sup>

A 2013 United Nations Study<sup>11</sup> interviewed 1,863 Cambodian men to gain a better understanding of men's use of different forms of violence against women (specifically intimate partner violence and non-partner rape).<sup>12</sup> The study found that 21 per cent of ever-partnered men<sup>13</sup> had raped a partner at least once in their lives.<sup>14</sup> The study further found that 16.4 per cent of ever-partnered men had committed physical violence against an intimate partner at least one time in their lives.<sup>15</sup> Approximately 32.8 per cent of ever-partnered men admitted to committing either sexual or physical or both sexual and physical violence against a partner at least once in their lifetimes.<sup>16</sup>

Cultural and strong patriarchal attitudes play a significant role in propagating domestic violence. In a 2015 WHO survey, almost half of the women interviewed believed that their partners were justified in beating them.<sup>17</sup> Of the women who admitted to experiencing physical and sexual violence, almost 58 per cent accepted that a husband could beat his wife in particular situations.<sup>18</sup> And 19 per cent of all ever-partnered women believed they were not entitled to refuse sex from their husbands.<sup>19</sup> It is also significant to note that more than half of respondents (55%) who had been subjected to intimate partner violence in the WHO survey reported that they have never fought back against the violence.<sup>20</sup>

Impunity and under-reporting play a significant role in enabling domestic violence. Most women do not tell anyone about their victimisation or report domestic violence to the relevant authorities.<sup>21</sup> Few victims of domestic violence seek assistance from police or the criminal justice system. Reasons for victims' silence over their abuse included: (1) lack of formal services available to women in Cambodia, especially in rural settings;<sup>22</sup> (2) difficulty and prohibitive costs in accessing townships from rural areas;<sup>23</sup> (3) lack of sensitisation among agencies and police, magistrates and health services for victims;<sup>24</sup> (4) lack of sensitisation among community leaders, who often pressure victims to reconcile with their partners;<sup>25</sup> and (5) weaknesses in the current legal system which encourage settlements and discourage prosecution.<sup>26</sup>

There are strong beliefs that domestic violence is a private matter in which courts or other authorities should not be involved.<sup>27</sup>

#### Domestic violence: law

**Constitution of Cambodia 2008:** The Constitution of the Kingdom of Cambodia 'recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and

the covenants and conventions related to human rights, women's rights and children's rights.<sup>28</sup> Article 38 'prohibits all physical abuse of any individual. The law protects the life, honour and dignity of citizens'.<sup>29</sup>

Article 31(2) guarantees that all 'citizens shall be equal before the law, enjoying the same rights and freedoms and obligations regardless of race, colour, sex, language, religious belief, political tendency, national origin, social status, wealth or other status'.<sup>30</sup>

Article 31(2) is important in placing priority on the need to address gender inequality in the domestic violence framework. It is recommended that judges use Article 31 and Article 38 to inform how laws and cases involving domestic violence are handled.

### **The Law on the Prevention of Domestic Violence and the Protection of Victims 2005:**

Article 1 sets out three objectives: 'prevent domestic violence; protect the victims; and strengthen the culture of non-violence and the harmony within the households in society in the Kingdom of Cambodia'.<sup>31</sup> The emphasis on harmony within households must be balanced against the judiciary's obligation to comply with articles 31 and 38 of the Constitution and Cambodia's obligations under CEDAW to eliminate all forms of violence against women, while also ensuring victims' access to justice, remedies and reparations.

Article 2 sets out the scope of the Act, where it states, '[d]omestic violence is referred to as violence that happens and could happen towards: (1) Husband or wife; (2) Dependent children; (3) Persons living under the roof of the house and who are dependent of households'.<sup>32</sup> It should be noted that neither informal unions nor former spouses are recognised within the scope of the Act. Taking such a narrow scope potentially excludes certain groups of women and girls who are victims of domestic violence yet do not fall into one of the enumerated categories. It is recommended that an inclusive approach be taken in cases involving domestic violence to ensure that all potential victims are captured within the protections of the Act.

Articles 3 to 7 provide substantive definitions for domestic violence. Article 3(2) states that '[domestic] violence includes: Acts affecting life; Acts affecting physical integrity; Torture or cruel acts; Sexual aggression'.<sup>33</sup> Articles 4 to 7 provide substantive definitions for each of the above-mentioned four categories.

Article 4 enumerates conduct which constitutes acts affecting life: 'Premediated homicide; Intentional homicide; Unintentional homicide resulted from other intentional acts of the perpetrators; unintentional homicide'.<sup>34</sup>

Article 5 addresses conduct affecting physical integrity: ‘Physical abuses with or without using a weapon, with getting or not getting wounded; Torture or Cruel acts.’<sup>35</sup>

Article 6 addresses the substantive meaning of torture: ‘Torture or cruel acts include: Harassment causing mental/psychological, emotional, intellectual harms to physical persons within households.’<sup>36</sup> Article 6(2) adds further elements that tend to widen the definition such as ‘[m]ental/psychological and physical harms exceeding morality and the boundaries of the law’.<sup>37</sup> The wider framing of torture and cruel treatment under article 6 allows for the possibility of capturing certain non-physical forms of domestic violence, such as emotional abuse and controlling behaviour.

Article 7 defines sexual aggression. Article 7 states, ‘Sexual aggression includes: Violent rape; Sexual harassment; Indecent exposures.’<sup>38</sup> Using a qualifier to include only ‘violent’ rape is problematic. It fails to recognise non-violent marital rape as a form of domestic violence.

Complex terms such as ‘sexual harassment’ have not been defined. A definition of sexual harassment is set out at article 250<sup>39</sup> of the Criminal Code; however, it is confined to situations where a person abuses a position of authority to obtain sexual favours. In the absence of such a definition within the domestic legislation, guidance may be taken from international human rights as article 31 of the constitution requires. The Declaration on the Elimination of Violence against Women 1993 offers a general definition of violence as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women ... whether occurring in public or private life’<sup>40</sup>, which could be used to inform what is meant by ‘sexual harassment’. According to article 7 and 16 of CEDAW, States parties must take appropriate measures to eliminate discrimination against women by state and non-state actors in all spheres. Article 16 specifically calls for the elimination of discrimination against women in matters relating to marriage and family relations.<sup>41</sup>

Article 8 of the Law on the Prevention of Domestic Violence and the Protection of Victims discusses threatening and harassing behaviour but it does not define what constitutes threatening or harassing behaviour. Article 8(2) introduces a qualification, allowing threats and harassing behaviour under the guise of ‘disciplining and teaching’ if it is undertaken with a ‘noble nature’ and in line with principles of the United Nations Conventions. However, such a qualifier is problematic as it reinforces the perception that some forms of family-based violence such as threats or harassment are acceptable. It is recommended that in assessing whether conduct is threatening or harassing, Cambodia’s obligations under CEDAW, notably to

eliminate all forms of violence against women, should be used to inform how this provision is interpreted and applied.

Articles 13 to 19 set out provisions for the protection of domestic violence victims. Article 13 calls for urgent intervention, including seizing weapons or concrete objects that have been used or could be used by the perpetrators;<sup>42</sup> removing perpetrators from the situation;<sup>43</sup> and offering protection assistance to victims.<sup>44</sup> Article 13 allows for mediation to facilitate reconciliation.<sup>45</sup>

Article 14 empowers authorities to issue protection orders or other temporary measures against the perpetrator to prevent further domestic violence and ensure the protection of victims and household members.<sup>46</sup>

Article 16 empowers the victim to file a complaint with the provincial or municipal courts for a protection order.<sup>47</sup>

Article 17 prevents authorities from mediating or reconciling conduct which constitutes a felony crime or a severe misdemeanour crime.<sup>48</sup> Article 19 requires authorities to investigate and bring a prosecution (where sufficient evidence is found) for conduct amounting to a felony crime or severe misdemeanour.<sup>49</sup>

Articles 20 to 25 set out the authority of the Court to issue protection orders. A protection order is a civil measure intended to protect victims.<sup>50</sup> Judges have the authority and duty to issue protection orders and alter and change them according to the situation. A protection order can impose any sort of conditions on an accused to do or not do something so long as it is related to the protection of a victim of domestic violence.<sup>51</sup> The orders are made in two stages: (1) Stage 1 where the order is issued for two months, during the emergency period when the domestic violence incident first comes to the Court; (2) Stage 2 where the order is issued up to six months during the investigation, pre-trial and trial period.<sup>52</sup>

Article 25 lists the different forms of protection orders: (a) prohibition on certain behaviour; (b) prohibition from approaching or entering certain premises; (c) no-contact orders between the victim and perpetrator; (d) prohibition from destroying or liquidating property or assets.<sup>53</sup>

Articles 26 to 32 discuss reconciliation. Article 26 recommends reconciliation or mediation for offences involving mental/psychological or economic acts, as well as other minor misdemeanours or petty crimes. Article 26 requires both parties' agreement for mediation or reconciliation. It should be noted that Article 26 allows household members such as parents and relatives of the victim or perpetrator to act as arbitrators in the reconciliation. Buddhist monks, elders, village chiefs, and commune councillors may also act as mediators. Article 26 emphasises the importance of 'preserving harmony within the household in line with the nation's good custom and tradition[s]'.<sup>54</sup>

Article 27 encourages courts and judges to reconcile domestic violence cases; however, it cautions against pressuring or forcing parties to reconcile.<sup>55</sup>

Article 28 imposes a special duty to keep the court apprised of cases involving children. The courts must take measures to ensure the protection and safety of child victims in handling domestic violence cases.

Chapter 7 addresses penalties. Article 35 states that ‘any acts of domestic violence that are considered criminal offences shall be punished under the penal law in effect.’<sup>56</sup> However, in practice, prosecutors have tended to treat all domestic violence offences similarly using a single generic offence under article 222 of the Criminal Code which reads, ‘[i]ntentional acts of violence shall be punishable by imprisonment from two to five years and a fine from four million to ten million Riels if they are committed by a spouse or partner of the victim.’<sup>57</sup> In doing this, domestic violence involving serious human rights abuses such as rape or sexual violence go unpunished with victims continuing to live without access to justice, remedies and reparations for domestic violence. In this respect, Article 35 has had a negative impact, enabling impunity for domestic violence related crimes, notably marital or spousal rape.<sup>58</sup>

**Criminal Code of Cambodia 2010:** Offences against the person, any physical or sexual violence or threat of physical or sexual violence perpetrated against an intimate partner may be prosecuted under the Cambodian Criminal Code.<sup>59</sup>

**International obligations:** Cambodia is obligated under international human rights law to exercise ‘due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.’<sup>60</sup> If State officials or authorities fail to take sufficient steps to investigate or punish acts of domestic violence or obstruct or interfere with any such efforts, Cambodia may be in violation of its obligations under international law.<sup>61</sup>

As a State party to CEDAW, Cambodia must ‘condemn discrimination against women in all its forms’<sup>62</sup> committed ‘by any person, organization or enterprise.’<sup>63</sup> Domestic violence is recognised as a form of gender-based discrimination and violence,<sup>64</sup> which involves ‘acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.’<sup>65</sup>

In practical terms, Cambodia must take measures to criminalise acts of domestic violence against women;<sup>66</sup> remove underlying legal, social and cultural barriers including gender stereotypes that may prevent women from exercising and claiming their rights and impede their access to effective remedies;<sup>67</sup> investigate allegations and, where sufficient evidence is found, prosecute domestic violence allegations before an independent and impartial tribunal with the intention of punishing the accused with a sentence



commensurate with the gravity of the offence. This obligation falls on all branches of government, including the judiciary.<sup>68</sup>

There are notable weaknesses in the Law on the Prevention of Domestic Violence and the Protection of Victims. First, the emphasis on reconciliation and mediation propagates a perception that domestic violence is a ‘private family matter’. It also trivialises family-based violence against women and undermines victims’ access to justice, remedies and reparations. The focus on reconciliation can also discourage victims from coming forward as there is little prospect of justice or long-term protection.

Article 26 allows for the reconciliation and mediation of domestic violence cases involving mental/psychological abuse, in which immediate family members can be appointed as arbitrators. The use of family members as mediators to facilitate settlements is problematic for several reasons. First, it denies victims the right to an impartial and independent hearing or investigation into the domestic violence case, thus undermining victims’ right to access remedy and reparations for family-based violence against women. Second, it endangers the victim and any affected children, denying them the very-much-needed protection and separation from their family members, who often enable or acquiesce in the domestic violence and abuse. Third, it tacitly supports the strongly patriarchal values, again undermining victims’ voices and trivialising the gravity of domestic violence.

The second key weakness of the domestic violence legislation is the lack of any penalties or punitive measures for acts of domestic violence, or the breach of protection orders. The lack of any punishment weakens the overall protection mechanisms for victims. Again, the lack of criminal or legal sanctions for domestic violence inculcates a culture of impunity for domestic violence.

There is also a demonstrated lack of understanding about the Domestic Violence Law and its relevance to victims and local authorities.<sup>69</sup> Despite the stated requirement to educate the public on the law and domestic violence generally under Article 33, as of 2007 the Government had not made any sustained effort to educate its citizens about the law.<sup>70</sup>

#### **Domestic violence: recommendations**

The following recommendations offered to the judiciary may help in bringing Cambodia into compliance with its obligations under international law. As a starting point, it is recommended that the provisions of CEDAW and the Declaration on the Elimination of Violence against Women be used to inform the interpretation and application of domestic laws related to domestic violence. In respect of specific issues, it is recommended that:



- An inclusive approach must be taken in interpreting the scope of the Law on the Prevention of Domestic Violence and the Protection of Victims to ensure all potential victims are captured within the protections of the Domestic Violence Act
- The safety and protection of women and any affected children, and their right to access justice, remedies and reparations for domestic violence must be placed above the need for reconciliation;<sup>71</sup>
- All acts of domestic violence which could amount to a criminal offence must be subject to a full investigation, and where necessary a prosecution under the most appropriate criminal charge before an independent and impartial tribunal, resulting in a sentence commensurate with the gravity of the offence;<sup>72</sup>
- Victims of domestic violence should not be precluded from accessing justice, remedies and reparations if a case is handled through mediation or reconciliation<sup>73</sup>
- Measures be taken to ensure the safety and best interests of any affected child or children in any decisions involving the mediation or reconciliation of domestic violence;
- Mediation or reconciliation be invoked only when the victim specifically requests it – it should not be suggested or offered<sup>74</sup>
- Mediation be prohibited without exception where one or more of the allegations involves serious human rights abuses or grievous injury or harm
- Family members be prevented from acting as mediators in claims, and instead only independent and impartial parties adjudicate or mediate domestic violence<sup>75</sup>
- Where possible, courts exercise their discretion to provide gender-sensitive and protection measures in the Court to ensure the safety of victims and witnesses. Measures could include<sup>76</sup>
  - (a) Protection orders and other measures to ensure the safety and security of victims throughout the judicial process;
  - (b) Publication bans, in-camera proceedings and other measures to ensure the confidentiality and privacy of victims;
  - (c) Video-link testimony, screens or other visual barriers to ensure victims are not required to face their perpetrator while testifying;
  - (d) Separate entrances and waiting areas for victims before, during and after court proceedings.

## 6.2 India

### 6.2.1 Domestic violence

In its annual report of 2016, Amnesty International said:

*Although nearly 322,000 crimes against women, including over 37,000 cases of rape, were reported in 2014, stigma and discrimination from police officials and authorities continued to deter women from reporting sexual violence. A majority of states continued to lack standard operating procedures for the police to deal with cases of violence against women.*

*In over 86% of reported rape cases, the victims knew the alleged offenders. Statistics released in August showed that nearly 123,000 cases of cruelty by husbands or relatives were reported in 2014. In March, the central government announced that it was considering allowing for the withdrawal of a complaint of cruelty if a compromise is reached between the parties.*

*In July, a committee appointed to evaluate the status of women made key recommendations on prevention, protection and access to justice for women and girls facing violence. Among other recommendations, it urged the government to make rape within marriage a criminal offence, introduce a special law on honour crimes, and not dilute laws relating to cruelty by husbands.*

*In December, the government stated in Parliament that it intended to amend the Penal Code to criminalize marital rape.*

*Caste-based village bodies continued to order sexually violent punishments for perceived social transgressions. Discrimination and violence against women from marginalized communities remained widespread, but reporting and conviction rates were low.<sup>77</sup>*

In 2014, 426 cases were reported under the Protection of Women from Domestic Violence Act 2005; with 91 per cent being from five states – Kerala (140 cases), Bihar (112 cases), Uttar Pradesh (66 cases), Madhya Pradesh (53 cases) and Rajasthan (17 cases).<sup>78</sup> The NCRB reported a total of 337,922 cases of crime against women (under the IPC and special and local laws affecting women) in the country in 2014 as compared to 309,546 in 2013, including 8,455 dowry deaths, 122,877 cases of cruelty by a husband or husband's relative, and 10,050 cases under the Dowry Prohibition Act.<sup>79</sup>

#### Domestic violence: law

**Indian Penal Code 1860 (IPC):** Section 498A of the IPC criminalises cruelty by a husband or his family towards a married woman punishable by a maximum of three years' imprisonment or fine. Section 304B states that:

*Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death.*

Whoever commits dowry death shall be punishable with not less than seven years' imprisonment, but this may extend to life imprisonment.

**Indian Divorce Act 1869 (IDA):** A wife may divorce her husband if he treats her with such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with him.<sup>80</sup>

**Indian Evidence Act 1872:** If a woman commits suicide within seven years of her marriage and if there is evidence that she was subjected to cruelty by her husband or his relative, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.<sup>81</sup>

**Dissolution of Muslim Marriages Act 1939:** A woman married under Muslim law may get an order of dissolution from a competent court, if her husband 'treats her with cruelty'.<sup>82</sup>

**Hindu Marriage Act 1955:** Either spouse may seek judicial separation<sup>83</sup> or divorce on the ground of 'cruelty'.<sup>84</sup>

**Dowry Prohibition Act 1961:** This Act penalises the acts of demanding, giving and taking any dowry.<sup>85</sup>

**Commission of Sati (Prevention) Act 1987:** This Act prohibits and criminalises any commission and glorification of sati,<sup>86</sup> defined as 'burning or burying alive of a widow along with the body of her deceased husband or any other relative'.<sup>87</sup>

**Protection of Women from Domestic Violence Act 2005:** This Act covers physical, sexual abuse, verbal and emotional and economic abuse. Section 3 defines 'domestic violence' to include all forms of actual abuse or threat of abuse of physical, sexual, verbal, emotional and economic nature that can harm, cause injury to, endanger the health, safety, life, limb or well-being, either mental or physical of the aggrieved person. The definition is wide enough to cover child sexual abuse, harassment caused to a woman or her relatives by unlawful dowry demands, and marital rape.

Section 2(f) defines 'domestic relationship' as 'a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a

relationship in the nature of marriage, adoption or are family members living together as a joint family’.

The Act grants a number of rights to women victims of domestic violence which include: the right to reside in a shared household,<sup>88</sup> and the right to obtain assistance of Police Officers, Protection Officers, Service Providers,<sup>89</sup> Shelter Homes,<sup>90</sup> and medical establishments.<sup>91</sup>

Under the Act a victim of domestic violence may get the following orders issued in her favour through the courts once the offence is *prima facie* established: protection orders; residence orders; monetary relief; custody orders; and compensation orders.<sup>92</sup>

The Act imposes certain duties on Police Officers, Service Providers and Magistrates to inform the aggrieved person of her right to apply to obtain a relief or the various orders granted under the Act: the availability of services of Service Providers and Protection Officers; her right to obtain free legal services; and her right to file a complaint under Section 498A of the Indian Penal Code.<sup>93</sup>

The aggrieved person or any other witness of the offence on her behalf may approach a Police Officer, Protection Officer, and Service Provider, or directly file a complaint with a Magistrate for obtaining orders or relief under the Act.<sup>94</sup>

#### Domestic violence: key judgments

#### **Indra Sarma v V.K.V. Sarma [2013] INSC 1051 (26 November 2013)**

##### Key points:

- Definition of marriage and a live-in relationship
- Domestic violence in a live-in relationship

[...].

4. Appellant and respondent were working together in a private company. The Respondent, who was working as a Personal Officer of the Company, was a married person having two children and the appellant, aged 33 years, was unmarried. Constant contacts between them developed intimacy and in the year 1992, appellant left the job from the above-mentioned Company and started living with the respondent in a shared household. [They had had a son from this relationship]. [...]. Respondent’s family constantly opposed their live-in relationship and ultimately forced him to leave the company of the appellant and it was alleged that he left the company of the appellant without maintaining her.
5. Appellant then preferred Criminal Misc. No. 692 of 2007 under Section 12 of the DV Act before the III Additional Chief Metropolitan Magistrate, Bangalore [...].

### Case 6.1 Indra Sarma v V.K.V. Sarma

6. [...]. The learned Magistrate found proof that the parties had lived together for a considerable period of time, for about 18 years, and then the respondent left the company of the appellant without maintaining her. Learned Magistrate took the view that the plea of domestic violence had been established, due to the non-maintenance of the appellant and passed the order dated 21.7.2009 directing the respondent to pay an amount of Rs.18,000/- per month towards maintenance from the date of the petition.
7. Respondent, aggrieved by the said order of the learned Magistrate, filed an appeal before the Sessions Court under Section 29 of the DV Act. [...]. The appellate Court also concluded that the appellant has no source of income and that the respondent is legally obliged to maintain her and confirmed the order passed by the learned Magistrate.
8. The respondent took up the matter in appeal before the High Court. [...]. The High Court held that the relationship between the parties would not fall within the ambit of relationship in the nature of marriage and [...] allowed the appeal and set aside the order passed by the Courts below. Aggrieved by the same, this appeal has been preferred.  
[...].
52. Live-in relationship, as such, as already indicated, is a relationship which has not been socially accepted in India, unlike many other countries. [...].
55. [The Supreme Court of India provided the following guidelines]. [...]. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.
  1. Duration of period of relationship: Section 2(f) of the DV Act has used the expression at any point of time, which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.
  2. Shared household: The expression has been defined under Section 2(s) of the DV Act and, hence, need no further elaboration.
  3. Pooling of Resources and Financial Arrangements: Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.
  4. Domestic Arrangements: Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or up keeping the house, etc. is an indication of a relationship in the nature of marriage.
  5. Sexual Relationship: Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.
  6. Children: Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.
  7. Socialization in Public: Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.
  8. Intention and conduct of the parties: Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship. [...].
65. We are, therefore, of the view that the appellant, having been fully aware of the fact that the respondent was a married person, could not have entered into a live-in relationship in the

(continued)

nature of marriage. All live-in relationships are not relationships in the nature of marriage. Appellants and the respondent's relationship is, therefore, not a relationship in the nature of marriage because it has no inherent or essential characteristic of a marriage, but a relationship other than in the nature of marriage and the appellant's status is lower than the status of a wife and that relationship would not fall within the definition of domestic relationship under Section 2(f) of the DV Act. If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship, would not amount to domestic violence under Section 3 of the DV Act.

66. We have, on facts, found that the appellant's status was that of a mistress, who is in distress, a survivor of a live-in relationship which is of serious concern, especially when such persons are poor and illiterate, in the event of which vulnerability is more pronounced, which is a societal reality. Children born out of such relationship also suffer most which calls for bringing in remedial measures by the Parliament, through proper legislation.
67. We are conscious of the fact that if any direction is given to the respondent to pay maintenance or monetary consideration to the appellant, that would be at the cost of the legally wedded wife and children of the respondent, especially when they had opposed that relationship and have a cause of action against the appellant for alienating the companionship and affection of the husband/parent which is an intentional tort.
68. We, therefore, find no reason to interfere with the judgment of the High Court and the appeal is accordingly dismissed.

### **Shalu Ojha v Prashant Ojha [2014] INSC 447 (18 September 2014)**

#### **Key points:**

- DV explained
- Gross abuse of judicial process

[...].

2. This is an unfortunate case where the provisions of the Protection of Women from Domestic Violence Act, 2005 are rendered simply a pious hope of the Parliament and a teasing illusion for the appellant.
3. The appellant is a young woman who got married to the respondent on 20.04.2007 in Delhi according to Hindu rites and customs. [...].
4. According to the appellant, she was thrown out of the matrimonial home within four months of the marriage on 14.8.2007. Thereafter, the respondent started pressurizing the appellant to agree for dissolution of marriage by mutual consent. As the appellant did not agree for the same, the respondent filed a petition for divorce being H.M.A. No.637 of 2007 under Section 13(1) of the Hindu Marriage Act, 1955 on 17.10.2007 before the Additional District Judge, Tis Hazari Courts, Delhi. The said petition was dismissed by an order dated 03.10.2008. [...].

### Case 6.2 Shalu Ojha v Prashant Ojha

After appeals at various forums, the matter reached the Supreme Court of India. The Supreme Court said the following:]

[...].

20. Domestic violence is defined under Section 3 as any act, omission or commission or conduct of any adult male who is or has been in domestic relationship. Section 3. Definition of domestic violence. For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it harms or injures or endangers the health, safety, life, limb or well-being whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or otherwise injures or causes harm, whether physical or mental, to the aggrieved person.
21. The expression domestic relationship is defined under Section 2(f) [1]. The expressions physical abuse, sexual abuse, verbal and emotional abuse and economic abuse are explained in Explanation-1 to Section 3.
22. Section 12 of the Act recognizes the right of an aggrieved person [2] (necessarily a woman by definition) to present application to the Magistrate seeking one or more reliefs under the Act. The reliefs provided under the Act are contained in Sections 17 to 22. Section 17 creates a right in favour of a woman/aggrieved person to reside in a shared household defined under Section 2(s) [3].
23. Section 18 deals with various orders that can be passed by the Magistrate dealing with the application of an aggrieved person under Section 12. Section 19 provides for various kinds of residence orders which a Magistrate dealing with an application under Section 12 can pass in favour of a woman. Section 20 authorizes the Magistrate dealing with an application under Section 12 to direct the respondent to pay monetary relief to the aggrieved person. Section 20 reads as follows: Section 20. Monetary reliefs.
  1. While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but is not limited to, ... the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.
  2. The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.
  3. The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.
  4. The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in-charge of the police station within the local limits of whose jurisdiction the respondent resides.



(continued)

5. The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).
6. Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent. (emphasis supplied).
24. Section 21 deals with the jurisdiction of the Magistrate to pass orders relating to custody of children of the aggrieved person. Section 22 deals with compensation orders which authorizes the Magistrate to pass an order directing the respondent to pay compensation and damages for the injuries including mental torture and emotional distress caused by the act of domestic violence committed by the respondent. The Magistrate receiving a complaint under Section 12 is authorized under the Act to pass any one of the orders under the various provisions discussed above appropriate to the facts of the complaint.
25. Section 29 provides for an appeal to the Court of Session against any order passed by the Magistrate under the Act either at the instance of the aggrieved person or the respondent.
26. One important factor to be noticed in the context of the present case is that while Section 23 expressly confers power on the Magistrate to grant interim orders, there is no express provision conferring such power on the Sessions Court in exercise of its appellate jurisdiction. Section 23 reads as follows:  
*Power to grant interim and ex parte orders*
  1. In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.
  2. If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.
27. It can be seen from the DV Act that no further appeal or revision is provided to the High Court or any other Court against the order of the Sessions Court under Section 29.
28. It is in the background of the abovementioned Scheme of the DV Act this case is required to be considered. The appellant made a complaint under Section 12 of the DV Act. The Magistrate in exercise of his jurisdiction granted maintenance to the appellant. The Magistrate's legal authority to pass such an order is traceable to Section 20(1) (d) of the DV Act.
34. [...]. We are of the opinion that the conduct of the respondent is a gross abuse of the judicial process. We do not see any reason why the respondent's petition CrI. MC No. 1975 of 2013 should be kept pending. [...].
35. We also direct that the maintenance order passed by the magistrate be executed forthwith in accordance with law. [...].

## 6.3 Pakistan

### 6.3.1 Domestic violence

Up to 90 per cent of women in Pakistan face some form of domestic violence in their families and from their husband or in-laws.<sup>95</sup> In the extreme forms of such violence, women are used as exchangeable goodwill tokens in resolution of family or community feuds, abused, attacked, burnt, set on fire and killed in the name of 'honour' or after petty quarrels, or in relation to conflicts over dowry, property, and marriage choices. Lack of comprehensive and structured legal protection mechanisms notwithstanding, in the common perception, domestic violence in its varied forms is largely understood as a 'private family matter', rather than a criminal offence.<sup>96</sup>

According to the Pakistan Demographic and Health Survey 2012–13:

- 32 per cent of ever-married women aged 15–49 have experienced physical violence at least once since age 15, and 19 per cent experienced physical violence within the 12 months prior to the survey;
- overall, 39 per cent of ever-married women aged 15–49 reported ever having experienced physical and/or emotional violence from their spouse, and 33 per cent reported having experienced it in the past 12 months;
- among ever-married women who experienced spousal physical violence in 12 months, 35 per cent reported experiencing physical injuries;
- One in 10 women reported experiencing violence during pregnancy; and
- 52 per cent of Pakistani women who experienced violence never sought help or never told anyone about the violence they had experienced.<sup>97</sup>

As noted, very few women appear to seek justice: as reported by one well-established women's organisation, the Aurat Foundation, only 3,472 cases of domestic violence were reported in the five years between 2008 and 2013.<sup>98</sup>

#### Domestic violence: law

**Constitution of Pakistan 1973:** Several provisions of the constitution may be relied on in cases of domestic violence. Article 4 states that enjoying protection of law and treatment in accordance with law is the inalienable right of everyone. It further states that in particular 'No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law'.<sup>99</sup>

Article 9 states that 'No person shall be deprived of life or liberty save in accordance with law'.

Article 14 guarantees the right to ‘dignity’ and ‘the privacy of home.’ Article 9 is a fundamental right and ‘Any law, or any custom or usage having the force of law, in so far as it is inconsistent with [fundamental rights], shall, to the extent of such inconsistency, be void.’<sup>100</sup>

**Pakistan Penal Code 1860:** The penal code does not expressly define or address domestic violence but specific provisions of it are employed in cases of domestic violence. For instance, section 332 defines ‘hurt’ as follows:

1. Whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables [disfigures, defaces] or dismembers any organ of the body or part thereof of any person without causing his death, is said to cause hurt.

Several other sections starting from 333 to 337L of the penal code deal with harm or hurt to the human body. The superior courts have historically relied on these provisions of the constitution and the penal code when dealing with cases of domestic violence. The Lahore High Court has extensively discussed these provisions and their relevance to and application in cases of domestic violence in *Ali Muhammad*.<sup>101</sup>

**Criminal Law (Second Amendment) Act 2011:** This Act amended the PPC 1860 to incorporate a new offence of hurt being caused by acid, a crime of which women are the most common victims. It also amended the section on hurt to include the effects of acid, i.e. disfigurement or defacing and causing hurt by corrosive substance, penalised by up to life imprisonment and a fine of one million rupees.<sup>102</sup>

Honour killing is an offence under section 302 of the penal code.<sup>103</sup>

**Dissolution of Muslim Marriages Act 1939:** A wife who has been married under Muslim law has the right to divorce a husband who treats her with cruelty.<sup>104</sup>

**Dowry and Bridal Gifts (Restriction) Act 1976:** This act restricts the amount of dowry, presents and bridal gifts that may be given to the parties to a marriage.<sup>105</sup> This potentially reduces the scope for a husband or his family to demand dowry after marriage. ‘Dowry’ includes ‘any property given before, at or after the marriage’.<sup>106</sup>

**Prevention of Anti-Women Practices – Criminal Law (Third Amendment) Act 2011:** This amended the PPC to criminalise anti-women customs,<sup>107</sup> such as preventing women from inheriting their property, and forced marriages.<sup>108</sup>

There are provincial laws dealing specifically with domestic violence:

- The Domestic Violence (Prevention and Protection) Act 2013 Sindh
- The Baluchistan Domestic Violence (Prevention and Protection) Act 2014

- The Punjab Protection of Women against Violence Act 2015
- The KPK Domestic Violence Bill 2014 (under consideration by the Council of Islamic Ideology).

Section 5 of the Sindh Domestic Violence Act 2013 defines DV thus:

*Domestic Violence includes but is not limited to, all acts of gender based and other physical or psychological abuse committed by a respondent against women, children or other vulnerable persons, with whom the respondent is or has been in a domestic relationship.*

Domestic violence: key judgments

### **Zafar Iqbal v The State 2010 SCMR 401**

Key points:

- Throwing acid and disfigurement
1. Zafar Iqbal seeks leave to appeal from the judgment dated 10-6-2009 of a learned Judge in Chambers of Lahore High Court, Rawalpindi Bench, whereby, criminal revision filed by the petitioner was dismissed and his conviction under section 336/34, P.P.C. was upheld along with sentence to imprisonment for 7 years and payment of Arsh to the tune of Rs.500,000.

#### **Case 6.3 Zafar Iqbal v The State**

2. Zafar Iqbal, along with his co-accused Ghulam Hussain and Adnan is said to have thrown acid on Mst. Sahib Bibi, wife of complainant Muhammad Iqbal, as a result of which, she sustained acid burns on her face, neck and left arm, covering 17 per cent of the body area.
3. The occurrence is sufficiently proved by the injured lady, who herself appeared in Court, carrying the marks of occurrence. Her statement is duly supported by the medico-legal report (P.86). [...].
5. Even disfigurement is sufficient to constitute offence under section 336, P.P.C. and hence the petitioner was rightly convicted there under. However, it is to be noticed that the principal sentence is that of Arsh and the Court can also award sentence of imprisonment to the extent of 10 years, in the given circumstances of each case. We have found that the facial disfigurement is only to the extent of five per cent, which might be a scar of small size, the compensation (Arsh) to the extent of Rs.500,000 and the sentence of 7 years over and above is a bit on the heavier side.
6. Consequently, the petition after conversion into appeal is partially accepted to the extent of sentence alone. The petitioner is sentenced to the payment of Rs.300,000 as Arsh and an imprisonment of 5 years with benefit under section 382-B, Cr.P.C. The imprisonment in default will remain intact.

## Muhammad Ameer v The State PLD 2006 SC 283

### Key points:

- Honour killing
- Informal justice system

This petition is directed against the judgment, dated 27-5-2003 passed by the Lahore High Court, Lahore in Murder Reference No.111 of 1999, Criminal Appeal No.203 of 1999 and Criminal Revision No.186 of 1999 whereby the sentence of death awarded to the petitioner by the learned Sessions Judge, Mianwali, under section 302(b), P.P.C. was converted into imprisonment for life with the direction to pay compensation of rupees one lac to the legal heirs of deceased under section 544-A, Cr.P.C. and in default thereof to undergo R.I. for two years. The benefit of section 382-B, Cr.P.C. was also allowed to the petitioner and his criminal appeal with reduction of sentence was dismissed. The murder reference was answered in the negative and criminal revision filed by the complainant was also dismissed.

### Case 6.4 Muhammad Ameer v The State PLD

[...].

This is a case of two versions and we having put the prosecution case in juxtaposition to the defence version, according to which the petitioner having felt insulted because of immoral act of the deceased, reacted and fired at him, have found that nothing was brought on record to suggest that petitioner at any time, had seen his daughter Mst. Shamim Akhtar and the deceased together at any place. The case of the petitioner was that he having come to know about the immoral act of deceased with his daughter, lost self-control and in the heat of passion due to Ghairat under grave and sudden provocation fired at the deceased. This version of the petitioner even if is given full weight, still the element of grave and sudden provocation would be missing and it could hardly be suggested that the petitioner on receiving the information about the act of deceased, was provoked and instead of setting the machinery of law at motion against the deceased took the law in his own hands on the excuse of grave and sudden provocation. The commission of an offence due to Ghairat or family honour must be differentiated from the grave and sudden provocation in consequence to which crime is committed in the light of facts and circumstances of each case. The plea of grave and sudden provocation may not be available to an accused who having taken plea of Ghairat and family honour, committed the crime with premeditation. The petitioner in the present case, with the intention to take revenge of the immoral act of the deceased of outraging the modesty of his daughter having prepared himself to commit the crime, armed with gun, went to the place of occurrence and fired successive shots at the deceased, therefore, his action would not be covered by the provisions of section 302(c), P.P.C., which may attract in a case, in which the essential ingredients of Qatl-i-Amd punishable under section 302(a) and (b), P.P.C. are missing. Learned counsel has also not been able to convince us that the case against the petitioner would not fall within the ambit of section 302(b), P.P.C. or that it was a case of lesser punishment under section 302(c), P.P.C.

6. In the light of foregoing discussion, this petition being without any substance, is accordingly, dismissed. Leave is refused.

## Morrison Bhatti v The State 2008 MLD 866

### Key points:

- Rising domestic violence in society

According to the prosecution, on 6-6-2006, at about 8-30 hours, applicant Morrison Bhatti, subjected his wife Shaleen Rossana Oliver to domestic violence in his house situated in Drig Road, Cant Bazar, Karachi. She was working as Manager Nursing, in Liaquat National Hospital, Karachi. On the day of incident, she proceeded for duty and as soon as she came out from her house the applicant pushed her back into the house, bolted the door from inside, and started giving her blows with an iron bar on head and other parts of the body, as a result of which she fell down and started bleeding. He then took a pair of scissors and cut off tip of her nose. She was rushed to Liaquat National Hospital and after giving her first aid she was referred to Jinnah Post-Graduate Medical Centre, Karachi. The matter was reported to police by her brother Salman William on the same day at 17.10 hours.

### Case 6.5 Morrison Bhatti v The State

Learned counsel for the applicant contends that out of the six wounds suffered by the victim on her eye, head and nose, the injuries at serials Nos. 2 and 4 have been declared as 'Shajjah-e-Mediha', while final opinion regarding injury on the left eye mentioned at serial No.1 of the certificate has not been given as yet. Surprisingly, the nose injury has been declared as 'Shajjah-e-Khafifah', supposedly for the reason that there was no fracture of any bone. This seems to be due to lack of legal knowledge.

In the F.I.R. also section 334 of the Pakistan Penal Code, 1860 (P.P.C.) has been incorrectly applied. The correct section applicable in the case will be 336, P.P.C. Cutting of nose, even a part of it, clearly causes permanent disfigurement which according to section 335, P.P.C. comes within the purview of 'Itlaf-i-Udw' and the offence is punishable under section 336, P.P.C., inter alia, with imprisonment up to 10 years.

The Court while considering the question of bail in the case like the present one, cannot ignore the increasing tendency of domestic violence in our society. The violence committed by the applicant is also a worst type of domestic violence. Moreover, most of the witnesses, including the victim, have already been examined and the case is near completion.

For all these reasons, the case is not fit for the grant of bail. Accordingly, the application is dismissed.

## 6.4 Thailand

### 6.4.1 Domestic violence

Domestic violence is a pervasive and widespread problem in Thailand.<sup>109</sup> According to the Ministry of Public Health, 13,265 women sought assistance from the one-stop crisis centres (OSCCs) for domestic violence between October 2014 and September 2015.<sup>110</sup> Of these victims, 67 per cent reported physical abuse, while 22 per cent reported sexual abuse.<sup>111</sup> According to the Ministry of Social Development and Human Security, 294 cases of domestic violence were reported in 2015, compared with 233 cases reported in 2014.<sup>112</sup> Of those 294 cases, victims in only 69 cases pursued criminal charges: victims in the other 117 cases chose not to access the justice system.<sup>113</sup>

In a 2016 UN Study, 44 per cent of Thai women admitted to being the victim of physical violence or sexual violence or both by an intimate partner in their lifetime.<sup>114</sup> Another 22 per cent admitted to being subjected to physical violence or sexual violence or both within the last 12 months.<sup>115</sup> Previous studies have shown that as many as one in three households experienced some form of domestic violence over the course of the year.<sup>116</sup>

Prevailing cultural and strong patriarchal attitudes play a significant role in enabling domestic violence in Thailand. There is a well-known saying in Thai culture that a woman is the 'hind legs of the elephant' following the man's front legs.<sup>117</sup> It is not uncommon for women and girls to believe they are partially to blame for incidents of physical abuse, or to agree that in some circumstances a man may be justified in abusing his intimate partner.<sup>118</sup> In a UN study conducted in 2005, 53.4 per cent of women who had previously experienced some form of intimate partner violence believed that a man was justified in beating his wife or intimate partner under certain circumstances.<sup>119</sup>

#### Domestic violence: recommendations for the judiciary

- Any incident of domestic violence involving an allegation of violence or a serious human rights abuse should not be resolved through informal settlements or mediation.<sup>120</sup>
- Victims should not be precluded from accessing judicial remedies even if the domestic violence matter is handed through settlement or a 'reconciliation process'.<sup>121</sup>
- Family members should be prevented from acting as mediators in domestic violence claims, and instead only independent and impartial parties should adjudicate and mediate domestic violence.<sup>122</sup>



- Victims should not be precluded from compensation and other forms of reparation or civil remedy, including filing for divorce, if the domestic violence claim is handled through reconciliation.
- The safety and protection of the victim and any affected child should be the paramount concern in any judicial decisions, protection orders, reconciliation agreements or judgments involving domestic violence.<sup>123</sup>

#### Domestic violence: law

**Domestic Violence Victim Protection Act, B.E. 2550 (2007):** This special law introduced measures intended to support and protect victims and family members affected by domestic violence. It provides a wide definition of ‘family member’ covering ‘spouse, former spouse, person who lives and cohabits, or used to live and cohabit together as husband and wife without registering marriage, legitimate child, adopted child, family member, including any dependent person who has to live in the same household’.<sup>124</sup> The wide definition of family member allows protection to be extended to women and girls in both formal and informal unions, including current and former spouses, and cohabitants.

The Act also seeks to improve victims’ access to remedy and reparations for domestic violence. Article 5 of the Act introduces a mandatory reporting requirement for any person who encounters an act of domestic violence.<sup>125</sup> Articles 6 and 8 allow an investigating official to make medical, psychological and psychosocial assistance available to victims of domestic violence.<sup>126</sup> Article 10 allows the senior administrative officer or senior police officer tasked with investigating the complaint to issue orders for financial relief to the victims. Article 9 safeguards the privacy of parties involved, prohibiting the publication or dissemination of the complaint or the alleged perpetrator’s name.<sup>127</sup>

Finally, Article 10 empowers the senior investigating officer to issue an array of different protection measures in the interests of the victim, notwithstanding victims’ consent. Such orders include: (1) sending a domestic violence perpetrator to receive medical examinations and treatment;<sup>128</sup> (2) forbidding or restraining the perpetrator from going near the victim, the victim’s family members or the family residence;<sup>129</sup> (3) arranging or specifying childcare arrangements.<sup>130</sup>

**The Criminal Code of Thailand B.E. 2499 (1956):** This code also provides a legal avenue for victims of domestic violence, particularly when the abuse results in a criminal offence such as rape, grievous bodily harm or death.

Under section 276, rape by a spouse (or marital rape) is criminalised; however, a judge may reduce the sentence if the perpetrator and victim are married and wish to continue to live together.<sup>131</sup>

Under section 297, '[w]hoever causes injury to the other person in body or mind is said to commit bodily harm'.<sup>132</sup> Under section 297, if the bodily harm involves more serious and permanent injuries, it amounts to 'grievous bodily harm', for which the punishment is imprisonment from six months to 10 years.<sup>133</sup>

Under Section 290, if a perpetrator through an act of domestic violence inflicts 'injury upon the body of [another] person without [the] intent to cause death' yet does in fact cause the death of the victim, it is culpable homicide for which the punishment is 'imprisonment of 3 to 15 years'.<sup>134</sup> Under section 288, if a perpetrator intends to kill the victim in the context of domestic violence, it is murder. The punishment is imprisonment of 15 to 20 years.<sup>135</sup>

**Civil and Commercial Code 1925:** Under section 1516, domestic violence is a basis to seek a divorce in a marriage. Section 1516 (2) (c) states that sustaining 'excessive injury or trouble' as a result of being in the marriage is a basis to seek a divorce.<sup>136</sup> Section 1516(3) further provides that causing any 'bodily harm or torture' is a basis to seek a divorce.<sup>137</sup>

Thailand is obligated under international human rights law to exercise 'due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons'.<sup>138</sup> If state officials fail to take sufficient steps to investigate or punish acts of domestic violence or obstruct or interfere with any such efforts, Thailand may be in violation of its obligations under international law.<sup>139</sup>

**International obligations:** As a State party to CEDAW, Thailand must 'condemn discrimination against women in all its forms'<sup>140</sup> committed 'by any person, organization or enterprise'.<sup>141</sup> Domestic violence is recognised as a form of gender-based discrimination and violence,<sup>142</sup> which involves 'acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty'.<sup>143</sup>

In practical terms, Thailand must take measures to criminalise acts of domestic violence against women;<sup>144</sup> remove underlying legal, social and cultural barriers including gender stereotypes that may prevent women from exercising and claiming their rights and impede their access to effective remedies;<sup>145</sup> investigate allegations and where sufficient evidence is found, prosecute domestic violence allegations before an independent and impartial tribunal with the intention of punishing the accused with a sentence commensurate with the gravity of the offence. This obligation falls on all branches of government, including the judiciary.<sup>146</sup>

The Domestic Violence Victim Protection Act places strong emphasis on reconciliation and mediation to ‘preserve[e] good relationships within the family’. Emphasising reconciliation and mediation over formal justice encroaches on Thailand’s due diligence obligations to investigate, prosecute and punish perpetrators for domestic violence offences. It also directly interferes with victims’ right to protection from all forms of gender-based violence.

The repeated emphasis on reconciliation and ‘preserving good relationships within the family’<sup>147</sup> in the Remarks section of the Act further undermines the gravity of domestic violence and trivialises the protection needs of victims. By urging reconciliation and mediation to give ‘offenders a chance to behave one self and refrain from repeating the offence, as well as preserving good relationships within the family’,<sup>148</sup> domestic violence is relegated to a minor annoyance which must be resolved in the interests of the family and community. The emphasis on reconciliation and mediation thus has far-reaching implications in how family-based violence against women is perceived in society and handled by the justice system.

The classification of domestic violence as a ‘compoundable offence’ under Thai law has had a further and more profound impact on the way domestic violence is handled procedurally, affecting how victims are able to access Thai law. Compoundable offences are generally viewed as resolvable between parties, and as such parties are often urged to engage in reconciliation to prevent the matter from coming before the formal justice system. A compoundable offence also means the State is not able to initiate an investigation into an allegation on its own; it may only initiate proceedings and investigation where the victim files a complaint. If, however, the victim decides to settle the case through reconciliation or mediation, then the complaint must be withdrawn, in which case legal proceedings initiated by the state must cease.<sup>149</sup> A compoundable offence is also subject to a three-month prescription period. As such, if a victim of domestic violence does not make a report within three months of the incident, they are precluded from accessing justice, remedy or reparations. Compoundable offences also have lesser sentences and no minimum sentences. The classification of domestic violence as a ‘compoundable offence’ comports with the overall emphasis on reconciliation over justice and accountability. Article 15 places specific emphasis on ‘settling’ domestic violence incidents, requiring the court to ‘try and attain a settlement between litigants’ at ‘any stage of proceedings’ with the aim of achieving ‘peaceful cohabitation within the family’.<sup>150</sup> Classifying domestic violence offences as compoundable directly interferes with the State’s obligation to investigate incidents of domestic violence, thus contravening

due diligence obligations to prevent and prohibit family-based violence against women.

According to the Act, the senior competent official (investigating the case) or the court may appoint mediators to settle an incident of domestic violence; mediators could include family members such as the father or mother, brother or sister of either the complainant or alleged perpetrator.<sup>151</sup> The use of family members as mediators to facilitate settlements is problematic for several reasons. First, it denies victims the right to an impartial and independent hearing or investigation into the domestic violence cases, thus undermining victims' right to access remedy and reparations for family-based violence against women. Second, it endangers the victim and any affected children, denying them the very-much-needed protection and separation from their family members, who often enable or acquiesce to the domestic violence and abuse. Third, it tacitly supports the strongly patriarchal values, again undermining victims' voices and trivialising the gravity of domestic violence. Women's rights NGOs and activists have commented that the vast majority of cases involving domestic violence have been resolved through reconciliation with 'a significant gap between the number of incidents reported to police and those that reach the courts'.<sup>152</sup>

Any settlement of a domestic violence case must take into account the following four principles: (1) the rights of the victims; (2) preservation and protection of the marriage; (3) protection and assistance for the family; (4) assistance to enable the family to live in harmony.<sup>153</sup> Highlighting 'family harmony' and 'preservation and protection of marriage' as one of the guiding principles to inform settlements directly undermines victims' right to protection from violence perpetrated within the family, and contravenes Thailand's due diligence obligations to prevent and prohibit all forms of violence against women.

#### **Domestic violence: initiatives to remove barriers to victims' access to justice in Thailand**

Between 2010 and 2013, UN Women in partnership with the Thai judiciary engaged in a gender sensitivity and capacity-building programme, in which 304 judges and court staff received training to support the implementation of the Protection of Domestic Violence Victims Act.<sup>154</sup> The aim of the programme was to conduct gender-sensitive training for judges on discrimination and domestic violence.

Over the course of the training, participants were encouraged to adopt gender-sensitive justice measures, which included: (a) screening for domestic violence cases at the initial bail hearing and separating domestic violence

cases from other domestic criminal cases; (b) allowing domestic violence victims to testify behind partitions or in closed circuit TV; (c) installing a 'witness room' or safe area for domestic violence victims to wait while the court was not in session.<sup>155</sup>

### Domestic violence: Recommendations

The following recommendations are offered which may help in bringing Thailand into compliance with its obligations under international law:

- Prohibit without exception the resolution of any incident of domestic violence involving an allegation of a serious human rights abuse through informal settlements or mediation<sup>156</sup>
- Ensure women victims are not precluded from accessing judicial remedies even if the domestic violence matter is handled through settlement or a 'reconciliation process'<sup>157</sup>
- Prevent members of the family from acting as mediators in domestic violence claims, and instead ensure that only independent and impartial parties adjudicate and mediate domestic violence<sup>158</sup>
- Guarantee that woman victims are not precluded from compensation and other forms of reparation or civil remedy, including filing for divorce if the domestic violence claim is handled through reconciliation
- Place the safety and protection of the victim and any affected child as the paramount concern in any judicial decisions, protection orders, reconciliation agreements or judgments involving domestic violence.<sup>159</sup>

### Notes

- 1 L. Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection' (2010) 8(2) *Journal of International Human Rights*, <http://scholarlycommons.law.northwestern.edu/njihr/vol8/iss2/3> accessed 7 October 2015.
- 2 UNICEF, 'Domestic Violence against Women and Girls' (Florence, 2000), <http://www.unicef-irc.org/publications/pdf/digest6e.pdf> accessed 7 October 2015.
- 3 Ibid.
- 4 Ibid.
- 5 UN Women, 'Facts and Figures: Ending Violence against Women, Various forms of violence against women' (2015), <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> accessed 8 October 2015.
- 6 Ibid.
- 7 S. Qureshi, 'Legislative Initiative in the Area of Domestic Violence in Pakistan: Gender Approach to the core provisions of the Domestic Violence (Prevention and Protection) Act 2009' (*Pakistan Vision*, 2012, 13(2)), [http://pu.edu.pk/images/journal/studies/PDF-FILES/Artical-10\\_V13\\_No2\\_2012.pdf](http://pu.edu.pk/images/journal/studies/PDF-FILES/Artical-10_V13_No2_2012.pdf) accessed 8 October 2015.

- 8 World Health Organization 'National Survey on Women's Health and Life Experiences in Cambodia – Report' (World Health Organization, March 2016), <http://asiapacific.unwomen.org/en/digital-library/publications/2015/11/national-survey-on-women-s-health-and-life-experiences-in-cambodia> accessed 20 November 2016, page 107.
- 9 Ibid, page 46.
- 10 Ibid.
- 11 Emma Fulu, Xian Warner, Stephanie Miedema, Rachel Jewkes, Tim Roselli and James Lang, *Why do some men use violence against women and how can we prevent it? Quantitative findings from the United Nations multi-country study on men and violence in Asia and the Pacific* (UNDP, UNFPA, UN Women, UNV, Bangkok, 2013), page 29.
- 12 Ibid, page 1.
- 13 Ibid, page 22; 'ever-partnered' is defined as '[m]en who had been married, cohabitated or had a girlfriend'. In the UN Multi-country Study in Cambodia, 1,474 of the 1,863 total respondents were classified as ever-partnered men, page 29.
- 14 Ibid, page 29.
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