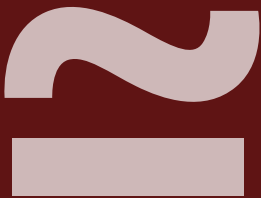
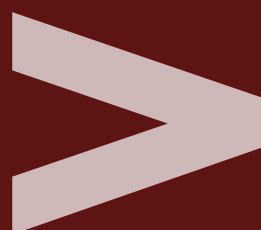
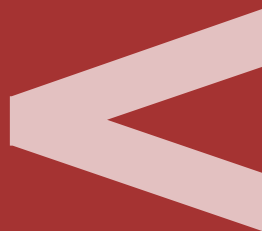




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Gender equity in justice systems of South Asia

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Gender equity in justice systems of South Asia
Implications for human development

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Abstract

This paper examines the parameters of the legal framework in the countries of South Asia and Iran from a gender perspective. It identifies the fault lines in the *de jure* position of the justice systems as well as the gaps between the *de jure* and the *de facto* positions. The study also indicates that domestic violence and sexual harassment are areas where legislative impact is incomplete, even though the problem is endemic.

Access to justice that includes effective legal services along with socio economic services is virtually absent in the region. With privatization, the state seems to be withdrawing from crucial areas such as education, health and employment and there are no mechanisms to address violations by non-state actors as a constitutional right. Various efforts by government and non-government bodies indicate positive developments that are moving towards progressive realization using the women's conventions as a benchmark.

The views expressed in this publication are those of the author(s) and do not necessarily represent those of the United Nations, including UNDP, or the UN Member States.

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Gender equity in justice systems of South Asia

Implications for human development

1. Introduction

This paper consists of an overview of law and legal mechanisms in the region and the legal system's response to concerns of gender. It reflects the commonalities and differences in the various legal traditions of the region with similar and varied experiences under colonial rule.

Laws – *de jure* and *de facto* – are instruments that influence the extent of security and differential power that people have. While women's movements and NGO activities in South Asia have had some success in bringing about legal amendments having a discriminatory effect on women and other gender minorities as well as introducing new laws strengthening their legal status, actual implementation often falls short. Measures designed to protect have often not been accompanied by measures to empower, and many women in the region neither have the knowledge nor the means to bring their cases to the courts even if the laws entitles them to do so. Additionally, most of the issues that impact women in the region are governed by personal laws that are not universal but are bound within the specifics of communities.

Issues under Focus

The study takes a rights based approach, identifying the rights of women, men and other oppressed gender minorities as human rights. The discussion focuses on criminal law, civil law, constitutional law and rules of evidence, and includes:

- (a) The *de jure* position on statutes (legal)
- (b) The *de facto* position in practice (facts)
- (c) Position in local/traditional laws (norms ex religious law etc.)
- (d) Position on the ground/in operation (fact)

The South Asian countries of Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka, and the Islamic Republic of Iran have been selected for the research. All countries have a shared history of mutual coexistence and a confluence of cultural values and systems. Islamic Republic of Iran, though not part of South Asia, has a contiguous geography with Afghanistan and this has had considerable influence on the Indian subcontinent.

Information Areas Sought

A brief overview of primary information areas that were researched for the project included:

- Sources informing the laws of the countries in the sub-region; relative importance of "personal" and "universal" laws within the countries; equality before law or otherwise for both men and women.
- Status of women in the personal law in the sub-region; to what extent personal law (particularly in areas such as inheritance rights, marriage, divorce, child custody, etc.) is universal and to which extent it is bound within the specifics of communities in different parts of the region.

- Awareness and understanding of gender equality in justice systems; differences, if any and the reasons for the gender based differences in law and who benefits from these differences.
- Mapping of the legal status in the sub-region: Secular versus traditional women and violence and laws.
- Women's economic position in the sub-region secured by law such as inheritance, property laws, etc.

Methodology

Research has broadly looked into two specific aspects:

- Human rights in the global context
- Legal systems and gender in a generalized context

The study is broadly divided into two parts. The first part deals with the *de jure* position and discusses legislation that covers areas of criminal law, evidence, legislation relating to employment, family law, and trafficking. The second part addresses the *de facto* position and addresses the role of law enforcers, the availability of resources, the application of the law and the areas of its non-application.

The paper has attempted to be all inclusive. The intersection of class, religion, caste and gender in addressing gender equity in justice systems has been considered in the study. In the context of gender the paper is not about women alone. However, marginalization on account of gender and disproportionate experience of disparity and disadvantage is more severe with women, minorities and other marginalized groups and these have been identified in this paper. It is recognized that legal interventions by themselves cannot address the problem of discrimination, lack of access to justice and violations of human rights. But they can set standards which in turn can be an effective tool to address these critical concerns.

2. Sources of Law in South Asian Countries

Legal Construct: A Historical Perspective

In some of the countries of the region that have a shared colonial past, civil law is often understood as law that governs all civil and commercial transactions. Some examples of such legislation would include the various Contract Acts, the Partnership Acts and the Companies Acts of Bangladesh, India, Pakistan and Sri Lanka. These were originally formulated during the colonial period to facilitate trade and commerce and continue to this day. The common law system, also led to the development of judicial precedents in cases and judgments of the higher courts that are considered binding on the lower courts.

The diversity of religious populace in the region also resulted in the growth of a complex set of personal laws or family laws based on religion that govern all aspects of marriage, divorce, custody, adoption, inheritance and other areas relating to the family. This branch of law, though civil in its impact, is based on religion and customary practices and is often referred to as personal law. During colonialism in the sub continent, some laws addressed certain areas of family matters. But the policy of

the colonialists was not to interfere in this area. Family law in the region thus is extremely diverse with each community following its own set of rules and regulations and with different kinds of legislative interventions.

There is also interplay between civil law and family law in some countries that needs to be understood. To give an example, while laws relating to inheritance owe their origin to religious laws, transfer of properties obtained in an inheritance would be governed by a civil law like Transfer of Property Acts in countries like Bangladesh, India and Pakistan. Islamic Republic of Iran provides for a comprehensive Code that includes both civil and family laws.¹

Sources of such laws are also varied. Within the same religious denominations of the region there are different systems of laws. Sometimes these are sourced from religious texts as in the case of statutes or religious texts are applied as in the case of *Shariat*. To give an example, legislations relating to Hindu law in India and Nepal while consolidating its applicability to all Hindus is based on customary and religious Hindu practices. However the laws governing Hindus in India and Nepal are very different. Bhutan follows customary law. In Sri Lanka legislative laws relating to the Tamil communities who are Hindus are based on customary practices while other communities have a combination of laws in this regard. In Bangladesh, Pakistan, Maldives, Afghanistan and the Islamic Republic of Iran, *Sharia* law is the basis of legislations relating to family law that are applicable to Muslims. The issue of state intervention with customs and traditions is a sensitive one because of the perception of influential groups in diverse communities that this is an official effort to denigrate and deny a legitimate sense of cultural or ethnic identity.²

Criminal law was codified by the British in the mid-nineteenth century, leaving behind three main legislations: the Penal Code, the Evidence Act and the Code of Criminal Procedure. These continue to be the foundation of the criminal justice system in Bangladesh, India, Pakistan and Sri Lanka despite each country having made various legislative changes in these laws. But since the British did not know much about the Sub Continent, they codified the laws based on their own experience in England and used the laws which had governed Britain as creating the right legal framework.³ Thus, laws that defined crimes involving violation to the body such as sexual assault, kidnapping or abduction were drafted with the dominant idea of protecting the honor of the individual and his/her family rather than as an injury to the woman. To give an example, the Bangladesh and Indian Penal Codes of 1860 treat adultery as an offence punishable with imprisonment only when it is committed by a married woman. This often resulted in discriminatory practices being sanctioned in the realm of criminal law whose impact is continued to be felt even today. In the case of Pakistan there is a shift to Islamic criminal law in certain areas of evidence and substantial criminal law.

¹ For the Civil Code of the Islamic Republic of Iran, see <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>

² Savitri Goonesekere, *Violence, Law and Women's Rights in South Asia*, page 41, Sage Publications New Delhi.

³ Law power and justice, *The protection of personal rights in the Indian Penal Code*, Vasudha Dhagamwar, Sage publications, 1992, page 51.

Colonialism also introduced informal legal systems to serve their purpose. The system of *Jirga* although prevalent in the area of Peshawar in the Khyber Pakhtunkhwa province of Pakistan was introduced as a system of resolving disputes in the region.⁴

Other legal systems of countries of the region such as Bhutan and Nepal did not have a history of colonialism but have had monarchies with different systems of law in place and are in the process of transition. Bhutan has held elections towards the establishment of a national assembly. In the case of Nepal, major changes in the political system have resulted in a transition from monarchy to republic and the country is poised for formulation of a constitutional assembly. Nepal has ratified all human rights treaties.

Islamic law operates in all the countries of the region in the area of family law while in Afghanistan, Pakistan and Maldives the principles of *Shairat* also govern parts of civil law and criminal law. Historically political and dynastic differences led to the creation of two schools in Islamic law, the Sunni and the Shia. The Shia school is divided into three main sub schools: the Athna-Asharias, the Ismailiyas and Zaidyas. The Sunni school is divided into several sub schools such as the Hanafi, Maliki, Shafei and Hanabali named after their respective founders. Islamic law recognizes the right of any Muslim to renounce the doctrines of any school and adopt any one that he or she would choose. In practice however, the systems of some countries discriminate in favor of one school. In the Islamic Republic of Iran, the laws have been codified following the Shia school and all Muslims to whichever school they belong are governed by the codified law. The vast majority of Muslims in the Indian sub-continent are Sunnis and the presumption is that parties to a legal proceeding are Sunnis unless the contrary is established. Since most of the Sunnis are Hanafis in the region the presumption is that a Sunni is governed by the Hanafi law.

The foundation of Islamic jurisprudence is the Holy Quran. Laid down in 7th Century AD it was the most progressive system of jurisprudence and contains many features that were very revolutionary at its time.

Islamic law was the earliest legal system to grant equal rights to women. Women enjoyed the right of inheritance with an absolute power of disposition over their properties even when there were male heirs. The personality of the wife did not merge with that of the husband on marriage, and divorce was not prohibited. While other systems addressed marriage as a sacrament, Islamic law looked upon the institution as a contract. Widow re-marriage was a recognized principle in Quranic law. These principles actually provided a progressive system of jurisprudence that was subsequently recognized by other legal systems at a later point of time.

As a source of law, the verses of the Holy Quran are quoted for various legal rules and moral laws. The Holy Quran also provided for principles of interpretation. When several verses deal with the same problem the principle of interpretation is that the earlier ones are repealed by the later ones.⁵

⁴ Lt Sandemann a British officer is credited with introducing *Jirga* in the region. Report of the Human Rights Commission of Pakistan.

⁵ Asaf A.A. Fyzee, *Outlines of Muhammadan law*, 4th edition OUP page 10.

While the distinction between legal laws and moral codes in the case of Islamic law pose a challenge in the administration of justice,⁶ the interpretation of the law during colonialism posed a great problem since it often resulted in judgments that were considered against the spirit of the Holy Quran.⁷ Another example was the introduction of the principle of restitution of conjugal rights in the region despite the fact that such a concept did not exist in Islamic law.

The other sources of Islamic law are the Hadis, Ijmaa and Qiyas, but the Holy Quran takes precedence over all of them. Islamic legal code based on the Holy Quran and other sources of law are called the *Shariat*.

1. *Hadis*: The law laid down in the holy book is supplemented by Hadis or Sunna, which are the precepts and the practices of the Messenger of God. They were not recorded during the lifetime of the Prophet but were collected from various sources and were preserved by tradition and handed down by various persons. Hence the authenticity of many of the traditions attributed to the Holy Prophet is considered to be in great doubt. Since they evolved subsequently, different jurists gave varied interpretations and very often the traditions were reported in contradictory ways without consensus among jurists. To give an example, one tradition was used against the former Prime Minister Benazir Bhutto by fundamentalists to state that a nation ruled by women could not prosper. Some scholars are of the view that such a Hadith is of a forged nature considering the high encomium paid in the Holy Quran to the rule of Queen Balqis of Sheba.⁸
2. *Ijma*: This is considered the third source of Islamic law and it means the concurrence or concordance of the companions and disciples of the Prophet, their successors and jurists.
3. *Qiyas* This is the fourth source of Muslim law that is based on the exercise of private judgment based on analogy. Linked to this is the concept of Ijtihad or Ijtehaad, which denotes the bringing into operation the whole capacity of forming a private judgment relative to a legal proposition.⁹ As a source of law, Ijtihad or Ijtehaad refers to determining a decision about an issue on which the *Shariat* is silent. The decision is taken in the light of one's own understanding of the situation as well as that of the spirit of the directives of the Holy Quran. Qiyas and Ijtihad constitute a dynamic mechanism to meet the exigencies of the situation and for the development of law.

⁶ Justice Mahmood, "one of the greatest difficulties in the administration of Muslim law, as indeed of all ancient systems, lies in distinguishing moral from legal obligations. (1885) 7 All 775.

⁷ Aga Mohamed vs Koolsom Beebee, ILR 1897 25 Cal, 9; 24 IA 196 on the right of maintenance of a Muslim widow. Despite clear dictum in the Holy Quran, Sura 2. Verse 240, granting a right of maintenance to a Muslim Widow, the Privy council dismissed her claim and held that she was not entitled to maintenance from her husband's estate. .

⁸ verse 27:27-44 in Muslim law of marriage and succession in India, Justice SA Kader, Eastern Law Company, 1998 page 11.

⁹ Syed Ameer Ali, Mahommedan law, 5th ed vol 1, page 27.

Opposed to this principle is the doctrine of Taqleed, which literally means following the opinion of another person without knowledge of the authority of such person.

British colonialism had its impact in causing stagnation of the development of *Qiyas* and *Ijtihad* as a source of law in India, Pakistan and Bangladesh. When Indo-Anglican courts interpreted Islamic law, they refused to consider them as valuable tools and instead depended upon commentaries of ancient jurists like Hedaya and Imameea. This resulted in old and antiquated views being prevailed upon what would have clearly followed and logically flowed texts of the Quran or the record of the Hadis.¹⁰ The current position continues in India in areas of interpretation where there is no statutory law.

Legal Construct: The Contemporary Challenge

Family laws in all the countries discriminate on the ground of gender. The safeguarding of minority rights which are all too essential in any country has unfortunately led to a situation where minority family laws are not amended even when they are discriminatory. As a result, women from minority communities often face double discrimination.

As an example, Hindus in India are governed by various statutory laws in matters pertaining to the family, which legitimates divorce. But Hindus in Bangladesh and Pakistan - by virtue of their minority status - cannot obtain divorce since it is prohibited under Sastric Hindu (scriptures) laws¹¹. In the same way, the practice of *triple talaq* by which a man can divorce his wife even in her absence by repeating talaq three times in the presence of two witnesses, is the common method of divorce among Indian Muslims. The Divorce Act of 1869 that governs divorce among Christians in India, Pakistan and Bangladesh was amended in 2003 in India to simplify and add grounds of divorce due to campaigns by Christian women's groups. But the legislation that recognizes only adultery in its various forms as grounds of divorce continues to operate in Pakistan and Bangladesh¹².

Despite these tensions there are a number of legislations that safeguard women's rights. In such instances discrimination persists in the form of informal practices and other socio economic factors that deny women legal access.

3. Justice Systems in South Asian Countries: Structure and Equality

The concept of equality has had a varied meaning in different systems of law. The traditional approach has been one of "treating likes alike" ignoring gender differences between men and women focusing on "equal treatment" rather than on equality of outcomes. As a result, there is an additional burden on women to achieve male standards when in fact the social and economic reality of women is not similar to that of men.¹³

¹⁰ Muslim and the Constitution, AM Bhattacharjee, 2nd edition pg 19 Eastern Law Company 1994.

¹¹ There is no statutory law in Pakistan and Bangladesh addressing marriage and divorce among Hindus

¹² Divorce Act of Pakistan and Divorce Act of Bangladesh.

¹³ Madhu Mehra, restoring rights to women 2004 Unifem publication page 24.

The second approach recognizes these differences and reinforces them by sanctioning different treatment as while taking note of biological difference it relies on social assumptions as a standard for the roles and capacities attached to men and women. Such approach often falls on the assumption of weakness and subordination on the basis of sex rather than addressing the external, structural or systemic causes of the subordination of women. These two dominant practices in relation to equality are called the ‘formal’ and the ‘protectionist’ model of equality respectively. ¹⁴ Under CEDAW however, a third approach has been adopted. This is called the corrective approach that recognizes that women were historically disadvantaged and corrective measures ought to be taken in order to address this discrimination. The thrust is on substantive equality. A substantive definition of equality takes into account and focuses on diversity, difference, disadvantage and discrimination. It examines the assumptions behind the difference in trying to assess the disadvantage resulting from it and stresses the need to develop a ‘different treatment’ or a response that dismantles the disadvantage. It seeks to eliminate existing discrimination faced by disadvantaged groups at the individual, institutional and systemic levels through corrective and positive measures. Its principal concern is to ensure that the law corrects the imbalance and impacts on the outcome by assuring equal opportunities, access and benefits for women. In doing so it seeks a paradigm shift from “equal treatment” to “equality of outcomes”.¹⁵

The boxes 1 to 10 indicate the CEDAW’s and equality and non-discrimination provisions of the various constitution of the countries.

Box 1: Equality under CEDAW

Under Article 1, different treatment of men and women that results in impairment or nullification of rights and freedoms amount to discrimination.

Under Article 2 state parties are required to embody the principle of equality of men and women in their constitutions.

Source: Articles 1 and 2 of CEDAW.

Box 2: Articles One and Six of the Constitution of Afghanistan 2004

Chapter. 1, Article. 6

The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country.

Chapter. 2, Article. 1

Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.

Source: Chapter 1 (article 6); chapter 2 (article 1) of the Constitution of Afghanistan

¹⁴ *ibid*, page 25.

¹⁵ *Ibid*.

Box 3: Article 15 of the Constitution of Bhutan 2008

Article 15

All persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics or other status

Source: Article 15 of the Constitution of Bhutan.

Box 4: Articles 27 and 28 of the Constitution of Bangladesh 1972

Article 27

All citizens are equal before law and are entitled to equal protection of law.

Article 28

(1) The State shall not discriminate against any citizen on grounds only of religion, race caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life.

(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

(4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens before the law

Source: Articles 27, 28 of the Constitution of Bangladesh.

Box 5: Articles 14 and 15 of the Constitution of India 1950

Article 14; The State shall not deny to any person equality before the law and equal protection of the laws within the territory of India.

Article 15; (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

Source: Articles 14 and 15 of the Constitution of India.

Box 6: Articles 19 and 20 of the Constitution of Islamic Republic of Iran 1979

Article 19

All people of Iran, whatever the ethnic group or tribe to which they belong, enjoy equal rights; and color, race, language, and the like, do not bestow any privilege.

Article 20

All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria.

Source: Articles 19 and 20 of the Constitution of the Islamic Republic of Iran.

Box 7: Article 13 of the Constitution of Maldives 2008

Article 13

Maldivian citizens are equal before and under the law and are entitled to the equal protection of the law.

Source: Article 13 of the Constitution of Maldives.

BOX 8: Article 13 of the Interim Constitution of Nepal 2007

Article 13

(1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.

(2) There shall be no discrimination against any citizen in the application of general laws on grounds of religion, race, gender, caste, tribe, origin, language or ideological conviction or any of these.

(3) The State shall not discriminate among citizens on grounds of religion, race, caste, tribe, gender, origin, language or ideological conviction or any of these.

Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, Dalits, indigenous ethnic tribes [Adivasi Janajati], Madhesi or farmers, labourers or those who belong to a class which is economically, socially or culturally backward, or children, the aged, disabled or those who are physically or mentally incapacitated.

(4) There shall be no discrimination with regard to remuneration and social security between men and women for the same work.

Source: Article 13 of the Interim Constitution of Nepal

Box 9: Article 25 of the Constitution of Pakistan 1973

Article 25

(1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex alone.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

Non-discrimination in respect of access to public places.-(1) In respect of access to places of public entertainment or resort, not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth.

(2) Nothing in clause (1) shall prevent the State from making any special provision for women and children.

Source: Article 25 of the Constitution of Pakistan.

Box 10: Article 12 of the Constitution of Sri Lanka 1978

Article 12

12. (1) All persons are equal before the law and are entitled to the equal protection of the law.

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds:

Provided that it shall be lawful to require a person to acquire within a reasonable time

sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office:

Provided further that it shall be lawful to require a person to have sufficient knowledge of any language as a qualification for any such employment of office where no function of that employment or office can be discharged otherwise than with knowledge of that language.

(3) No person shall, on the grounds of race, religion, language, caste, sex or any one such ground, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

(4) Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

Source: Article 12 of the Constitution of Sri Lanka

Equality and non discrimination find a reference in all the constitutions. These rights are guaranteed only to a citizen. Caste discrimination is prohibited under the Constitutions of Bangladesh, India, Nepal, Pakistan and Sri Lanka. The Constitutions of Bangladesh, India, Nepal, Pakistan and Sri Lanka permit the State to introduce special laws in favor of women and children. The interim constitution of Nepal is the only constitution that prohibits discrimination on the basis of gender. Such provisions cannot be considered discriminatory in view of the articles that address substantial equality. Thus the States are empowered by their Constitutions to provide for affirmative action and to introduce temporary special measures as envisaged in Article 4 of CEDAW. A different example is in the case of Islamic Republic of Iran where the role of the woman in the family is stressed in the constitution.

The Constitutions of all the countries grant a set of constitutional rights that include freedom of expression, freedom of movement, right to form associations and cultural rights. The constitutions of Afghanistan, Islamic Republic of Iran and Pakistan give supremacy to Islamic law.

Box 11: Caste System in Indian Sub-Continent

The caste system is peculiar to the sub continent. It is an elaborate hierarchy of birth based groups cutting across religion that form the basis of stratification. The entire structure of caste is based on endogamy and this in turn results in controlled marriages and relationships within the community. The system has also resulted in control of land and resources, by groups that are the dominant caste and hence can get interlinked with class. The Dalits, who are a cluster of castes considered “lowest” in the hierarchy face tremendous violence with increasing crimes against them. Despite several laws in India for their protection, many practices such as the Devadasi system, where Dalit girl children are dedicated to goddesses and then forced into prostitution, and manual scavenging where men and women undertake sanitation work literally with bare hands continue even in State run systems like the railways in India. Currently public interest litigation is pending in the Supreme Court of India in this regard. The practice of un-touchability against the Dalits, continues in great measure in the sub-continent. Dalits face historical discrimination that requires many temporary special measures at various levels.

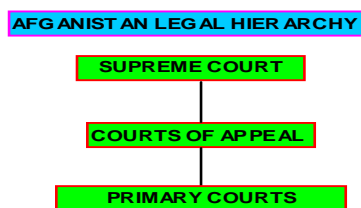
Source: India second and Third NGO Alternative Report on CEDAW, National Alliance of Women IWRAW - Asia Pacific 2006

The constitutions of Bangladesh, Bhutan, India, Nepal and Pakistan have many similar features in that they have a set of fundamental rights that are guaranteed to its citizens based on civil and political rights and a set of directives based on economic, social and cultural rights. However, despite of constitutional provisions of equality and non-discrimination, disadvantaged caste groups in India such as dalits do face discrimination of various forms (Box 11)

The legal systems of all countries operate at various levels starting from trial courts with different stages of appeals. The structure of trial courts of India, Pakistan, Bangladesh and Sri Lanka and their jurisdictions are a part of their colonial legacy and have similar features with slight variations. The jurisdiction of courts to issue writs such as *Habeas Corpus* and *Mandamus* are a constitutional right in these countries but have their source in common law. Among all the countries, the Constitution of India and the interim constitution of Nepal permit judicial review.

Afghanistan

In the Islamic republic of Afghanistan, no law can be contrary to the principles of Islam. The constitution prohibits discrimination and guarantees to all citizens fundamental equal rights and duties before the law.¹⁶ Followers of other religions are free to perform religious ceremonies in accordance to the provisions of law.



The legal system of Afghanistan operates at a three-tier level. The Supreme Court, courts of appeal and primary courts are the three structures with the first being the highest in hierarchy and the last court of appeal. The primary courts that are the trial courts include the juvenile court and the family issues court where disputes relating to the family

are taken. There are a small number of women in the formal legal system who work as clerks or with NGOs. Judges do not have formal legal training and there is a lack of legal texts. There is a near absence of defense lawyers both in urban and rural Afghanistan with the total number of lawyers in the country estimated at 150.¹⁷ The difficult terrain, the remoteness of the region and the lack of infrastructure has prompted the Government of Afghanistan to adopt the novel method of mobile courts that reach the litigant rather than the litigant approaching the system (Box 12).

Box 12: Mobile Courts of Afghanistan

In the absence of adequate qualified and legal personnel, the Government of Afghanistan has introduced the concept of mobile courts as a possible solution to the problems of accessibility and security. Mobile courts are a system where the court travels to the site of justice delivery to settle the dispute rather than being stationary in the city.

The Government of Afghanistan considers that such courts have the advantage of maintaining the delivery of justice in the place where the wrong has been committed, by reducing the

¹⁶ Article 22 of the Constitution of Afghanistan.

¹⁷ Country Reports on Human Rights Practices 2007, Afghanistan, Bureau of Democracy, Human Rights and Labor, March 2008.

unfairness to accused persons and witnesses that can arise when trials are removed to provincial capitals. Mobile courts can improve the caliber of local justice officials, survey facilities and improve the legal awareness of local people. They could also delay or eliminate the necessity of courts in many places. Teams of experienced judges, prosecutors, lawyers and administrative officials make periodic visits to places that are too remote, to insecure or too small to have permanent staffing. With the salaries and benefits of officials already provided, the additional costs are primarily transport and accommodation. As part of the NPP in 1383, the permanent justice institutions proposed a 3-year pilot program, eventually planning one traveling court for each province.

Mobile courts are considered as best practice in other countries with remote populations as in the remote aboriginal communities in Canada.

Source: Justice for All ; A comprehensive needs Analysis for Justice in Afghanistan, Government of the Islamic Republic of Afghanistan, Ministry of Justice.

Bangladesh

The Constitution of Bangladesh guarantees an impressive set of rights including the right to equality and equal protection of law.¹⁸ Discrimination on the ground of sex, religion, race, caste, or place of birth is prohibited.¹⁹ The constitution guarantees equality of opportunity in order to attain a uniform level of economic development.²⁰ The constitution also permits positive discrimination in the context of women to ensure equal participation of women in public offices.²¹ Safeguards against arrest and detention are a constitutional right.²² Apart from these national legal measures, Bangladesh is signatory to important global legal instruments that aim to advance gender equality (Box 14)

The concept of Public Interest Litigation²³ has also developed in Bangladesh with judges and human rights lawyers moving many cases to enforce constitutional guarantees for those who are not in a position to access the justice system (Box 13).

Box 13: Public Interest Litigation in Bangladesh

Sex workers in Bangladesh have often been evicted by law enforcement agencies from their place of residence despite being lease holders and tenants. In some cases they were forcibly removed to government established vagrant homes. In a public interest petition filed in 2000, charging forcible evictions of sex workers, the Dacca High Court, reiterated their fundamental right to equal protection of law and protection of life and personal liberty enshrined in Articles 31 and 32 of the Constitution and unequivocally censured such eviction, “since they were citizens of Bangladesh, enrolled as voters and exercised the right to franchise.”

The Government appealed against this ruling and subsequently evicted other sex workers from places outside Dhaka. Many of the homeless sex workers became street workers and faced greater threats to their safety. Programs on health started by UNDP were suspended due to the evictions.

Source: Shadow report of NGOs to the CEDAW Committee, 2004

¹⁸ Article 27 of the Constitution of Bangladesh.

¹⁹ Article 28 of the Constitution of Bangladesh.

²⁰ Article 19 of the Constitution of Bangladesh.

²¹ Article 28 of the Constitution of Bangladesh.

²² Article 33 of the Constitution of Bangladesh.

²³ Described in detail under the heading relating to India.

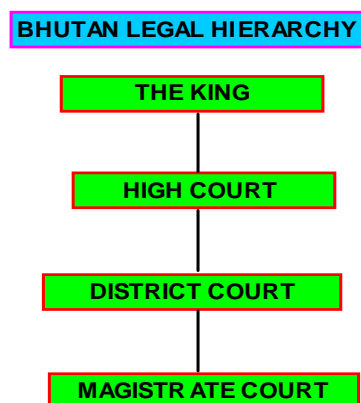
Box 14: Bangladesh Has Signed To Important International Instruments

Bangladesh is the first state in the region to have ratified the optional protocol to CEDAW. Bangladesh is a State party to a number of International instruments relating to women, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the Convention on the Political Rights of Women, the Convention on the Rights of the Child and its Optional Protocols, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is also a signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

In the Third Committee and the Commission on the Status of Women, Bangladesh had sponsored all resolutions concerning the advancement of women. Bangladesh has been one of the main sponsors of the resolution “Mainstreaming a gender perspective into all policies and programs in the United Nations system”, before the Commission on the Status of Women.

Source: Summary record of 5th periodic report of Bangladesh to the CEDAW Committee 2004

Bhutan



The Constitution of Bhutan guarantees equality under the law and effective protection and prohibits discrimination on the basis of race, sex, language, religion, politics and other status.²⁴ Under its directive principles of state policy, the state is required to endeavor to create a civil society based on the rule of law, protection of human rights and dignity and to

ensure the fundamental rights of its people. The state is required to take appropriate measures to eliminate all forms of discrimination and exploitation against women including trafficking, prostitution, abuse, violence, degrading treatment and economic exploitation.²⁵ Other rights include the right to freedom of conscience; freedom of expression; basic necessities; livelihood; vote; and equal pay for equal work; to name a few.

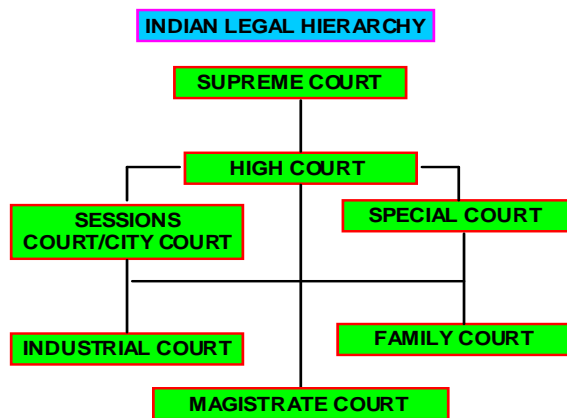
The judicial system consists of magistrate courts, district courts and a high court. Village headmen adjudicate minor offenses and administrative matters. Adjudication by village headmen can be reviewed by magistrate courts. Defendants have the final

²⁴ Article 7 of the Constitution of Bhutan.

²⁵ Article 9 of the Constitution of Bhutan.

right of appeal to the high court after which they can make a final appeal to the king. The Office of Legal Affairs conducts prosecution, drafts and reviews legislation and renders legal counsel.

India



The Constitution of India guarantees the fundamental right to equality and equal protection of law to all citizens and further prohibits discrimination based on religion, race, caste, sex or place of birth. It permits the state to make special laws for backward classes in view of the historical discrimination that communities faced. Such affirmative action can be done in educational institutions

and jobs in the government sector. It also permits the state to make special provisions for women and children.²⁶ Equality of opportunity is guaranteed to all citizens in matters of public employment.²⁷ The right to life and liberty are also recognized and freedom to practice and propagate one's own religion is guaranteed. Religious and linguistic minorities are given the freedom to manage their own affairs. Citizens with a distinct language, script or culture of their own have the right to conserve the same.²⁸

The Indian Constitution also lays down directive principles of state policy that are fundamental in the governance of the country and cast an obligation on the state to apply these in law making. Though not justifiable and enforceable by themselves, they have been held to supplement fundamental rights. Thus the state is required to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political rights shall inform all the institutions of national life. The state is also required to ensure that the operation of the legal system promotes justice, on the basis of equal opportunity and in particular, provide free legal aid by suitable legislation or scheme and ensure that opportunities for securing justice are not denied to any citizen.²⁹

Box 15: Evolution Of Public Interest Litigation In India

The evolution of public interest litigation(PIL) created by the Indian Supreme Court in the last two decades has led to a new approach by which concerns of human rights are addressed. This type of litigation, is considered as "judge made law" reflecting the individual philosophy of the judge. In the 1980's individuals and NGO's who were concerned by the large scale violation and deprivation of human rights of vast numbers of persons approached the Supreme Court espousing the cause of prisoners,

²⁶ Articles 14 , 15 of the Constitution of India.

²⁷ Article 16 of the Constitution of India.

²⁸ Articles 21, 25, 26, 27,28 and 29 of the Constitution of India.

²⁹ Articles 38, 39 and 39A of the Constitution of India.

bonded laborers, tribes, juvenile children and similar placed persons and groups . The persons who filed PILs included journalists, academics, lawyers, Doctors, activists of women's groups and human rights groups. They sought the enforcement of the constitutional rights against legal wrong. In the initial stage, PILs were filed by even sending letters to the court enclosing news reports of violations and the court treated them as a writ petition and issued many directions in this regard. The traditional rule of standing, the strict rules of evidence and the language of the law were simplified. In a PIL there is no determination or adjudication on individual rights. In a series of judgments the Court has given directions to the executive on large areas of human rights. The court also expanded the right to life guaranteed under the constitution to include the right to livelihood, right to health, right to education, the right to environment, the right to a safe working environment free of sexual harassment and the right to a fair trial process in the criminal justice system. The court has also addressed concerns relating to abuse of power and corruption in PILs.

Source: Sangeetha Ahuja - People, Law and Justice: Casebook on Public Interest Litigation Vol 1 & 2, Orient Longman, 1997

Legislative making falls in the domain of both the Federal (Central) government as well as the various states. In addition to this division there is a concurrent area where both the federal and the state governments can legislate. Family laws and criminal laws form part of the concurrent list under the Indian Constitution.³⁰ The constitution permits judicial review of legislations while citizens can challenge new laws through the prism of constitutional validity.³¹

By the development of PILs, the Indian Supreme Court has expanded its scope by including under it a host of socio economic rights including the right to livelihood, education, health, privacy, environment and a right to protection from sexual harassment (Box 15).³² The Indian Supreme Court has also read the provisions of international human rights treaties to which India is a party into domestic law. The court framed guidelines on sexual harassment citing Article 11 of the CEDAW Convention, which directs the state to take appropriate measures to eliminate discrimination against women in the field of employment.³³ This includes the prevention of sexual harassment in the workplace.

The practice of “untouchability” is prohibited under the Constitution³⁴ and special legislations such as the Protection of Civil Rights Act, 1955 and the Schedule Caste and the Schedule Tribe prevention of atrocities Act of 1989 defines various atrocities against the historically disadvantaged castes and provides for strict punishment.

³⁰ Seventh schedule of the Constitution of India.

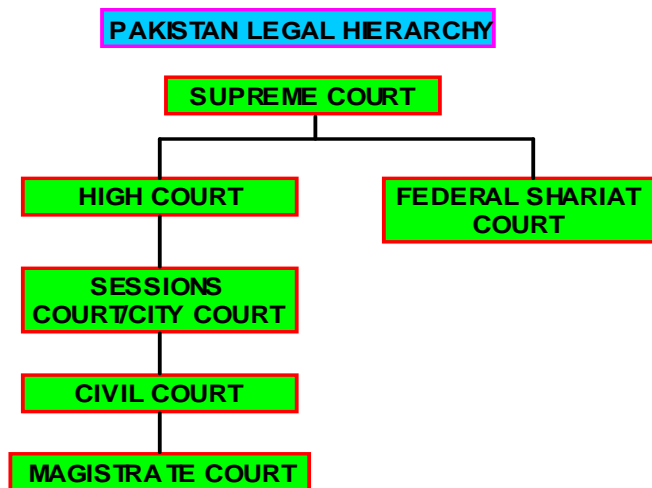
³¹ Articles 32 and 226 of the Constitution of India.

³² Olga Tellis vs Bombay Municipal Corporation AIR 1986 SC, 109, PUCL vs Union of India AIR 1997 SC, 1225, DK Basu vs State of West Bengal, AIR 1997 SC 610, SP Gupta vs Union of India AIR 1982 SC 149, Bandhua Mukti Morcha vs Union of India AIR 1984 SC 802, MC Mehta vs Union of India AIR 1987 SC 1086, AIR 1999 SC 2583, AIR 1997 SC 699, Common Cause laws vs Union of India AIR 1996 SC 1619.

³³ Vishaka and others vs State of Rajasthan and others (AIR 1997SC 3011).

³⁴ Article 17 of the Constitution of India.

Pakistan



The Constitution of Pakistan declares Islam as the state religion.³⁵ All laws must be in consonance with the *Quran* and *Sunnah*.³⁶ The constitution provides for the eventual Islamisation of all laws, reaffirming that no laws repugnant to the injunctions of Islam are to be enacted.³⁷

The Constitution of Pakistan also provides for three lists which are the subject matter for administration, namely the national list, the state list and the concurrent list. Legislation relating to citizenship, civil services and defense can only be formulated in the National Assembly after which it is forwarded to the Senate for consideration. Other issues such as measures for the welfare of labor, mines, insurances and health are within the purview of the federal legislative list or in the concurrent list.

The Constitution of Pakistan provides for gender equality.³⁸ Discrimination on the ground of sex is prohibited.³⁹ The right to life and liberty cannot be taken away unless in accordance with law.⁴⁰ The constitution also guarantees the dignity of man and the privacy of the home. Torture is expressly prohibited under the constitution.⁴¹ Slavery, forced labor and child labor are also prohibited.⁴²

Nepal

The right to equality and equal protection is guaranteed under Nepal's constitution. It also has provisions relating to non-discrimination and temporary special measures with reference to women, children, the elderly or those who belong to a class that is economically, socially or educationally backward (disadvantaged).⁴³ Nepal also has an impressive array of fundamental rights akin to other countries in the region. The interim constitution is the only one in the study covered that addresses women's concerns including the right to reproductive health, prohibition against violence and equal rights to inheritance and making these a constitutional right (Box 16).

³⁵ Article 1 of the Constitution of Pakistan. 1973

³⁶ Article 2 A of the Constitution of Pakistan.

³⁷ Part ix 9 of the Constitution of Pakistan.

³⁸ Articles 4 (2) and 9 of the Constitution of Pakistan.

³⁹ Article 25 of the Constitution of Pakistan.

⁴⁰ Article 9 of the Constitution of Pakistan.

⁴¹ Article 14 (1) and (2) of the Constitution of Pakistan.

⁴² Article 11 of the Constitution of Pakistan.

⁴³ Article 11 of the Nepal constitution. 2007

Box 16: Abolition of Death Penalty And Interim Constitution Of Nepal 2007

Nepal is the only country in the region that has abolished the death penalty. The prohibition of Death Penalty as a punishment in Nepal is in keeping with its obligation to the first optional protocol of the ICCR to which Nepal is the only state in the region to be a party.

Interim Constitution of Nepal 2007

Article 12: Right to freedom

(1) Every person shall have the right to live with dignity, and no law which provides for capital punishment shall be made.

Article 20 : Rights of women

(1) No woman shall be discriminated against in any way on the basis of gender.

(2) Every woman shall have the right to reproductive health and other reproductive rights.

(3) No physical, mental or other form of violence shall be inflicted on any woman, and such an act shall be punishable by law.

(4) Sons and daughters shall have equal rights to ancestral property.

Sri Lanka

The Constitution of the Democratic Republic of Sri Lanka 1978 recognizes the right to equality before the law and equal protection of the law.⁴⁴ Discrimination is prohibited on the ground of sex, caste, religion, language, political opinion or place of birth.⁴⁵ Equal protection before the law has been held to include the protection the right to livelihood.⁴⁶ The principle of non-discrimination is available against private actors by a judicial precedent. But no structure has been established to address such discrimination. The right to life is protected and torture and inhuman treatment is expressly prohibited under the constitution.⁴⁷

The legal systems of Bangladesh, India, Pakistan, Sri Lanka and under the Interim Constitution of Nepal

The shared colonial legacy has resulted in a common structure of courts in Bangladesh, India Pakistan and to a certain extent in Sri Lanka.

At the lowest level are the magistrate courts that try cases that are punishable with various degrees of imprisonment stipulated by different statutes. At the next tier are the session courts that try serious criminal offences and are empowered to give death sentence as a punishment. These courts also hear appeals from the magistrate courts. Special courts clothed with jurisdiction under special statutes deal with cases of corruption, and other crimes created under special laws.

In the case of civil litigation, the systems also provide for different tiers, beginning from trial courts and appeal courts. The Sessions Courts are also conferred with the jurisdiction to conduct civil cases. Family disputes if civil in nature are either tried in the family court wherever they exist or in the civil court.

⁴⁴ Article 12 (1) of the Constitution of Sri Lanka.

⁴⁵ Article 12 (2) of the Constitution of Sri Lanka.

⁴⁶ Jaysinghe vs Attorney General 1994, 2 Sri LR 74.

⁴⁷ Article 11 of the Constitution of Sri Lanka.

Above these courts are the High Courts that exist in every state or province. These are very powerful courts that can hear all appeals, enforce fundamental rights, issue directions to every functionary and issue writs. Judges to these courts are constitutional authorities. The Supreme Court is the highest tier in these countries, which can hear all appeals, decide constitutional matters and even adjudicate interstate disputes. The Indian Constitution is the only one in the region that permits judicial review. In Bangladesh, Pakistan and Sri Lanka, the Supreme Court can interpret the law but does not have the power of judicial review. The Supreme Courts of Bangladesh, India and Pakistan also have an advisory jurisdiction.

Pakistan is the only country among the four detailed here that has a Federal Shariat Court. The Federal Shariat Court can on its own motion or on the petition of a citizen of Pakistan or the Federal or provincial governments examine and decide whether or not any law or provision of law is repugnant to the injunctions of Islam. If the Court decides it to be so, the law ceases to have any effect and must be amended. The Federal Court also has appellate jurisdiction over cases that are tried under *Hudood law* and hears appeals from decisions of criminal courts relating to the enforcement of *Hudood law*. An appeal from the Shariat court goes to the Supreme Court. Judges of the Shariat court are drawn from the High Courts and the *Ulema*, scholars of Islamic law. Cases under the *Hudood law* that describe certain specific categories of offences are tried by the Sessions Courts.

In the case of Nepal the interim constitution provides for a three-tier system comprising the District Court at the lowest level, the Appellate Court and the Supreme Court— the highest court in the country.⁴⁸ The Supreme Court has the power to interpret the constitution, issue writs, and also consider the constitutional validity of legislation thus paving the way for judicial review.⁴⁹

Maldives

The Republic of Maldives is a democracy based on the principles of Islam, the state religion.⁵⁰ The citizens of Maldives are equal before the law and are entitled to equal protection of the law.⁵¹ The right to life and liberty is also guaranteed under the constitution.⁵² Criminal defense in conformity with fair trial standards is a fundamental right.⁵³ The right of defense has to be in accordance with the principles of *Shariah*.⁵⁴

The legal system in Maldives is a combination of English common law for commercial matters and Islamic law in all other areas including criminal law. The presence of a large number of islands has resulted in a highly decentralized system of administration. Each inhabited island has a magistrate or *Ghazi* dealing with legal and criminal matters. The high court is the highest court of appeal.

⁴⁸ 101 (1) of the Interim Constitution of Nepal 2063 (2007) as amended by the first, second and third amendments.

⁴⁹ Article 107 of the Interim Constitution of Nepal.

⁵⁰ Article 1 of the Constitution of Maldives.

⁵¹ Article 13 of the Constitution of Maldives.

⁵² Article 15 of the Constitution of Maldives.

⁵³ Article 16 and 17 of the Constitution of Maldives.

⁵⁴ Article 16 (2) of the Constitution of Maldives.

Islamic Republic of Iran

Islamic Republic of Iran's 1979 constitution called *Qanun-e Asasi* lays down an intricate structure of bodies, some of which are democratically elected and others that are based on religious inclinations. The constitution guarantees equality to both men and women who enjoy equal protection under the law and enjoyment of all political, economic, social and cultural rights in conformity with Islamic criteria.⁵⁵ The government is obliged to ensure the rights of women in all respects, in conformity with Islamic criteria.⁵⁶ Separate goals are created in addressing the role of a woman. All laws and regulations including civil, criminal, financial, economic, administrative, cultural, military, political, or otherwise must be in accordance with Islamic principles.⁵⁷

The Supreme Leader of the Islamic Republic of Iran is responsible for the delineation and supervision of the general policies of the Islamic Republic of Iran.

Next to the Supreme Leader, the President is the highest official in the country elected by universal suffrage for a four year term. The constitution also provides for the Council of Guardians comprising of twelve jurists, six of whom are appointed by the Supreme Leader while the other six are appointed by the President on the recommendation of the head of the judiciary.⁵⁸ The Council of Guardians interprets the constitution and determines if the laws passed by parliament are in accordance with *Sharia*. They have the power of vetoing a legislation passed by Parliament if in their opinion it is against *Sharia*.

Prior to the Islamic Revolution, Islamic Republic of Iran had ratified the ICCPR, ICESCR,⁵⁹ and later the Child Rights Convention (CRC).⁶⁰

Judges in Islamic Republic of Iran serve not only to make judgments, but their functions also include to serve as prosecutor, jurist and arbiter. In many ways the system is a form of the inquisitorial system.

The constitution stresses the need for an independent judiciary.⁶¹ The Chief Justice and the Public Prosecutor are required to be members of the clergy and demonstrate sufficient erudition in religious laws called *Shia mujtahids*. Judges of all courts are required to be experts in Shia jurisprudence. There are four categories of civil courts and two levels of criminal courts. Women are forbidden from becoming judges by long standing edicts of Islamic jurisprudence. However, they are allowed to climb the promotion chain and advance in the judiciary on an equal basis with men by becoming legal advisers in various civil and administrative courts, prosecutors, defense attorneys, etc.⁶²

⁵⁵ Article 20 of the Constitution of the Islamic Republic of Iran.

⁵⁶ Article 21 of the Constitution of the Islamic Republic of Iran.

⁵⁷ Article 4 of the Constitution of the Islamic Republic of Iran.

⁵⁸ article 91 of the Constitution of the Islamic Republic of Iran.

⁵⁹ Iran ratified them on 4th April 1968.

⁶⁰ 5th September 1991.

⁶¹ Article 156 of the Constitution of the Islamic Republic of Iran.

⁶² http://www.parstimes.com/women/womens_employment_situation.html

While the trial process in Islamic Republic of Iran is far speedier than in other countries, its duration is often limited to a few hours. Defendants can be found guilty on popular repute and the concept of a defense attorney is dismissed as a western absurdity. The charge of “sowing corruption on earth” describes a variety of offences including insulting Islam and the clergy, opposing the Islamic revolution, supporting the *Pahlavis* and undermining Islamic Republic of Iran’s independence.⁶³

Alternate dispute resolution (ADR) within the community

The resolution of disputes through alternate ways in the community is prevalent in Afghanistan, Bhutan, Bangladesh, India, Pakistan and Nepal and in many instances pre-dates the formal justice system. Such process does away with the formal requirement of evidence and is informal. Since the dispute is resolved by the community, the decisions are also speedily enforced. The settlement of such disputes is however fraught with serious concerns from a human rights perspective.

Customary practices operate not only as a source of substantial law in the region as indicated earlier but also act as a source for adjudication of disputes in an alternate forum.

In Afghanistan, customary law was enforced through the local *Jirga*, which was comprised of community members. Under the Taliban all customary laws were banned. They changed the Pashto word *Jirga* to the Arabic word *Shura* and instead of allowing the community to resolve disputes themselves, appointed the village Mullah as the head of the *Shura* and made him a government servant. The head then elected four others to constitute the *Shura*. With the defeat of the Taliban the old system of customary laws is slowly being practiced. But regardless of law enforcement before the *Jirga* or the *Shura*, women cannot be members. The Constitution of Afghanistan does not explicitly prohibit such practices.

In Pakistan the *Jirga* is commonly referred to as a tribal justice system. As in Afghanistan, elder men of the community comprise the *Jirga*. The disputes before the *Jirga* cover a broad spectrum from small claims to large disputes relating to land, money and disputes within the family. However the *Jirga* also judge crimes and impose punishment on those charged with *Zina* (adultery) by stoning or death.

In India and Nepal, disputes are settled by caste elders in caste *Panchayats*, ranging from enforcing customary divorce to permitting bigamous marriage. Minor disputes such as theft of cattle or crops are also brought before the informal legal systems. However the settlement of disputes by caste *Panchayats* has led to major human rights violations of including death, excommunication from the community and social ostracisation. Over the years these forums have also served the rich and powerful elements of the community. Measures to curb and ban them by court orders have not been successful since they enjoy tremendous community support.⁶⁴

⁶³ Abrahamian Ervand, *Tortured confessions*, University of California Press 1999 page 125.

⁶⁴ In 2004, the Sindh high court banned jirgas in the state but government functionaries, including chief ministers continue to participate in such meetings. Report of the Human Rights Commission of Pakistan.

Alternate dispute resolution (ADR) formulated by the state

The *Lok Adalat* or the people's court in India has been created under the Legal Services Authority Act of 1987 as amended in 1994. The courts operate under the formal judiciary and settle disputes that were pending for a long time in the formal justice system. Such disputes are settled by a panel comprising of lawyers, retired judges and other members drawn from civil society. A large number of civil disputes such as accident claims, default money claims, land acquisition claims, pension claims and other financial claims are settled this way and are facilitated by the various legal services authorities in the country. Once the *Lok Adalat* settles the dispute, the judge passes a decree on the case and the order becomes final and is executable. While a chunk of disputes have been settled this way, *Lok Adalats* are often critiqued as being concerned only with disposal of cases and not being sensitive to the concerns of the parties.⁶⁵

4. Gender Equity in the Political Sphere

Nationality and Citizenship

While the terms “nationality” and “citizenship” have similar impacts on people's lives and are often used interchangeably, they have different usages. Nationality is a term used in international law while citizenship is the term used in domestic law. While all citizens are nationals of a state, not all nationals are citizens.⁶⁶

CEDAW sets global benchmark on nationality rights. It requires equal rights of men and women to acquire, change or retain nationality (Box 17)

Box 17: Under Article Nine of CEDAW

State parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband.

State parties shall grant equal rights with men with respect to the nationality of their children.

Source: Article 9 of CEDAW.

Citizenship under national laws is obtained in three ways. The first is the principle of *Jus Sanguinis*, where citizenship is determined by the citizenship of parents. *Jus Soli* is when citizenship is determined by the place of birth and through naturalization, which operates independently and is given at the discretion of the state. The countries in the study follow both these principles but complexities arise in the context of cases where one parent has a different nationality.

The concept of nationality has traditionally been discriminatory, based on the oneness of the family and the unity of the nation, which in turn was based on the patriarchal notion that this unity should be determined only by the male “head of the household”. This resulted in the concept of “dependant nationality” that assumed that once a

⁶⁵ For an excellent critique of the system, “ Marc Galanter and Jayanth K. Krishnan, “Bread for the poor”; Access to justice and the rights of the needy in India, Hastings Law Journal, March 2004, Vol.page 788

⁶⁶ Final report on Women's equality and Nationality in International Law, International Law Association, London Conference . <http://ila-hq.org/pdf/Feminism.pdf>

woman is married, she joined her husband in his nation state. As a result of this, states that have not reformed their citizenship laws grant citizenships to foreign women who marry male citizens but do not grant citizenship to a foreign man if he marries the woman of the country's nationality.

The rights of children, born to parents of different nationalities in such situations, are determined solely by that of their father.

The impact of discriminatory nationality laws on the basis of gender restricts the woman's freedom to choose a residence and domicile. Children born to different nationals also risk becoming stateless in the event of the man abandoning his wife or denying paternity of the child. This in turn affects the right to education, and other social welfare benefits that might accrue to a child. In Nepal, children of sex workers faced severe consequences because their mothers could not transfer their citizenship to them.⁶⁷

The laws of Bangladesh, Bhutan, India, Maldives, and Sri Lanka have reformed their nationality laws and entrenched the concept of non-discrimination. In the case of the Islamic Republic of Iran, women continue to retain their nationality after marriage. However, her right to possess property is restricted if it is shown to be beneficial to her foreign spouse. While the legislation permits women to retain their nationality, it does not allow an individual to renounce his or her nationality except under strict conditions. However, the domicile of a married woman is the same as that of her husband. Nevertheless where the husband has no known domicile and also when the wife has a different domicile with the consent of her husband or by sanction of a court, she can have a separate domicile.⁶⁸

In Nepal, a person born, after the commencement of the Interim Constitution, whose father is a citizen of Nepal during his child's birth is a citizen of Nepal by descent.⁶⁹ A corresponding right is not available to the mother. A similar provision exists under their citizenship law. The Interim Constitution however seeks to rectify this anomaly (Box 18).

Box 18: Nationality Laws of Maldives, Islamic Republic of Iran, And Nepal

Maldives

Article 5 of the Constitution of Maldives Persons mentioned herein below shall be citizens of the Maldives:

- (a) every person who is a citizen of the Maldives at the commencement of this Constitution;
- (b) every child born to a citizen of the Maldives; and
- (c) every foreigner who, in accordance with the law, becomes a citizen of the Maldives.

Islamic Republic of Iran

Article 987 of the Civil Code

An Iranian woman marrying a foreign national will retain her Iranian nationality unless according to the law of the country of the husband the latter's nationality is imposed by marriage upon the wife. But in any case, after the death of the husband or after divorce or

⁶⁷ Shadow report on the second and third periodic report on the Government of Nepal on the CEDAW Convention, Coordinated by Forum for Women, Law and Development.

⁶⁸ Article 1005 of the Civil Code of the Islamic Republic of Iran.

⁶⁹ Article 9 of the Interim Constitution of Nepal.

separation, she will re-acquire her original nationality together with all rights and privileges appertaining to it by the mere submission of an application to the Ministry of Foreign Affairs, to which should be annexed a certificate of the death of her husband or the document establishing the separation.

Note 1- If the law of nationality of the country of the husband leaves the wife free to preserve her former nationality or to acquire the nationality of her husband, the Iranian wife who opts to acquire the nationality of the husband and who has proper reasons for doing so can apply in writing to the Ministry of Foreign Affairs and the Ministry can accord her request.

Note 2 - Iranian women who acquire foreign nationality by marriage do not have the right to possess landed properties if this would result in the economic dominance of a foreigner

Nepal

Section 3 Citizenship by descent

- (i) Any person born at the time when his father or mother is a citizen of Nepal, shall be a citizen of Nepal by descent.
- (ii) Whatever may be written in sub-clause (i), a child born out of wedlock by a Nepali female citizen to a foreign national shall be in accordance with clause 5, sub clause (ii)
- (iii) Every child found in the territory of Nepal, whose paternal and maternal addresses are undetermined, shall be considered a citizen of Nepal by descent until its father or mother are found.

Sources: Nepal Citizenship Act of 2006

The Citizenship Acts of 1958, 1977 and 1985 address the complex issue of citizenship and nationality in Bhutan. In Sri Lanka, Article 26 (3) of its 1978 Constitution stipulates 'no distinction shall be drawn between citizens of Sri Lanka, whether by descent or by virtue of registration'.

Under The Pakistan Citizenship Act of 1951, Pakistani women who marry foreigners do not lose their citizenship and children born of parents who were citizens of Pakistan also get the country's nationality.⁷⁰ However it still denies Pakistani nationality to foreign men who marry Pakistani women while permitting foreign women who marry Pakistani men to acquire citizenship.

Political Participation

Though all countries permit women the right to vote, their participation in the electoral process is very low. While there is no direct discrimination in the context of women participating in political and public life in most countries, the discrimination is indirect and structural in the form of socio economic barriers; cultural stereotypes; limited access to information; the prohibitive costs of the process; and threats and acts of violence.

In sync with CEDAW's requirements, most countries have constitution provisions on women's equal political participation. These countries include Maldives, Nepal and Afghanistan (Box 19)

⁷⁰ The Pakistan Citizenship (Amendment) Ordinance, 2000.

Box 19: CEDAW's Article Seven, Maldives, Nepal And Afghanistan Constitutional Provisions On Political Participation

Article 7 of CEDAW

State parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and in particular, shall ensure to women, on equal terms with men, the right;

- (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

The Constitution of the Republic of Maldives

Article 34. A person shall be qualified to be elected as President if he —

- (a) is a Muslim of Sunni following;
- (b) is a citizen of the Maldives whose parents . and grandparents are Maldivian citizen

Article 21 of the Interim Constitution of Nepal

Right to social justice

Women, Dalits, indigenous ethnic groups [Adivasi Janajati], Madhesi communities, oppressed groups, the poor farmers and labourers, who are economically, socially or educationally backward, shall have the right to participate in state structures on the basis of principles of proportional inclusion

Under Article 83 of the Afghanistan Constitution,

The number of members of the Wolesi Jirga, proportionate to the population of each region, shall be not more than two hundred and fifty.

Electoral constituency and other related issues shall be determined by election laws.

In the election law measures should be adopted for so the election system shall provide general and just representation for all the people of the country, and at least two female delegates should be elected from each province.

Article Eighty-four

Members of the Meshrano Jirga are elected and appointed as follows:

From among the members of each provincial council, the respective council elects one person for a period of four years.

From among the district councils of each province, the respective councils elect one person for a period of three years.

The President from among experts and experienced personalities – including two representatives from the disabled and impaired and two representatives from the Kochis – appoints the remaining one-third of the members for a period of five years. The president appoints 50 per cent of these people from among women.

Sources: <http://www.servat.unibe.ch/icl/af00000 .html>; http://www.afghan-web.com/politics/current_constitution.html;
http://www.unifem.org/afghanistan/docs/pubs/05/parliament_manual_EN_05.pdf

However quotas for women in political process are a feature of the constitutions of Afghanistan, Bangladesh, Nepal and Pakistan. Nepal's House of Representatives has a reservation for three women members among thirty five members. Five per cent of

the total number of candidates contesting an election from any organization or party must be women.⁷¹

While Bangladesh, India, Pakistan and Sri Lanka have had female heads of state, the percentage of women participating in the electoral process is nowhere near the critical mass of 33 per cent.

The constitution of Bangladesh provides for 45 seats in parliament out of a total number of 300. It also has a quota system of one third seats for women at the local level and ten per cent reserved for women in government posts. The Indian constitution provides for reserving seats in parliament and assemblies to members of scheduled castes and scheduled tribes in proportion to their population.⁷² In the Indian system, 33 per cent of reservations are provided to women, scheduled castes and scheduled tribes in *Panchayats*⁷³ in rural areas and local bodies in urban areas.⁷⁴ The Women's Reservation Bill that sought to provide 33 per cent reservations for women in both houses was defeated on two occasions in parliament.

Gender-Based Violence

International human rights law guarantees various rights to an individual who is charged of an offence.⁷⁵ The foundation of these rights is found in the Universal Declaration of Human rights and in the International Convention of Civil and Political rights. Some of these rights include the right to be informed about the grounds of arrest, the right to a lawyer, the right to understand the trial process in a language known to the accused, the right to appear before a court immediately, the right to bail and the right to appeal. These are considered extremely important to a fair trial process and are found in many criminal justice systems in the region.

In all the countries in the study the prosecution is required to prove the guilt of the accused who is presumed innocent unless found guilty.

In the context of gender based violence however, complexities emerge since the sexual nature of certain offences result in substantive and procedural laws having a strong gender bias. This in turn often results in male behavioral standards being used in the application and interpretation of the law.

Gender based violence is a form of discrimination and states are obliged to eliminate violence perpetuated by public authorities and private persons.⁷⁶ States are required to follow the principle of due diligence under which the state has the responsibility to prevent violations of rights or investigate and punish acts of violence perpetuated by private actors.

⁷¹ Article 46 and 114 of the Nepal constitution

⁷² Articles 330 and 332 of the Constitution of India.

⁷³ The term Panchayat used here is a creation of the Constitution and should not be confused with caste Panchayats under the heading on ADR.

⁷⁴ 73rd and 74th Constitutional Amendments in India.

⁷⁵ Article 9 and 14 of the ICCPR.

⁷⁶ Rebecca Cook (1994) State responsibility for violation of women's human rights "Harvard Human Rights Journal" 7, p 125-175

Under the CEDAW, gender based violence is defined as violence that is directed against a woman because she is a woman or that which affects women disproportionately.⁷⁷

Violence against women is “any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”⁷⁸

The International Convention on the Elimination of all forms of Racial Discrimination addresses sexual violence committed against women members of a particular racial and ethnic group as a form of racial discrimination.⁷⁹

Under the Convention against Torture, sexual abuse and physical violence by state agents is considered torture and a violation of human rights protected under the torture convention.⁸⁰

Not all gender based violence in the region is of sexual nature. Deliberate denial of adequate health care during pregnancy, withdrawal of food to the girl child, forced physical labor, driving a woman to suicide are all examples of gender based violence. Customary practices such as *dowry*, forced marriages, violation of free speech norms, domestic violence, honor crimes, witch-hunting, female genital mutilation, sex determination and sex selective abortion are some of the other examples that result in violence.⁸¹

Same sex behaviour among consenting adults is an offence in all the countries defined variously as against the order of nature in Bangladesh, India, Pakistan and Sri Lanka and as Hadd in case of Islamic Republic of Iran. The Delhi High Court has struck down this provision as discriminatory and unconstitutional with the case pending adjudication before the Indian Supreme Court.⁸²

This section looks at the *de jure* position of some of the critical areas relating to gender violence

Common Customary Practices in the Region

The following are some of the customary practices in the sub region that have an impact on gender based violence. All relationships are within the framework of marriage. A very high premium is placed on a woman’s marital status and being single is not encouraged. Despite Islamic law being more progressive with reference to status of divorcees and widows, social norms operate against single women. Women who have relationships outside the institution of marriage are often

⁷⁷ CEDAW general recommendation NO 19, paragraph 6

⁷⁸ UN Declaration on the Elimination of Violence against Women adopted by the General Assembly resolution 48/104, 20 December 1993.

⁷⁹ The UN International Convention on the Elimination of All forms of Racial Discrimination (ICERD) General recommendation No 25; Gender-related dimensions of racial discrimination. Fifty-sixth session 2000.

⁸⁰ Article 1 of the Convention against Torture.

⁸¹ For a detailed analysis see Report of the UN Special Rapporteur on Violence against Women, its cause and consequences. UN Doc. E/CN.4/2003/75/Add.1,2003.

⁸² Naz Foundation vs NCT of Delhi 160 Delhi Law Times page 277.

considered “immoral” or “deviant”, and are subject to violence from the community. In some countries such as Iran such relationships are considered an offence inviting severe punishment.

a) *Child marriage*: Sanctioned by law in some countries, the caste system and kinships among tribes strictly control relations in the family and provide for marriage within one’s own community at a very early age.

b) *Forced marriages*: Marriage by choice though permitted by law is not a common practice. Arranged marriages within one’s community are common. People who make their own choice or marry outside the community are subject to violence. It should be noted that not all arranged marriages are forced.

c) *Dowry*: The custom of *dowry* exists in Bangladesh, India, Nepal and Pakistan and cuts across religion. The system is one where property or valuable security are given or agreed to be given to the bridegroom’s family by the bride’s family at the time of marriage or in connection with the marriage and are most often demanded by the man’s family. These demands include both movable and immovable such as money, vehicles, furniture, house, gold jewels, silver to name a few. Among certain communities, the marriage expenses and expensive gifts to the husband’s relatives are also borne by the woman’s family. The practice of *dowry* has resulted in significant violence against women ranging from harassment, abuse, assault, murder and suicides.

Box 20: Dowry Deaths and Honor Killings

The two practices are manifestations of severe violence against women. While dowry deaths are violence caused by the husband and his family who kill the bride, “Honor killings” relate to the death of the woman due to a variety of causes as defined in under honor crimes. “Honor killings” are often caused by the natal family members with community sanction. At the De jure level there are laws to tackle both forms of crimes in the countries of the region. The practice of dowry and that of “Honor Killings” have community sanction making it a greater challenge to address the crime.

Source: For a detailed study, Honour; Crimes, Paradigms and Violence Against Women, Lynn Welchman and Sara Hossain, 2005 Zed Publications

d) *Fatwas*: Actually an advisory opinion concerning religious law and religious edict, *Fatwas* are often issued by self-styled leaders of the community in reaction to any act of “transgression”. As with the opinion of the caste *panchayats*, *Fatwas* enjoy community sanction and have often instigated violence against women.

e) *Honor crimes*: The term is extremely problematic since it encompasses a variety of manifestations of violence against women including interference with choice of marriage, partner, sexual preferences, adultery, pre marital relationships and rape. “Honor” is defined in terms of women’s assigned sexual and familial roles as dictated by traditional ideology.⁸³ Violation of codes dictated by the family and the community is regarded as an attack on “honor”, “prestige”, “*Ghairat*” or “*Izzat*”. Used in Bangladesh, India and Pakistan, the term is a wide ranging masculine concept underpinning patriarchal practices (Box: 20).

⁸³ Report of the UN Special Rapporteur, on Violence Against Women its causes and consequences, March 10 1999, para 18, UN Doc. E/CN.4/1999/68.

f) “*Honor Killings*”: The term is used to define killings of women (and men) for any of the acts listed above (the list is not inclusive) and enjoys social sanction. Sometimes traditional adjudication forums such as *Panchayats* and *Jirgas* conduct a kangaroo trial and impose punishment. The social sanction to commit such crimes is given by these forums that often operate as parallel legal systems. In Pakistan and Afghanistan, the term has different names in different provinces, “*Karo Kari*”, “*Kalakali*”, “*Siyakari*” and “*Taurtoora*”.

Country Specific De Jure Laws

Afghanistan

Fair trial standards are sought to be provided under the Afghan Constitution. The Constitution also casts an obligation on the government to respect all international conventions to which the country is a party.

In terms of individual civil rights, a person arrested has to be reported before the public prosecutor within 72 hours who can then either decide to release the person or seek further detention from a judge. The accused has a constitutional right to legal representation.⁸⁴ It is also a constitutional right for someone who is destitute to be entitled to legal aid in a criminal case.⁸⁵ But the lack of lawyers makes this right unenforceable. Damages can be claimed by the victim from the accused, and other practices such as “blood money” continue to exist.

Allegiance to tribes is an important identity for the people of Afghanistan. The practice of Bad or Badal where women or girls are exchanged between tribes as a method of resolving disputes are criminalized under the Afghanistan Penal Code and are in contradiction to the general rule that marriages take place only between same tribes.

Sexual violence such as rape requires the victim to produce four witnesses to prove the crime. In the absence of such witnesses the woman can be charged with *Zina* (adultery) as she would have complained of an act of sexual intercourse. The *Jirgas* or community of elders, comprising of men, impose punishment that is legal under the law. *Hadd* and *Zina* make it virtually impossible for women to report sexual abuse or rape since they would not be able to obtain multiple witnesses, but having laid the charge, they could be punished for adultery.

There are currently no laws relating to domestic violence and sexual harassment.

The absence of legislation in Afghanistan is only a part of the problem. Judicial institutions need to be sufficiently created and strengthened in order that they can contribute to an integral process of building political, economic and social development in Afghanistan.

⁸⁴ Article 32 of the Constitution of Afghanistan

⁸⁵ *ibid*

The Commonalities between Bangladesh, India, Pakistan and Sri Lanka

Since the criminal justice system of Bangladesh, India and Pakistan are part of a shared legacy, the definitions relating to various offences relating to violence, are similar with certain amendments specific to the country. The Penal Code, the Evidence Act and the Criminal Procedure Code form the foundation of the criminal justice system. In the context of these countries, assault or force against a woman with intent to outrage her modesty; kidnapping and abduction of woman to compel her to marriage; inducing a girl under 18 years of age to go from any place or to do any act with the intent that she is forced or seduced into illegal sexual intercourse; or importation of a girl below 21 years of age for the purpose of selling or disposing her when she is under 18 years of age for prostitution are all offences under the various penal codes. Marital rape is an offence only when the wife is below 15 years.⁸⁶

Kidnapping, abducting or inducing a woman to compel her marriage are offences under the Penal Codes of India, Bangladesh and Pakistan.⁸⁷

However, the framework and the language of the law do not reflect the reality of women's lives. Broadly there are two ways in which laws define rape. First, sexual intercourse with a woman must occur and second, it must be without her consent.⁸⁸ Intrinsic to the concept of rape are the notions of penetration and forced or involuntary sexual relations. Any other violent act, such as the use of objects or instruments, is treated as a different crime (outraging the modesty of a woman).⁸⁹

The age of consent is 16 years and sexual intercourse below that age is statutory rape. However, the law does not recognize marital rape except when it is committed by a man on his wife if she is below 15 years⁹⁰ or when it is committed after the wife obtains a decree of judicial separation.⁹¹

In the context of Pakistan, the introduction of *Qisas* and *Diyat* to the Penal Code have changed the law by introducing the concept of retribution.⁹² *Qisas* (exact retaliation) and *Diyat* (monetary compensation) are forms of punishment prescribed under law.

Bangladesh

Bangladesh is the only country in the study that has taken serious note of the offence of acid attacks and defined acid crimes in the region. Acid attacks are committed by persons who pour or throw acid on women. Most of the time they occur when the woman has rejected the advances of the man or where the man perceives himself as jilted. Cases of men pouring acid on their wives are also common. The Prevention of Repression of Women and Children Act of 2003, the Acid Attack Crime Repression

⁸⁶ Section 366, 354, 376 penal code of Bangladesh and India

⁸⁸ Section 376 of the penal codes of Bangladesh, Pakistan and India of 1860 and section penal code of Sri Lanka 1883.

⁸⁹ 354 of the penal codes of Bangladesh, Pakistan and India of 1860.

⁹⁰ Section 376 of the Penal Code of India.

⁹¹ Section 376 of the penal code of India, and section 364 of the Penal Code of Sri Lanka

⁹² Hina Jilani and Eman M. Ahmed, Violence law and Women's rights in South Asia, pg 152, Sage publications, 2004.

Act 2002, and the Acid Crimes Control Act of 2002, are some of the legislation that have been formulated in Bangladesh to address the problem of violence (Box 21).⁹³

Box 21: Laws In Bangladesh That Combat Acid Attacks Against Women

The Bangladesh Government initiatives, such as the passage of the Acid Attack Crime Repression Act (2002) and the Acid Control Act (2002), have addressed the violence of acid crimes. The Acts call for the death penalty for acid attack and further seek to provide with regulatory mechanisms addressing the creation and the sale of acids. The Speedy trial of Tribunal Act of 2002 seeks to reduce the length of trials in order to make the justice delivery system more responsive to the needs of the victims. Other provisions include protecting the privacy rights of the victim by prohibiting the media from featuring pictures of the victims of such crimes.

Source: Summary record of 5th periodic report of Bangladesh to the CEDAW Committee

In January 2001, the Bangladesh High Court, issued a suo motu ruling declared Fatwas issued against women as illegal. The Court observed “the legal system of Bangladesh empowers only the Courts to decide all questions relating to legal opinion on Muslim and other Laws in force. We therefore hold that any fatwa are all unauthorized and illegal.” The Court also recommended that the government should bring about “an unified education system that would bring freedom of religion subject to law, public order and morality within the scope of article 41(1) of the Bangladesh Constitution.” Members of some extremist political groups obtained a stay of the order before the Supreme Court.

Bhutan

Bhutan does not have a statute relating to domestic violence but any such act is punishable with fine. The draft Penal Code seeks to define marital rape as sexual intercourse without the consent or against the will of the spouse. Criminal cases are adjudicated under a legal code established in the 17th century and revised in 1958 and 1965. Accused are entitled to legal representation from a list of lawyers maintained by the Government.

India

Custodial rape is committed by a police officer, public servant, or by persons managing jails, remand homes or places of custody. Here, the burden of proof is shifted to the accused as there is a presumption as to the absence of consent.⁹⁴

The definition of consent has often reflected male behavioral standards in judgments of courts resulting in the accused getting acquitted. Despite the Indian Supreme Court holding that a person can be convicted on the sole testimony of the victim, many courts still look for corroboration. Courts have ruled that a victim of rape is entitled to legal assistance at the expense of the state. There is no statutory compensatory mechanism but courts have ordered compensation in individual cases. The Supreme

⁹³ The Indian Supreme Court in a public interest litigation is considering directing the government of India to formulate similar legislation in India by citing the Bangladesh experience.

⁹⁴ Articles 376 (2) a, b, c, d and e and 114 A of the Indian Evidence Act.

Court has also extended the concept of payment of compensation in such cases to fix the liability on those in the area where the offence was committed.⁹⁵

The offence of outraging the modesty of a woman is the framework for cases of sexual harassment. The language of the law from the days of colonialism is extremely problematic casting a burden to prove “modesty” on the woman. In the absence of a statute on sexual harassment this is the provision under which criminal cases are filed for all forms of harassment and sexual assault short of rape and attempted rape.

The Dowry Prohibition Act of 1961 prohibits the giving and the taking of a *dowry* and makes these acts a crime. Under law even the bride’s parents can be prosecuted for the offence though there are hardly any cases in this regard. Despite outlawing *dowry* the law holds that any *dowry* that is given is for the benefit of the wife or her heirs.

Due to the increasing practice of *dowry* and with increased campaigns by the women’s movement, the Penal Code was changed to include mental and physical cruelty towards a married woman as an offence. When a husband or his family harass a woman with a view to coerce her or her relatives to meet any unlawful demand for any property or valuable security or where there is a failure on her part to meet the unlawful demand an offence is made out under the Penal Code that is punishable with a maximum period of three years imprisonment.⁹⁶

There is a separate definition of *dowry* death in order to address the large number of murders of married women. When the death of a woman is caused within seven years of marriage due to burns or bodily injury and it is shown that before death she was treated with cruelty or harassment by her husband or relatives, it is presumed that the husband or the relative where the cause of her death. Such deaths are defined as “dowry deaths” under the Penal Code.⁹⁷ Since direct evidence is rarely available in such cases the burden of proof shifts on the accused if the prosecution is able to prove that the death took place within seven years of marriage and that soon before death she was treated with cruelty by her husband or his family in connection with the *dowry*.⁹⁸

Prosecutions can also be launched under the offence of abetment to suicide. A person who abets the commission of a suicide commits an offence under the Penal Code.⁹⁹ If a married woman commits suicide within seven years of marriage and it is shown that her husband or his family has subjected her to cruelty, a presumption is raised that they may have abetted her suicide.¹⁰⁰

All these offences are in the context of the institution of marriage and not applicable to women in relationships outside the marriage.

⁹⁵ Chairman Railway Board and others vs Chandrima Das and others All India Reporter, 2000 Supreme Court, page 988. In this case a Bangladeshi national was gang raped by private persons in the premises belonging to the railway. The court held that the railway was vicariously liable for the action of its employees.

⁹⁶ Section 498 A of Indian Penal Code.

⁹⁷ Section 304 B Indian Penal Code.

⁹⁸ Section 113 B Indian Evidence Act.

⁹⁹ Section 306 Indian Penal Code.

¹⁰⁰ Article 113 A Indian Evidence Act.

The Domestic Violence against Women (Prevention and Protection) Act of 2005 is a civil law that could be used by any woman who has been in a domestic relationship with the respondent. It does not exclude from its purview women who are governed by different personal laws. It is inclusive in its definition and even those women who are sisters, widows, and mothers have a right of residence in the shared households and can get protective orders from courts.

The Act recognizes physical abuse, mental abuse, sexual abuse and economic abuse as forms of violence and recognizes the concept of shared household.

It provides for 'stop violence' orders, and gives effect to the guarantee of immediate protection. This legislation has been of particular importance for redefining relationships and addressing the gendered power inequality in the family.

Kidnapping from lawful guardianship is also an offence. Since the lawful guardian of a minor is the father when minors elope or run away fearing family pressure, it results in the commission of an offence. Fathers seeking to retrieve their daughters from the men whom they choose to marry or live with bring charges of kidnapping, abduction and inducing their daughters to compel them into marriage.

Any person above the age of 18 years in the case of a female and 21 years in the case of a male have a right to marry a person of their own choice. Pre-marital relationships among adults are not prohibited under the law though they do not guarantee any civil rights such as inheritance. Under the Domestic Violence Act, women in live-in relationships are entitled to a right of residence in the shared household and can claim compensation. .

The law criminalizes adultery when it is committed only by a married woman and gives a right to her husband to make a complaint.¹⁰¹ The woman is not treated as an accused but the person with whom it is alleged that she has had a relationship is treated as one and can face five years imprisonment. Adultery committed by a single woman is not a crime. The constitutional validity of this provision has been challenged on the grounds of discrimination but the Supreme Court has refused to strike it down on the grounds that when a person "trespasses into a marriage, he is an offender".¹⁰²

Bigamy is an offence punishable up to seven years imprisonment. Conviction is difficult since the ceremonies of the bigamous marriage have to be proven and such marriages are conducted in secrecy.. The offence of bigamy does not apply to Muslim men since their personal law legalizes the practice of polygamy.

Maldives

Rape is an offence under the law. But criminal law prohibits any sexual relationship outside the institution of marriage that is termed as "Zina".

¹⁰¹ Section 497 Indian Penal Code and Section 198 of the Code of Criminal Procedure.

¹⁰² Sowmithri Vishnu vs Union of India 1985 Supreme Court Cases supp 137, Revathy vs Union of India 1988 2(Supreme Court Cases) page 72.

Cases of *Zina* include both consensual and non-consensual sex outside the institution of marriage. In cases of rape, the woman's charge needs to be proved by two men or four women witnesses. Given the requirements of strict rules of evidence, cases are rarely proven. However a woman's pregnancy may establish her commission of this offence even when she is a victim of sexual abuse or rape. This could include even a pregnant minor (below 18 years) being sentenced to punishment. *Zina* is the exception to the rule that puts a minimum age limit of eighteen years on a person to receive adult punishment. The sentence in relation to *Zina* allows for public lashings.

There are no statutes on domestic abuse or sexual harassment.

Nepal

Nepal is the only country in the region to recognize freedom from domestic violence as a constitutional right in its Interim Constitution. It is yet to formulate legislation relating to domestic violence and on sexual harassment.

The laws of Nepal are exhaustively contained in *Mulki Ain*, or country code that is in the process of change. Confessions before the police are legal under the law unless they are retracted. There is no difference in the evidentiary requirements between a male and a female.

While marital rape is not yet prohibited under legislation, the development of marital rape by judicial precedent is path breaking (Box 22).

Box 22: Nepal's Supreme Court Vocal Stand on Crime of Marital Rape

The offence of Rape as detailed in the statutory law exempted marital rape. A judgment of the Nepal Supreme court held that such an exemption was violation of the obligation of Nepal to CEDAW and other treaties. The court reasoned that if an act is an offence by its very nature, it is unreasonable to say that it is not an offence merely because different categories of individuals commit the act and held that to say that a husband can rape his wife after marriage denies a woman's independent existence, her right to live with self respect, and her right to self determination. Nepal is the only country in the study that now addresses marital rape as a crime.

Source: Forum for law and development (FWLD) vs his majesty's government Writ no 55/048, Supreme Court decided on May 2, 2002

Pakistan

The criminal justice system of Pakistan, though similar in its origin to the system in Bangladesh, India and Sri Lanka, was Islamicized to introduce the concept of *Qisas*. Under the system of *qisas*,¹⁰³ a person convicted of an offence can be punished by causing similar hurt that was caused to the victim. If the victim was killed, the sentence of death could also be executed in the same manner that resulted in the death of the victim.

¹⁰³ *Qisas* are defined under Section 299 k of the Pakistan Penal Code as punishment by causing similar hurt at the same part of the body of the convict as has been caused to the victim or by causing his death if he has committed Qatl-i-Amd in exercise of the right of the victim of Wali.

Death penalties however cannot be imposed where the direct descendents or legal heirs, or *Walis*, of the victim are related to the accused. To give an example, if a man kills his wife and they have a child he will not be given the death sentence since his child is also the legal heir of the victim.

A murder can be proven if the accused confesses or if there are eyewitnesses to the crime.¹⁰⁴ Thus even though torture is expressly prohibited under the Constitution, since confessions of the accused have validity unless retracted under the Evidence Act, instances of law enforcement authorities using torture to extract confessions are not uncommon. Even though circumstantial evidence is a strong requirement of the criminal justice system, the confessions and the lack of retraction by the accused may result in a conviction.

The law of evidence was amended in 1984 that devalued women's testimony as a result of which the evidence of two women is equal to that of a man.

Karo Kari or "honor killings" are usually committed when a woman is alleged to be involved in an illicit relationship. The idea is rooted in the cultural notion that women are the custodians of family honor and by entering into an illicit relationship they tarnish the family reputation.¹⁰⁵ The custom of *Karo Kari* is sometimes used to legitimize murders that are not even remotely connected to the family honor. In some cases the *Kari's* (victim) family demands a girl from the *Karo's* (accused) family in exchange for the life of the accused.

Women have been killed in the name of "honor" in cases of perceived 'sexual misdemeanor' to situations where women have married by choice, refused to be forced into marriage or sought a divorce, or have been raped.¹⁰⁶

The complexity of "honor killings" arises because courts permit the use of the defense of grave and sudden provocation despite such a provision no longer being available under the Penal Code after its amendment based on Islamic law.¹⁰⁷ The defense of grave and sudden provocation is based on common law. The superior judiciary has through various decisions recreated the rule of grave and sudden provocation both on the basis of Islamic jurisprudence as well as on the grounds that the plea of diminished responsibility under grave and sudden provocation had been well-recognized in the sub-continent for more than one hundred years.¹⁰⁸ The plea of grave and sudden provocation weaved into "honor crimes" has often been used in a way that reinforces patriarchal bias.¹⁰⁹ Earlier amendments to the law were not successful and

¹⁰⁴ Section 299 of Pakistan Penal Code.

¹⁰⁵ Hina Jani and Eman M. Ahmed, in *Violence against women; the legal system and institutional responses in Pakistan*, Edited by Savitri Goonesekere, "Violence, law and women's rights in South Asia", Sage Publications, 2004 page 153.

¹⁰⁶ *ibid* page 154.

¹⁰⁷ Section 299 of the Pakistan Penal Code had a provision prior to its amendment that defined culpable homicide as not murder if the offender while deprived of his power of self control by grave and sudden provocation caused the death of the person. This provision continues to exist in the Indian Penal Code, the Bangladesh penal code and the Sri Lankan Penal Code.

¹⁰⁸ See footnote 66.

¹⁰⁹ The following cases are examples where honor killings was used as mitigating circumstances. A man who killed his mother's 'lover', (Ghulam Mustafa and another vs state 1983 Pakistan Criminal Law journal p 1712 Lahore), a man who shot his ex wife because he saw her with a stranger,

have been critiqued as being a matter of culture.¹¹⁰ However some progressive judicial rulings by Supreme Court of Pakistan aim to realize the due legal rights of women (Box 23)

The offence of rape is termed as *Zina bil jabr* while *Zina* is a consensual act of sex outside the institution of marriage. Under *Hudood* laws that criminalize such acts, rape can be committed by either a man or woman. The concept of statutory rape currently does not exist. In the past few years various legislative interventions have taken place in Pakistan addressing violence against women. In 2004, the Criminal Law Act, declared *Karo Kari* and other similar customary practices as criminal offences.¹¹¹

The Prevention of Anti Women Practices (Criminal law Amendment) Bill of 2006 sought to further amend the Pakistan Penal Code criminalizing the practice of settling disputes by marrying off girls and women and was introduced through the Criminal Law Amendment Act 2004.

Under the Women's Protection Bill of 2006, women are not arrested under the Hudood Ordinance nor are they required to produce four witnesses to prove a charge of rape, as required under the *zina* laws (laws regarding extramarital sexual intercourse). Failure to prove a charge of rape will not attract the offence of fornication which is sexual relationship between an unmarried male and female.¹¹²

In July 2007, the Law Reforms Ordinance was promulgated, allowing women held under the Hudood Ordinance to be eligible for bail.

Sexual harassment falls under the category of outraging the modesty of a woman. Stripping a woman and exposing her to public view is punished with death.¹¹³

Box 23: Pakistan's Supreme Court Stand on Honor Killing

Neither the law of the land, nor religion permits so-called honor killing, which amounts to murder (qatl-e-amd) simpliciter. Such iniquitous and vile act is violation of fundamental rights as enshrined in Article 9 of the Constitution of the Islamic Republic of Pakistan, which provides that no person would be deprived of life and liberty except in accordance with law and any custom or usage in that respect is void under Article 8(1) of the Constitution.”

Source: The Supreme Court of Pakistan, in Muhammad Akram Khan vs The State, Pakistan Law Digest, 2001 S.C. para 3 page 100.

(Muhammed Sharif vs state 1993 Pakistan Criminal Law Journal, pg 1817 Lahore,) the wearing apparels on a dead woman that were termed to be fashionable indicating that it could have provoked her husband into thinking that she was wayward. (Abdul Majid vs State Hina Jani and Eman M. Ahmed, Hina Jani and Eman M. Ahmed) , in Violence against women; the legal system and institutional responses in Pakistan, Edited by Savitri Goonesekere, “Violence, law and women’s rights in South Asia, Sage Publications, 2004, page 159)

¹¹⁰ *ibid* page 160.

¹¹¹ Section 299i (ii) Pakistan Penal Code, of 1860.

¹¹² Proposed amendments to 496 B of Pakistan Penal Code

¹¹³ Section 354 A of the Pakistan Penal Code.

Islamic Republic of Iran

Even though Islamic Republic of Iran has acceded to the International Covenant on Civil and Political Rights, the criminal justice system is not based on fair trial standards but on a harsh interpretation of Islamic law. The substantive definitions are not only discriminatory but also encourage violence against women both in the family and in society. Islamic Republic of Iran also follows the practice of *Qisas* (retribution or blood money), The blood money of a Muslim woman is half of that of a Muslim man.¹¹⁴ As an example, if a woman is murdered and her family members insist on retribution, the family of the woman is obliged to give half of the *Qisas* to the accused or his family. Thus, even in the retributive justice the accused stands to gain if the victim is a woman.

If the father or the paternal grandfather murders his child or grandchild, the accused does not face the death penalty. But if a woman kills her children, she can be sentenced to death.

The evidence of two women is the same as that of one man in certain instances while in other instances it is not sufficient in a court of law.¹¹⁵

Ironically, despite her evidence having no value, a girl child is treated under law as an adult after nine years of age while a boy child is an adult at the age of 15.¹¹⁶ Thus, girl children above nine years of age can be tried as adults in criminal trials and can face severe punishment. To give an example, if a girl child above nine years is a victim of rape, she can be charged under *Zina* or adultery if she is unable to prove the crime with sufficient witnesses and can be sentenced to 100 lashes.

Any act deemed to be prohibited under *Sharia* is punishable in Islamic Republic of Iran. The definition of “prohibited acts” does not have a clear legal definition but is left to the discretion of the judiciary and the government agents. Certain acts such as appearance in public by women without covering the entire body, except the face and palms, are considered a “prohibited act”. Women who appear on streets and in public without the prescribed *Hejab* can face fines and lashing.¹¹⁷

A man and a woman enjoying each other’s company even without sexual relationship can also be punished with 74 lashes.¹¹⁸

Transgender individuals have been classified as a distinct group separate from homosexuals and have been granted legal rights. “Gender identity disorder” is officially recognized and the judiciary permits sexual reassignment surgery.

Sri Lanka

The Penal Code of Sri Lanka is part of the colonial legacy and has similar provisions as that of India and Bangladesh. The law was amended in the 1990s and certain changes were incorporated. Custodial rape is a serious offence with a minimum of ten

¹¹⁴ Articles 209, 213, 300 and 301 of Islamic Penal Code of Iran. “ the deyah of a muslim woman is half of the deyah of a muslim man.

¹¹⁵ Articles 137, 74 and 75 of laws of Islamic Penal Code of Iran.

¹¹⁶ Article 49 laws of Islamic Penal Code of Iran

¹¹⁷ Article 102 of Islamic Penal Code of Islamic Republic of Iran.

¹¹⁸ Articles 74, 102 and 114 of Islamic Republic of Iran.

years imprisonment and a maximum of 20 years.¹¹⁹ Under Sri Lanka law, incest is a grave crime punishable with imprisonment of not less than seven years and not exceeding 20 years and is also liable to a fine.¹²⁰ Other countries do not define incest by law. Another provision of the Penal Code includes grave sexual abuse that addresses sexual assault thereby watering down the concept of outraging the modesty found in other systems. The law also has an in-built system whereby the court can direct compensation to be paid to the victim.¹²¹

It is also the only country that does not criminalize adultery. Marital rape is an offence only if the parties are separated by a decree of judicial separation. The Domestic Violence Act of 2005 permits courts to grant protection orders and injunctions against men who perpetuate violence.

Trafficking

Article 6 of CEDAW requires States parties to take appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Under the draft constitution of Bhutan women had the right to be free from all forms of discrimination and exploitation, including trafficking in women, prostitution, abuse and violence. Bhutan is the only country in the study that has made freedom from prostitution and trafficking a constitutional right thereby making it clear that prostitution was a form of discrimination.

In Bangladesh, India, Nepal and Sri Lanka prostitution is not illegal per se, but trafficking, brothel keeping, soliciting and seducing are treated as criminal offences.¹²² While sex work is not an offence, the law still has ample scope for police harassment under soliciting and seduction.

In Afghanistan, Maldives, Pakistan and the Islamic Republic of Iran, prostitution is illegal and those accused face criminal charges. Two kinds of trafficking take place in the countries of the study. The first is internal trafficking and the other is trans-border trafficking.

The demand for cheap labor, deception and trickery resulting in transporting women for sex are common in the various countries. This results in trans-border trafficking facilitated by porous borders. Lack of employment opportunities, organized crime and the presence of organized criminal gangs, economic disparities, social discrimination, armed conflict, profitability, growing deprivation and marginalization of the poor, internal displacement, natural calamities and insufficient penalties against traffickers are some of the factors that result in trafficking being “a low cost, high profit” situation. Women are trafficked on promises of a better job only to find themselves forced into prostitution. In many instances the agents pay the families money to take the women. Bangladeshi and Burmese women are trafficked into India and then to Pakistan via the borders. The border police on all the sides are part and parcel of this

¹¹⁹ Section 364 of the Penal Code of Sri Lanka.

¹²⁰ Section 364 (A) of the Penal Code of Sri Lanka.

¹²¹ Section 364 of the Penal Code of Sri Lanka.

¹²² The Immoral Traffic (Prevention) Act of 1956, India, the Suppression of Immoral Traffic Act, Bangladesh, and the Country Code, Nepal.

network of corruption and they make it easy to get the women across without any documentation.¹²³

A crucial problem relates to the repatriation of the woman to her country since such an act is a lengthy process requiring the permission of the various home governments, identifying the nationality of the victim by the special branch of the police and then sending the victim home. Meanwhile, the woman is kept in protective custody during a process that may take years. One of the most important requirements of repatriation is the home address of the victim. But in many cases the victims themselves are unable to provide the same. The lack of a proper birth registration system in India, Bangladesh, Nepal, and Bhutan make the determination of age and identification of victims extremely difficult.

Trafficking is also closely linked with kidnapping and abduction and while the countries have strict laws making such acts a serious offence, few offenders are prosecuted. It is an area where the system operates against the women in harsh ways. In Pakistan and Islamic Republic of Iran the concept of *Zina* does not make any difference between forced and consensual prostitution. This often results in the traffickers going free while women are charged with adultery.

Trafficking is surrounded by a culture of silence, making it very difficult for any kind of action at the micro level. An added dimension to trafficking is that women come not only from impoverished backgrounds but are also from the disadvantaged classes and castes. The caste factor operates in large measure in South Asia with many *Dalit* women being forced into prostitution. Cultural practices such as the *Devadasi* system and the *Deuki* system in Nepal, where young *Dalit* girls and those of the *Badi* caste respectively are dedicated to a Goddess and then exploited in prostitution are common despite legislation prohibiting such practices.

Box 24: Nepal's Supreme Court Judgement On Discriminatory Law on Prostitution

In Nepal, the law made a distinction in the case of a rape of a prostitute. The preferred word is sex worker but since legislation in the countries under study use the term prostitute, the term is used here. The offence was treated as a simple crime involving the payment of 500 Rs or with imprisonment of one year while in other categories it was three to five years. Such provisions encouraged and motivated rape resulting in the accused taking the defense that the victim was a prostitute. In public interest litigation, the Supreme Court of Nepal held that prostitution is a profession or occupation irrespective whether or not it was legal. Such a provision is discriminatory and classifies women as "low class" and such laws do not comply with the spirit of the Constitution.

Source: Advocate Sapna Pradhan Malla vs HGM, Ministry of Law and Justice and Parliamentary affairs) Writ no 56/058, decided on May, 2, 2002

While the Nepal Supreme Court's judgment did not the address the issue of public policy and morality under which the debate of legalizing prostitution has emerged, the

¹²³ Hina Jilani, Violence against women, the legal system, in Violence law and Women's rights in South Asia Sage publications 2004 pg 178

ruling has addressed the issue of a woman's right to her sexuality and choice (Box 24) .

5. Gender Equity in the Economic Sphere

Women in Employment

Under Article 11 of CEDAW, states are required to provide for protective legislation to ensure equality in employment. These include the right to work free choice of professions, right to equal remuneration, benefits and conditions of service, right to social security, protection of health and safe working conditions and prevention of discrimination on grounds of marital status.

TABLE 1: Global Gender Gap Index– Percentage of Women Participation in the Socio Economic Space¹²⁴

Countries	Afghanistan	Bangladesh	Bhutan	India	Iran	Maldives	Nepal	Pakistan	Sri Lanka
Economic participation and opportunity									
Labor Force Participation									
		55		36	41	49	53	34	82
Legislators, Senior Officers and Managers									
		23		3	13	15	8	2	79
Professional and Technical Workers									
		12		21	33	40	19	26	54

While a large number of women are actively participating in the workforce, it is evident that when it comes to senior level positions, their participation is much lower (Table 1). Women have not been able to reach anywhere near the “glass ceiling,” leave alone break it. A concerted effort to encourage their presence in the form of quotas would be a form of special temporary measures to address inequity.

The constitutions of India, Pakistan, Nepal and Bangladesh prohibit all forms of slavery, forced labor and bonded labor. Discrimination by the state is prohibited and special measures can be taken for women and children. But the prohibition of discrimination and special measures such as quotas in jobs apply only to employment with reference to state. Private actors are exempted from the purview. The constitutions make provision for just and humane conditions for work, ensuring that women and children are not employed in hazardous tasks and that they are entitled to maternity benefits. In Maldives, sex-based discrimination in employment opportunities and remuneration is not recognized by the State as discriminatory from the principle of substantive equality.¹²⁵ All countries have legislation addressing the rights of persons in employment and have put labor policies and institutions in place.

¹²⁴ Global Gender Gap Index 2007, <http://www.weforum.org/pdf/gendergap/index2007.pdf>

¹²⁵ Shadow report of Maldives to the third periodic Government Report submitted to the CEDAW Committee, 2006.

There is a fundamental right to form associations and to enter any lawful business in all the countries in the region.

The earliest laws in the sub-region were factory laws that related to mines that were implemented under colonialism in the early part of the twentieth century. Some of these statutes, such as the Factories Act, prohibited employment of women in night shifts such as mines work. On the other hand, industries termed as essential services, such as hospitals and power supply do not have any exemption on women being employed in night shifts. In India and Pakistan, the prohibition of women working on night shifts in factories has been repealed. While this could be seen as addressing inequality, employers can now force women to work two shifts at a time or terminate their services. Such changes have more to do with the demand of market forces rather than with gender equity. They do not take note of the cultural and other inhibiting factors that cause a double burden on women and are instead based on a formal model of equality.

In labor legislation of the region, regulatory mechanisms are provided that address violations under law, payment of wages, hours of work, leave, rest, maternity benefits, safety at work and other rights.

The right to form unions is a fundamental right in all countries in the region. All countries have a statutory provision for minimum wage and maternity leave. At the *de jure* level, statutes provide for equal work and equal pay in the region. In Bhutan, equal pay and employment opportunities are guaranteed by the Royal Civil Service Rules, while labor policies provide for equal wages. The 1980 Police Act in Bhutan discriminates against women in the Royal Bhutan Police, by limiting their functions to investigating cases involving women, handling female prisoners or directing traffic.¹²⁶ Though there is no formalized gender bias in employment, a rigid division of labor based on gender persists.

In Islamic Republic of Iran, a minimum national wage is applicable to each sector of activity fixed by the Supreme Labor Council. Membership to the social security system is compulsory. The minimum age for workers is 15 years but certain categories such as family owned enterprises, agricultural operations and home based industries are exempted from this law. Labor laws in Islamic Republic of Iran are worker-friendly, with lay off made difficult to carry out. Employees cannot be dismissed without proof of a serious offence, while employing personnel without making them permanent for a consecutive six month contract is illegal.

Labor in the Organized Sector

Persons working in the organized sector have better rights when compared to those in the unorganized sector in all the countries included in this study. Historically there were strong labor movements in the region and the organized sector witnessed a series of legislation that sought to protect the rights of people. Labor legislation also provides for mechanisms for redressing disputes. While the laws do give a series of valuable rights, they are almost always based on the formal model of equality. Thus, concerns of sexual harassment at the workplace that are very gender specific have emerged as part of the legal discourse only in recent years.

¹²⁶ This provision has now been repealed under the Royal Bhutan Police Act 2009

Labor in the Unorganized Sector

Unorganized sector includes agriculture and many categories of employment such as construction, domestic work, *beedi* work and home based industries. In addition, primary employers that include the state sub-contract many jobs to contractors, which in turn employ others as contract labor. Such employment is governed under the various Contract Labor Acts of the region. While legislation provide for equal pay for equal work exist in the region, a large part of women employed in areas such as agriculture, construction and domestic work do not get the benefits of such laws since there is a division of labor based on gender. Persons working in the unorganized sector also lack the power of collective bargaining.

The rights of domestic workers in all the countries of the region except India are hardly recognized by any statute. Such workers work in homes under poor paying conditions for long hours without any leave and in exploitative conditions. The sector also has a large number of child labor. The Domestic Workers (Registration Social Security and Welfare) Act of 2008 in India seeks to ensure and regulate conditions of service for domestic workers and to prevent their exploitation.

Impact of Market Forces

With liberalization, the stress on good labor laws is developing even in the organized sector since the creation of special economic zones have resulted in the non-application of existing legislation to these areas. The employment of a large number of women working night shifts in BPOs (business process outsourcing) and call centers has raised new issues relating to health and safety. With the exception of existing labor laws, no new mechanisms have been put in place. An argument in favor of market forces is that they are a better way to close the gender wage gap than legislation. However, free market forces do not automatically translate into a reduction in the gender gap. Many employers do not employ women if it means giving them more privileges such as maternity leave. Studies also indicate that in special economic zones, there is a preference for unmarried young women over married women based on the justification that unmarried women are more efficient, willing and available for compulsory overtime work.¹²⁷ In order to increase targets and the limitless extension of the workday, women workers are left with very little time for household chores- a phenomenon that married women are not able to cope with on a day-to-day basis.¹²⁸ Strong legislative intervention is required to safeguard women's rights in the workplace.

Discrimination in the area of employment operates directly by the prohibition of women's employment in certain areas. The region has had many case laws relating to the discriminatory rules of airlines that distinguished between male and female flight pursuers restricting their employment. The courts of Nepal, Pakistan, Bangladesh and India have struck them down as discriminatory. The Pakistan Supreme Court struck down a discriminatory age of retirement rule, which was different (lesser age) for women holding that there was no intelligible differentia (Pakistan International Airlines Corporation vs. Samina Masood and others).¹²⁹ The Bangladesh Supreme

¹²⁷ Padmini Swaminathan, The trauma of wage employment and the burden of work for women in India, quoted in the Violence of our times, edited by Kalpana Kannabiran, Women Unlimited, 2005.

¹²⁸ Ibid.

¹²⁹ Pakistan Law Digest 2005 Supreme Court 831.

Court struck down a similar rule that held that men and women were different as women lose their intelligence, while men don't, and that women hostesses should be young and attractive for viability in the travel industry (Dalia Parveen vs. Bangladesh Biman Corporation and another),¹³⁰ The Nepal Supreme Court took the same view (Rina Bajracharya and other vs HMG, Secretariat of Council of Ministers).¹³¹

Sexual Harassment in the Workplace

Women workers face additional risk of sexual harassment in the workplace. Currently forms of sexual harassment, though not defined as such, constitute an offence such as outraging the modesty if they are in public places. The Nepal Supreme Court had directed the Government of Nepal to make appropriate laws in this regard in a public interest litigation (Janahit Samrakshan Manch and others vs. HMG).¹³²

The Indian Supreme Court formulated various guidelines to address sexual harassment in the workplace during a class-action litigation. Holding that sexual harassment violated the constitutional rights of the right to life and observing that there was still no legislation, the court defined sexual harassment by using the language of General Recommendation 19 of the CEDAW Committee.¹³³ The court cast an obligation on employers to take preventive steps, formulate rules in the workplace, initiate disciplinary action against an employee who indulged in sexual harassment, provide for a grievance mechanism and an enquiry committee to look into the complaint. The chairman of the committee is required to be a woman. The rules and guidelines have resulted in changing the language of the law. However, for the purpose of an offence, cases have to be filed under the provision of 'outraging the modesty of a woman'.

Ten years after this judgment, efforts are underway only now to formulate legislation. However, the guidelines form part of service rules in various establishments of the government, the corporate and the organized sector.

Maternity Leave

All countries in this study have provisions for maternity leave. In Pakistan, a woman worker is entitled to six weeks prenatal and postnatal leave. In India, it is three months, while in Bangladesh it is four months. The concept of paternity leave has been introduced in India only in employment with the Federal government. In Islamic Republic of Iran, women employees are entitled to 90 days of maternity leave. The employee's salary is paid according to the social security act. Maternity leave is considered as part of a service record and employers are required to provide returning employees with the same position. However, a man may prohibit his wife from employment.¹³⁴

In the region, Islamic Republic of Iran is the only country that provides for nursing breaks for lactating mothers and does not treat it as a break in employment (Box 25).

¹³⁰ 48 Dacca Law Reports 1996.

¹³¹ Writ No.2812 of 2054 BS.

¹³² NKP 2061 (2004) Vol. 10, page 1312.

¹³³ Visaka Vs state of Rajasthan AIR 1997 SC 3011.

¹³⁴ Article 1117 of the Civil Code of the Islamic Republic of Iran.

Box 25: Islamic Republic of Iran's Law on Lactating Mothers

In Islamic Republic of Iran, Mothers who breast-feed are given half an hour break every three hours at work in order to feed their babies.

The breaks are calculated as their working hours. Employers who deny women workers such rights are fined the first time and in case they repeat the offence they would receive prison terms ranging from 91 to 180 days.

However, under Article 1117 of the Civil Code of Islamic Republic of Iran, the husband can prevent his wife from occupations or technical work which is incompatible with the family interests or the dignity of himself or his wife.

Sources: Statistical Glance at Women's Employment in Iran, Seaming monthly publication Kowsar Economic Organization, No 39-40; By Mehdi Moayedi; Article 1117 of the Civil Code of Islamic Republic of Iran.

Migrant Workers

The region has very little regulation that empowers migrant workers. Legislation in this area has yet to be formulated. Migrant workers enjoy no protection from unscrupulous recruiting and employment agencies. Workers are sometimes sent overseas without any proper documentation or without assurance that there is an actual job vacancy. At times, workers in the country are not subject to positive domestic laws because they are not citizens. The region has a large number of workforces that are employed abroad but a concerted effort in this direction has yet to emerge. In Bangladesh, the Emigration Ordinance of 1982 seeks to regulate migrant workers, but the necessary supplementary rules and ordinances are yet to be formulated.

A ban imposed on female domestic workers in 1998 in Bangladesh has led women to using illegal channels of travel and recruitment leading them to further vulnerability.¹³⁵

Inheritance and Succession

The right to own, dispose and earn profit from property is a right recognized by CEDAW Convention under Article 15.

Since the laws of inheritance and succession are based on religion and have a cross cutting influence in the region, this subheading analyses the system of inheritance among Hindus, Muslims, Christians and others in the region.

The inequality in the private sphere is reflected in the inheritance laws of the region.

Islamic Laws in the Region

Islamic law has a very sophisticated system of inheritance where the interests of all family members are cared for (Box 26). The Sunnis and the Shias have a slight difference in their laws of inheritance. Three kinds of heirs are recognized under Islamic law, viz "sharers" who are entitled to a prescribed share on inheritance, "residuary" who take on prescribed share but succeed to the residue left after

¹³⁵ Shadow report of Bangladesh to the periodic report of the government to the CEDAW committee.

satisfying the claims of the sharers, and “distant kindreds” who are blood relations other than the sharers and residuaries and succeed only in the absence of sharers and residuaries. The principles of succession are two fold, viz the nearest in blood relationship excludes the remote and whoever is related to the deceased through any other person shall not inherit while the person is living.¹³⁶

Box: 26: Islamic Provision On Inheritance

Holy Quran Verse 4:176 says:-

They ask thee, for a legal decision, Say: Allah directs (thus) about those who leave, no descendants and ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance. If such deceased person was a woman who left no child, her brother takes her inheritance. If there are two sisters, they shall have two thirds of the inheritance between them; if there are brothers and sisters, (they share) the male having twice the share of the female, Thus doth Allah make clear, To you (His law), lest you err and Allah hath knowledge of all things.

Source: S A Kadar, Muslim Law of Marriage & Succession in India, Eastern Law House, 1998

The sharers are called Quranic heirs because definite shares are allotted to them under the Quran, which varies under certain circumstances. They consist mainly of females and in the distribution of the estate of a deceased person, their shares are carved out first.

The Residuaries are agnate heirs who were the principal heirs before the advent of Islam. They consist of all male agnates and four female agnates, daughter, son's daughter, full sister and consanguine sister. Distant kindred are distant relatives on whom the property devolves if there are no sharers and residuaries.

Under Shia law there are only sharers and residuaries. Since the shares are fixed, every member of the family is entitled to a fixed portion of the property.

A general principle that discriminates against women is that the female inherits half of the share of the male. To give an example, when a male dies among the Sunnis of the sub continent, the wife (or wives) will inherit one eighth of their husband's estate if there are children and one fourth if there are no children. When a female dies, the husband will get one fourth of his wife's estate if there are children and one half of her estate if there are no children. In the same way, the mother is entitled to one sixth of the estate of her son if the deceased left behind a male child or has brothers or sisters. On the other hand the father gets one sixth from the estate of his son if the deceased son left a male child. In the absence of any grandson, the father also gets the entire residue after satisfying other claims of sharers and becomes a sharer and a residuary.

Since the rule of nearer in relationship excludes the remoter in relationship, children of a predeceased son or daughter do not inherit from their grandparent if the deceased grandparent left behind other children. This often renders children of predeceased parents destitute. In Bangladesh this anomaly has been removed by the Muslim

¹³⁶ Mulla Principles of Mohamedan law,

Family Laws Ordinance 1961, which provides that the children of a predeceased child would inherit as if their parent was alive. A widow of a predeceased son cannot inherit from her father by law.

A Muslim can only bequeath one third of his estate by will. In Islamic Republic of Iran, a Muslim can bequeath more than one third provided the other sharers agree to the same.

Islamic law of inheritance is not codified in the region except in case of Islamic Republic of Iran (Box 27).¹³⁷ It is the only country in the study that recognizes the rights of transgender persons in inheritance. The law permits such persons to inherit as male or female depending upon their physical attributes.

Box 27: Islamic Republic of Iran's Laws On Inheritance

Article 862 of the Civil Code- Persons who take inheritance by relationship are of three categories:

- 1 - Father, mother and children.
- 2 - Grandparents, brother, sister and their children.
- 3 - Paternal uncles and paternal aunts, maternal uncles and maternal aunts and their children.

Article 863 - Heirs of the lower categories take an inheritance when no person of a higher category exists.

Article 864 - An instance of those who inherit by marriage is one of the spouses who survive the other one.

Article 865 - If several causes of inheritance are united in the same person, he takes inheritance from all the causes, unless some of those causes exclude other, in which case he takes inheritance only from those causes which exclude others.

Article 939 of the Civil Code

If the heir is a hermaphrodite and be one of a group of heirs which are such that the males take twice the portion of the females, his portion will be determined as follows.

If the indications of masculinity are the greater, he takes the portion of boy of his degree; and if the indications of femininity are the greater, the hermaphrodite takes the portion of one girl of that degree; and if neither the masculine nor the feminine indication be preponderant, the hermaphrodite will take one - half of the sum of the portions of one boy and one girl of his degree

Sources: Civil code of Islamic republic of Iran

<http://www.alaviandassociates.com/documents/civilcode.pdf>

http://www.parstimes.com/law/Iran_law.html

In India, Pakistan and Bangladesh, Muslims who adopt children are governed under the Guardian and Wards Act of 1890.

¹³⁷ Articles 907, 1059, Civil Code of Islamic Republic of Iran.

Hindu Law in the Region

Hindu law has been codified only in India and Nepal. Hindu law in India applies to Buddhists, Jains and Sikhs who are other religious minorities in the country.¹³⁸ Women and men inherit equally and there are no fixed shares. The law recognizes various classes of heirs, with the first class taking precedence over the other classes. Separate classes of heirs exist for male and female Hindus. The mother is a class one heir along with the widow and children of a male Hindu. By making a mother a sharer in her son's property, the legislation reinforces the need of a male heir.

In the case of a female Hindu, three distinct kinds of property are recognized. These are property obtained from her parents, property obtained from her husband and her self-acquired property. The first-class successors are the children and the spouse for a female Hindu. In the event of no class of heirs from the first set, the property is obtained from her parents and in-laws revert to them respectively. In the case of self-acquired property, the husband's family is the beneficiary.

Hindu law also has a complicated system of inheritance in the joint family property called the Mitakshara coparcenary. In such a system, the property is held jointly by three generations with the right of succession to the male at birth. All agricultural land is held as coparcenary. Females were excluded from this system until recently when till the Act was amended abolishing such discrimination.¹³⁹

A male or female Hindu in India can will away their entire self-acquired property.¹⁴⁰

In Nepal, The Country Code Amendment Act of 2002 Establishes a wife's equal right to her husband's property immediately after marriage, rather than after she reaches 35 years of age or has been married for 15 years, as prior to the amendment. 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. However, if she does not have any child, she should return her property to her divorced husband's child or to her divorced husband. The right to food, clothing, appropriate education, and healthcare is granted to daughters as it is the case with sons.¹⁴¹

In countries where Hindus are a minority such as in Afghanistan, Bangladesh and Pakistan, there are no statutory changes in Hindu law and individuals are governed by ancient texts and laws that have varied schools. Among Hindus in India and Nepal, while adoption is recognized for both sexes, a married woman can adopt only with the consent of her husband. A corresponding obligation is not required for the husband to seek the consent of his wife. A child that is adopted has equal right to inheritance. The law permits the adoption only if the person does not have a child of the same gender. This implies that a Hindu cannot adopt a girl child if she already has a girl child.

In Sri Lanka, the Tamils are governed by the *Thesawalamai* law that is not codified and based on customary practices.

¹³⁸ Section 2 of the Hindu Marriage Act, Hindu Adoptions and Maintenance Act, Hindu Minority and Guardianship Act and Hindu Succession Act.

¹³⁹ The Hindu Succession (Amendment) Act 2005

¹⁴⁰ The Hindu Succession Act and the Indian Succession Act.

¹⁴¹ www.fao.org/gender/landrights/report/country-NP

Under the Kandyan law that applies to people of Kandyan origin in Sri Lanka, a surviving spouse receives only a life interest in the property of the deceased spouse. Although this law does not appear to be discriminatory per se, in reality it has greater negative impacts on women who have less economic capacity and cannot inherit property absolutely.

The Drukpa branch of Buddhism enjoys a statutory representation in the National Assembly of Bhutan. Questions of family law are resolved according to Buddhist tradition and Hindu tradition.

Christian Law in the Region

In India, Pakistan, and Bangladesh, Christians are governed by the Succession Act of 1925. Upon the death of a Christian the surviving spouse and lineal descendants are the heirs. The spouse inherits half of the property while the remaining descendants get the remaining half. In the absence of children, the lateral descendants get the remaining half. A Christian can bequeath their entire property by will. The Succession Act is also the substantive and procedural law in relation to wills for all communities in these countries. In India, if a spouse belongs to a different religion and is married under the Special Marriage Act, then the Succession Act will apply for purposes of property inheritance. However, for the purpose of inheritance from their natal families, their personal laws will be applicable. The community of Parsees is also governed by the provisions of this Act. However the rules of inheritance are different for them.

In Bhutan, the Inheritance Law provides for equal inheritance among all sons and daughters, but traditional inheritance practices, which vary among ethnic groups, may be observed if the heirs choose to forego legal challenges. Traditional inheritance laws for the majority of Buddhists stipulate that daughters inherit family land. As a result, 60 per cent of rural women hold land registration titles. These inheritance practices favoring daughters accounted for the large number of women who owned shops and businesses. Tradition dictates that the most capable member of the family runs the household, which often resulted in the mother or eldest daughter holding this position.¹⁴²

In all the countries in the study women have the right to acquire and dispose property. However due to discriminatory inheritance laws, women's share of ownership of property is limited. Despite being inheritors under the law, women can still be denied their rights by male members of the family who use force, subjugate or indulge in violence to prevent the females from seeking their rightful share.

Civil Laws in the Region

All of the constitutions studied provide for equality before law and equal protection before the law. In sync with CEDAW's article 15 requirement (Box 28), various constitutions of the region also have provisions that permit the state to make special measures for women. However discrimination in the realm of civil law operates in various ways.

¹⁴² Country Reports on Human Rights Practices 2007, as released by the Bureau of Democracy, Human Rights and Labor, March 2008.

Box 28: CEDAW's Article 15 on Equality Before The Law

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Source: Article 15 of CEDAW

The laws of evidence are similar to both civil and criminal cases in Bangladesh, India, and Sri Lanka following the common law system. It is also similar in Pakistan except for changes in the realm of criminal law. In countries following *Sharia* law, the evidentiary requirements for women are different than that of men. (Table 2).

TABLE 2: Evidence Requirements Of Men And Women in Criminal Cases in the South-Asia Region

Country	Evidence Status of Women vis-a vis Men
Afghanistan	Evidence of two women equal that of one man.
Bangladesh	Evidence of men and women have equal validity.
Bhutan	Evidence of men and women have equal validity.
India	Evidence of men and women have equal validity
Islamic Republic of Iran	The evidence two women are the same as that of one man. (the change was brought in after the country became an Islamic republic)
Maldives	The evidence of two women is the same as that of one man.
Pakistan	Evidence of two women is the same as that of one man.
Sri Lanka	Evidence of men and women has equal validity.

In cases relating to civil transactions such as contracts, transfer of property, partnerships, labor law and corporate law, the impact of such discriminatory evidentiary value is not seen since women constitute a major part of the work force, own and dispose property, are decision makers at various levels, hold senior posts and

participate in the political process. The Civil Code of Islamic Republic of Iran does not distinguish the evidence of men and women while in the realm of criminal law the differences are present. The Civil Code stipulates that a witness must have maturity, sanity, justice, faith and legitimate descent.¹⁴³ It has a further provision relating to children that stipulates that the evidence of children who have not reached the full age of 15 may be heard only for supplementing information, except where the law has recognized evidence given by such children as valid.¹⁴⁴ A dichotomy is thus seen between civil and criminal law relating to the value of evidence relating to children.

Since the husband is the designated head of the household a wife cannot travel out of the country without his permission.¹⁴⁵ A wife is also legally obligated to be obedient to her husband.¹⁴⁶

Women have the right to sue and can be sued under the various laws. The Code of Civil Procedures in Bangladesh, India and Pakistan have special provisions for *Pardanashin* (women who live in *Purdah*) and courts can exempt their personal appearance. But it does not exonerate such women from the legal process.

In Nepal, a woman must have the approval of her father or husband before she can initiate proceedings in a court. A daughter cannot dispose family property without the permission of her father; a wife cannot dispose family property without permission of her husband; and a widow cannot do so without permission from her son. The Interim Constitution of Nepal now seeks to eliminate all forms of discrimination.

The capacity to enter into a contract is 21 years of age for civil transactions under the Majority Act of India, Pakistan and Bangladesh. However, in these countries civil transactions such as obtaining a driving license, opening a bank account, controlling finances are also permitted at the age of 18. Any adult male or female (18 years of age or older) have the capacity to enter into any contract. The Act stipulates that this age does not concern matters relating to marriage.

The *Thesawalamai* law applicable to the Tamils of Sri Lanka is discriminatory in regard to equality in legal capacity. Women governed by this system of law require the consent of their husbands to enter into contracts and to transfer immovable property, even those that are their own.

In India, Sri Lanka and Bangladesh, an action for tort and compensation can be initiated along with criminal proceedings for acts of sexual harassment, kidnap, rape and other forms of violence. The Law of Torts, also called as civil wrongs, developed under common law. In the absence of legislation addressing compensation in some of these areas, tort law develops precedents under the common law. Both remedies may be pursued together. Evidentiary value in such cases is based on the principle of preponderance of probability, which requires a less degree of proof than the requirement of benefit of doubt in a criminal trial.

¹⁴³ Article 1313 of the Civil Code of Islamic Republic of Iran.

¹⁴⁴ Article 1313 of the Civil Code of Islamic Republic of Iran.

¹⁴⁵ Ibid.

¹⁴⁶ Article 1108 and 1114 of Iranian Civil Code.

6. Gender Equity in the Social Sphere

While the earlier chapter addressed laws on inheritance and succession in the family, this section addresses laws relating to marriage, divorce and custody.

All the countries in the study are parties to CEDAW Convention except Islamic Republic of Iran. The Article 16 of the Convention deals with equality of men and women in the family matters (Box 29). However, countries in the region, with the exception of Sri Lanka and Nepal have declarations and reservations to this Article (Table 3) . The following table indicates the country reservations and the reasons given by them.

Box 29 : Article 16 Of The CEDAW Convention

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

The same right to enter into marriage;

The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

The same rights and responsibilities during marriage and at its dissolution;

The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation, in all cases the interests of the children shall be paramount;

The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

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

Source: Article 16 of CEDAW.

TABLE 3: Most Countries in the Region Has Reservations to Article 16 of CEDAW

Country	Date of signature	Date of ratification, accession, succession and declaration or reservation	Declarations and reservations
Afghanistan	27-9-1990	28-3-1994	"The Government of the Republic of Afghanistan reserves the right to express, upon ratifying the Convention, reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shari'a and the local legislation in effect." (D)
Bangladesh	26-1-1990	3-8-1990	"[The Government of Bangladesh] ratifies the Convention with a reservation to article 14, paragraph 1. "Also article 21 would apply subject to the existing laws and practices in Bangladesh." ®
Bhutan	4-6-1990	1-8-1990	
India		11-12-1992	"While fully subscribing to the objectives and purposes of the Convention, realising that certain of the rights of child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognising that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum age for admission to each and every area of employment in India - the Government of India undertakes to take measures to progressively implement the provisions of article 32, particularly paragraph 2 (a), in accordance with its national legislation and relevant international instruments to which it is a State Party." (D)
Iran	5-5-1991	13-7-1994	Upon signature: Reservation: "The Islamic Republic of Iran is making reservation to the articles and provisions which may be contrary to the Islamic Shariah, and preserves the right to make such particular declaration, upon its ratification". Upon ratification:

			Reservation: "The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect."
Maldives	21-8-1990	11-2-1991	Upon signature: Reservations: "1) Since the Islamic Shariah is one of the fundamental sources of Maldivian Law and since Islamic Shariah does not include the system of adoption among the ways and means for the protection and care of children contained in Shariah, the Government of the Republic of Maldives expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention on the Rights of the Child. "2) The Government of the Republic of Maldives expresses its reservation to paragraph 1 of article 14 of the said Convention on the Rights of the Child, since the Constitution and the Laws of the Republic of Maldives stipulate that all Maldivians should be Muslims." Upon ratification: Reservations to articles 14 and 21.
Nepal	26-1-1990	14-9-1990	No declaration or reservation
Pakistan	26-1-1990	12-11-1990	Declaration The accession by [the] Government of the Islamic Republic of Pakistan to the [Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan. Reservation The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention. 12.3.1996
Sri Lanka	26-1-1990	12-7-1990	No declaration or reservation

Family Law or Personal Law

Family law in the region is based on one's religion. It is a complex area, with more difficulties arising from the combination of increasing fundamentalism and the assertion of the third generation of human rights that stress group identities, making reform difficult in some countries. It is also an area where the intersection of caste, class and religion play a part in the realization of rights.

Marriage

Rights such as maintenance, legitimacy of children, and mutual rights over property in inheritance are only possible through the prism of marriage in the countries covered in

the study. In each country, relationships outside the institution of marriage do not give any rights to the parties. In some jurisdictions, they would also be offences as illustrated in the section on gender in social context relating to violence against women.

Here, we discuss the various marriage laws in the region, rights on divorce, child custody, maintenance and child marriages.

Marriage under Muslim Law

In Muslim law, marriage is a contract and must be based on mutual acceptance. Divorce is based on the principle of the irretrievable breakdown of marriage. The marriage of a Muslim man with a non-Muslim woman who belongs to the religion of the book (*Kitabiyya*) is acceptable while the marriage of a Muslim woman with a non-Muslim man is not legal under religious law. Marriages with persons who are not *Kitabiyya* (not of the book) have no legality under Muslim law. In Pakistan and Bangladesh, marriages are governed under the Family Law Ordinance. The laws in Pakistan and Bangladesh have been amended to provide for compulsory registration of marriages. In the Islamic Republic of Iran, the code of civil procedure has codified family law. While these laws have their origin in *Shairah* as do all personal laws that have their origin in religion, codification makes it easier for the application of law. In India, Nepal and Sri Lanka substantive Islamic law is not codified. In India there was only one law, after its independence from British colonialism, that addresses the rights of Muslim women to maintenance.

Dower or Mahr

Dower or *Mahr* is a unique feature of Islamic law that is often confused with bride price due to colonial interpretations. *Mahr* is a specific settlement of property made by the husband to the wife that has to be specified in the marriage contract and is arrived at by the contracting parties.¹⁴⁷ It is given to her as a mark of respect and is an economic right that allows the woman to use and utilize the *Mahr* absolutely. The wife is within her rights under Islamic law to refuse any “marital obligations” until her *Mahr* is paid.¹⁴⁸ *Mahr* is an essential ingredient to the marriage and if it is unspecific in the *Nikahnamah*, or marriage contract, it must be judged on definite principles. Since *Mahr* is property, it can be both movable and immovable and includes money, livestock, gold jewellery, land, house, etc. *Mahr* can be prompt or deferred. A prompt *Mahr* is one that is given at the time of marriage. A deferred *Mahr* is one where the marriage’s contract stipulates the time when it is to be given, such as during divorce, or death. On the death of the husband, *Mahr* as a debt has priority over the claims of other heirs to the estate and a claim for unpaid *Mahr* constitutes a debt on par with the demands of other creditors. *Mahr* can also be paid in installments.

Muta Marriages

Shia law recognizes temporary marriages called *Muta*. They are common in Islamic Republic of Iran, and are also prevalent among the Ithna Asharis in the Indian sub-continent. These are temporary contractual marriages that can last for a few hours, days, months or years with *Mahr* being stipulated in the contract. A man has the

¹⁴⁷ Apart from judicial precedents, this is stipulated in Articles 1078 to 1101, Chapter 7 of Civil Code of Islamic Republic of Iran.

¹⁴⁸ Ibid.

capacity to contract any number of wives by *Muta* marriage, without the normal limitation of four wives. The non-specification of these would make the marriage void. Such marriages are not recognized among the Sunnis. All the requisites of a valid marriage, such as offer and acceptance, must be observed in a *Muta* marriage. The main distinction between a permanent marriage and a *Muta* marriage is that in the later a term is specified and parties to a *Muta* marriage cannot inherit from each other. The woman is not entitled to maintenance unless stipulated in the contract. The marriage comes to an end on the expiry of the term and there is no need for a formal *Talaq* or divorce.

Children born of *Muta* marriages are legitimate and have the right of inheritance from their father.¹⁴⁹

Marriage under Hindu Law

India and Nepal have unified marriage law as applicable to all Hindus. The Jains, Buddhists and Sikhs are considered Hindus for the purpose of the personal law, and are governed by the Hindu Marriage Act of 1955 but these communities are religious minorities under the constitution. The law requires both parties to be Hindus in order for the marriage to be valid. It is evident that the hold of religion on law in matters of marriage starts from the validity itself. In other countries of the region, where Hindus are a religious minority as in the cases of Afghanistan, Bangladesh, Pakistan and Sri Lanka, ancient texts and scriptures govern them. Marriage is a sacrament, making it indissoluble and extremely difficult for a spouse to obtain a divorce.

Marriage under Christian Law

The region has a large number of Christians, both Catholics and Protestants. Under the Christian Marriages Act of the region, it is sufficient if one party to the marriage is a Christian.

Inter religious marriages: The Special Marriage Act in India governs interreligious marriages where either party does not convert to the religion of their spouse. Other legislation in the region addresses such marriages.

Registration of Marriages

In Bhutan, all marriages must be registered, without which they are not legally recognized. Certificates are not issued for common law marriages below the minimum age, even though they are legal and parties involved in the same can be fined. Registration of marriage is not compulsory in India and Nepal, though certain states in India have formulated legislation in this regard. Non-registration of marriages results in a lack of documentation in India and often result in the man denying the marriage itself and the woman is left without any proof. The Family Law Ordinance in Bangladesh and Pakistan provide for compulsory registration of marriages to be solemnized by a Nikah Registrar. In all the countries in the region, non-registration does not make the marriage void.

¹⁴⁹ Articles 1062 to 1070 of Chapter 6 of the Civil Code of Islamic Republic of Iran.

Polygamy

Among the countries in the region that follow Islamic law, it is permissible for a man to have four wives (Box 3). Legislative interventions have restricted the practice in some of countries. In Maldives, stringent conditions for the practice of polygamy has been instituted: for example, an approval is needed from the court for such a marriage and before approving a new marriage, the court asks for information from the spouse about the man's earnings, to verify his capacity for maintenance and support.¹⁵⁰ In India and Sri Lanka, polygamy is permissible for the Muslims. In Pakistan and Bangladesh, under the Family Laws Ordinance, a married men has to seek permission in writing from the arbitration council if he wants to marry again during the subsistence of his earlier marriage. Notice has to be given to his spouse and the Arbitration Council grants permission only if it is satisfied that the proposed marriage is necessary and just. In Bhutan, polygamy and polyandry are permissible under the law with the consent of the spouse.

Box 30 : Islamic Provisions on Polygamy

Verse 4:3 of the Holy Quran

If ye fear that ye shall not be able to deal justly with the orphans, marry woman of your choice Two or three or four. But if ye fear that ye shall not Be able to deal justly (with them) Then only one or, That which your right hands possesses , that will be more suitable to prevent you from doing injustice.

Verse 4:129

Ye are never able to do justice between wives even if it is your ardent desire

Source: **S A Kadar**, Muslim Law of Marriage & Succession in India, Eastern Law House, 1998

Consanguinity

All systems prohibit marriages among certain relatives but they vary with persons of different religions. In Bhutan, marriages contracted between persons within the degree of consanguinity and affinity if permissible by local custom is recognized by the law.

Different customary practices within the region permit certain kinds of marriages that may otherwise appear as one of consanguinity. Marriage among paternal cousins is legal among Muslims but not with maternal cousins. Among Hindus of South India, marriage with the maternal uncle or cousin is legal owing to customary practice, but not that with a paternal cousin. However, such a marriage is void in other parts of India.

Restitution of Conjugal Rights

A spouse can file proceedings under for this relief claiming that the other spouse has withdrawn from the marital life without any reasonable excuse. While such a decree is unenforceable, it can coerce a re-union since it provides for attaching the salary of the spouse who refuses to comply with an order under the Code of Civil Procedure in India. Restitution of conjugal rights is legislative sanction for the marital rape. However, those that challenge the law have unsuccessfully claimed that it violates the

¹⁵⁰ The Family law Act 2001 of the Republic of Maldives.

right to life by forcing people to live together.¹⁵¹ The remedy of restitution of conjugal rights is available under Muslim, Hindu and Christian laws in India, Pakistan and Bangladesh.

Divorce Laws in the Region

Muslim Laws

Divorce in Islamic law, as practiced in the region, is the practice of *Talaq-ul-biddat*, or *triple talaq* where the divorce is complete by pronouncing the word *Talaq* three times in the presence of two witnesses. The pronouncement can be made in the absence of the woman. This practice is one of the legal forms of divorce in Afghanistan, India, Islamic Republic of Iran, Nepal and Sri Lanka.

Box 31 : Quranic Reference on Divorce

If ye fear a breach between them twain appoint two Arbiters— one from his family, and the other from hers. If they seek to set things right, Allah will cause their reconciliation. For Allah hath full knowledge and is acquainted with all things.”

Source: Verse 4:35 of the Holy Quran

Muslim law

In Bangladesh and Pakistan, the practice of *Triple Talaq* is prohibited under the Family Law Ordinance 1961, which provides for reconciliation and adjudication of divorce cases. When a man pronounces *Talaq*, he has to intimate the authority under the statute of his intention. After this an arbitration council is constituted to bring about reconciliation between parties.¹⁵² The practice of reconciliation is also encouraged under Islamic law provisions (Box 31). India, Pakistan and Bangladesh also have a common legislation called the Dissolution of Muslims Marriages Act of 1939, where women can seek divorce on various grounds such as cruelty, desertion, neglect, impotency and failure to perform marital obligations; or when her marriage is solemnized before the age of 15 years and she repudiates the marriage between the age of 15 and 18 years; or if the husband does not treat all of his wives equally; and on any other ground recognized under Muslim law. Amendments have been made to the laws in Pakistan and Bangladesh, permitting the wife to apply to the court seeking *khul'a*. There is some confusion as to whether a corresponding right is available to women under the practice of *khul'a* in India. The current opinion seems to be that the husband has to give his consent to release her from the marriage when she asks for it. In Maldives, the law permits pre-nuptial agreements where the wife can impose a condition restricting the right of the husband to commit polygamy during the subsistence of their marriage. However, even when requiring both men and women to approach the court for divorce, the language of the requirement is different for men and women, based on the “inalienable right” of man to divorce his wife, at his discretion with or without any reason whatsoever. Men must require the court’s permission for divorce, but if a woman wants a divorce she must request court mediation in requiring her husband to grant her a divorce. Parties are expected to

¹⁵¹ The court in one instance observed that “ introducing constitutional law into the family is like introducing a bull into a china shop.

¹⁵² Section 3 of the Family Law Ordinance 1961.

appear by themselves in family disputes without the legal assistance.¹⁵³ In Islamic Republic of Iran, a man may divorce his wife whenever he wishes to do so.¹⁵⁴ However, a woman may seek *khul'a* in which case she forgoes her right to *Mahr*.¹⁵⁵

In Sri Lanka, the Muslim Marriage and Divorce Act of 1951 have similar provisions for divorce based on matrimonial wrongs such as adultery, cruelty and desertion.¹⁵⁶ Courts are required to mediate in cases before them, but the husband has the right of pronouncing *Talaq*.

Iranian law also recognizes the practice of *Mubarat*, or divorce by mutual consent. In such instances the compensation for the wife is not more than her *Mahr* or "marriage portion".¹⁵⁷ In other regions the practice of *Mubarat* is also recognized, but such options are not generally exercised.

The practice of triple *Talaq* is regulated in countries by various legislation that are based on Islamic law or have a Muslim majority. Countries such as Nepal, India and Sri Lanka, where Muslims are religious minorities, have refrained from addressing this form of divorce. This in turn has resulted in double discrimination against Muslim women in these countries since they face the brunt of arbitrary divorce.

Hindu law

The law of divorce for Hindus in India is based on matrimonial wrongs where the spouse who seeks divorce has to prove cruelty, adultery, desertion or other grounds listed in the statute.¹⁵⁸ The wife has grounds of divorce such as conviction of a husband on charges of rape, sodomy or bestiality apart from an additional ground for divorce when her marriage is solemnized before the age of 15 years and she repudiates the marriage between the ages of 15 and 18. There is hardly any litigation under this provision, as not many children married below age 15 can find support systems to file cases before they attain the age of 18. No corresponding right is available to the boy child. The statute also has separate grounds of nullity and divorce. Grounds such as impotency, fraud, a subsequent marriage while the first one is subsisting are some of the grounds for nullity. The law also recognizes divorce on mutual consent. In Nepal, divorce is also granted on fault based grounds.¹⁵⁹ In Sri Lanka, the law relating to the Tamils is based on the customary law of the Theswamalai law.

The Marriage Registration Ordinance 1907 in Sri Lanka permits divorce on adultery, malicious desertion, and incurable impotence apart from mutual consent. However, the Kandyan Marriage and Divorce Act 1952 that applies to Sri Lankans of the Kandy region, stipulates that divorce can be granted on the basis of adultery by the wife, adultery by husband coupled with incest, desertion for two years and mutual consent. In Pakistan and Bangladesh, since Hindus are a religious minority, the state has refrained from amending laws of marriage and divorce that are based on ancient texts.

¹⁵³ Shadow report of Maldives.

¹⁵⁴ Article 1133 of the Civil Code of the Islamic Republic of Iran.

¹⁵⁵ Article 1146 of the Civil Code of the Islamic Republic of Iran.

¹⁵⁶ Section 19 of Muslim Marriage and Divorce Act 1951

¹⁵⁷ Article 1147 of the Civil Code of Islamic Republic of Iran.

¹⁵⁸ Section 13 of the Hindu Marriage Act of 1955.

¹⁵⁹ Mulkiyan Ain or Country Code of Nepal.

Christian law

The Indian Divorce Act of 1869 applies to Christians living in India, Pakistan and Bangladesh. In the region, this law was enacted during colonialism primarily to protect the institution of the British rulers who were living in different countries, away from their spouses and has very stringent grounds for divorce. In India, after lengthy campaigns by various women's groups and reformists among the Christian community, the statute was amended in 2003. Though still based on fault driven grounds, the Act provide for mutual consent as a reason for divorce. The fault based grounds are similar to those under the Hindu Marriage Act and the Special Marriage Act. In Bangladesh and Pakistan, however, the Act has yet to be amended. It recognizes adultery as grounds for the men only, while in the case of the women, grounds for divorce has to be incestuous adultery, bigamy with adultery, rape, sodomy or bestiality, or adultery coupled with cruelty, or adultery coupled with desertion for more than two years. By providing only adultery as a ground for divorce for the man while combining it with other grounds for a woman, the law becomes discriminatory in nature. Apart from that, it recognizes only various forms of adultery as a form of divorce. The Act also permits the husband to claim damages from the "adulterer" and to seek the settlement of her property in the name of the children, while no corresponding right is available to the woman. Along with the penal provision on adultery, this colonial vestige continues to exist in the statutes, making it one of the harshest law in the region. In Sri Lanka, Christians are governed by the Marriage Registration Ordinance of 1907 that permits divorce on the fault based grounds as mentioned above.

Bhutan

The Marriage Act permits either spouse to initiate proceedings for divorce on various grounds, such as adultery, abandonment, sterility, impotence and willful negligence by one of the spouses.

Guardianship and Custody of the Children

In all legal systems, the father is considered the natural guardian of the child. There are different laws relating to the custody of children with an overriding law in the sub-region being termed the Guardian and Wards Act of 1890. Despite personal laws giving a preferential right to the father, courts in the region have harmoniously used the personal law and the Act to grant custody to mothers or appoint women as guardians of children based on the welfare and best interests of the child. In Sri Lanka, the various laws recognize the best interests of the child for purposes of guardianship and custody.¹⁶⁰

Muslim law

In Afghanistan and the Islamic Republic of Iran, the natural guardian of the minor child is the father or the paternal grandfather.¹⁶¹ In Bangladesh, Pakistan and India, while the same principle applies in customary law, the Guardian and Wards Act of 1890 under which proceedings of guardianship and custody are filed, stresses the "welfare of the minor" as a factor that determines guardianship and custody. In the

¹⁶⁰ The Civil Procedure Code 1889 (Sri Lanka): Section 621, The Kandyan Marriage and Divorce Act 1952 33(7) ii-iii and the Muslim Marriage and Divorce Act 1951 Section 48.

¹⁶¹ Article 1180, Chapter 3 of the Civil Code of the Islamic Republic of Iran.

Islamic Republic of Iran, if a guardian is found to be acting against the interests of the child, the public prosecutor can seek the investigation of his conduct and seek the appointment of a provisional guardian.¹⁶² Article 21 (5) of the Constitution of the Islamic Republic of Iran also declares that the guardianship of children can be granted to worthy mothers in order to protect the children in the absence of the guardian.

Muslim law in the region permits the mother to have the custody of the girl child until puberty and that of the boy child until the age of nine. However, courts have addressed this in the context of the welfare of the minor in cases of custody, and are currently moving towards the “best interest of the child” principle. But welfare or best interest of the child principle often depends on the subjective satisfaction of the judge. In Sri Lanka, under Shafi law the female child remains with the mother until she re-marries. Under Hanafi law, custody is with the mother only until the girl reaches puberty. If it is a boy child, the mother has custodial rights until the age of seven.

Hindu law

Hindu law in India recognizes the father as the natural guardian of the child and after him the mother. The constitutional validity of this provision was challenged on the grounds of discrimination, but while the Supreme Court recognized the right of the mother as a guardian, it did not strike down the law and only held in case of the father’s absence, the mother will also be the guardian. The mother is the natural guardian only if the child is illegitimate. The law recognizes the preferential rights of the mother to keep a child with her until the age of five.¹⁶³ Under the Hindu Marriage Act, courts are required to pass orders during matrimonial proceedings, keeping the welfare of the child in mind.¹⁶⁴

Christian law

Guardianship in India, Pakistan and Bangladesh is governed by the Guardian and Wards Act as mentioned earlier. In disputes relating to custody, courts are required to pass orders during matrimonial proceedings keeping the welfare of the child in mind under the Indian Divorce Act. In Sri Lanka, custody is based on the best interests of the child. In Bhutan in the event of divorce, the mother is given custody of the child until the child attains the age of nine. Thereafter, the child can choose to live with either parent.

Maintenance and Alimony

Muslim law

In Bangladesh and Pakistan, classical law recognizes the right of the woman to have maintenance only for the period of *Iddat* or *Iddah*, which is a waiting period to be observed by the woman on death of or divorce from her spouse. It is approximately three months, and is calculated by three menstrual courses. If the woman is expecting a child, then the period starts after the birth of her child. Classical Islamic law recognizes the right of the wife to claim maintenance and live separately from her husband if he re-marries.

¹⁶² Article 1186 of the Civil Code of the Islamic Republic of Iran.

¹⁶³ Section 6 of the Hindu Minority and Guardianship Act of 1956.

¹⁶⁴ Section 26 of the Hindu Marriage Act of 1955.

In countries where there is a provision for arbitration and mediation and where *Talaq* is regulated, the right of maintenance is also well-defined. In the Islamic Republic of Iran, the cost of maintenance during *Iddat* includes housing, clothing, food, furniture and other amenities in proportion to their standards of living.¹⁶⁵ As long as the dispute is pending between the parties, even the court can fix a suitable dwelling for the wife.¹⁶⁶

The tension of balancing minority rights with those of gender is reflected in the rights of maintenance of Muslim women in India. Under the Code of Criminal Procedure, wives including divorced wives and parents of all religions were entitled to maintenance.¹⁶⁷ Since this is under the Criminal Code, it was argued that it was a secular law since the criminal justice system applied to all irrespective of religion. The constitutional validity of this provision was challenged as violating personal law by a Muslim husband who argued that legislative interventions asking a husband to pay maintenance to his divorced wife was anti-Islamic since she was entitled only to maintenance until *Iddat*. The Supreme Court dismissed his case.¹⁶⁸

To neutralize the effect of the judgment, the government enacted the Muslim Women (Protection of Rights on Divorce) Act that restricted maintenance to Muslim women to the period of *Iddat* and gave her “a reasonable and fair provision and maintenance”. An issue that has come up before the courts is the interpretation of this term. The Supreme Court has interpreted this provision harmoniously with customary law and taking note of the status of women, held that at the time of divorce, a Muslim husband is required to contemplate the future needs for the entire life of the divorced wife and make preparatory arrangements in advance for meeting her needs.¹⁶⁹ Parents can claim maintenance from their children including married daughters under the Code of Criminal Procedure in India.

Hindu law

Two types of maintenance are recognized under statutes in India: interim alimony that is paid pending litigation and permanent alimony that is payable once the marriage is dissolved under the Hindu Marriage Act.¹⁷⁰ Among Hindus, the woman can also be directed to pay alimony to her husband. Alimony is paid either monthly or as a lump sum. Hindu law also recognizes the right of dependants to claim maintenance. These include parents, children, a widowed daughter-in-law, and grandchildren of predeceased children. Daughters are entitled to marriage expenses. In Nepal, a divorced woman who is unable to maintain herself is entitled to maintenance for a period of five years or until remarriage, whichever is earlier.

¹⁶⁵ Article 1107 of the Civil Code of the Islamic Republic of Iran.

¹⁶⁶ Article 1116 of the Civil Code of the Islamic Republic of Iran.

¹⁶⁷ Section 125 Code of Criminal Procedure (India)

¹⁶⁸ Mohammed Ahmed Khan vs Shah Bano Begum, AIR 1985 SC,945 (India).

¹⁶⁹ Daniel Latifi vs Union of India, AIR 2001 SC page 3958.

¹⁷⁰ Section 4 and 25 of the Hindu Marriage Act (India).

Christian law

The Divorce Act of 1869 in Bangladesh, Pakistan and India provides for permanent alimony and maintenance. In India Christian women can also claim maintenance under the Code of Criminal procedure.¹⁷¹

Women and Health

The issue of health has always been in the realm of public policy and has not always been addressed as a right that is enforceable under the law. But some related concerns have had major impacts on the gender. Early marriage, teenage pregnancy, lack of adequate measures to plan or space a family, the lack of control over sexuality and the arbitrary authority of the state are examples where gender inequity exists.

Abortion and Sex-Selective Abortions

Abortion is legal in India under the Medical Termination of Pregnancy Act of 1971. The law permits abortion in cases where the pregnancy involves a risk to the life, or grave injury to women's physical and mental health, or where there is a substantial risk that the child would suffer from physical or mental abnormalities. Pregnancy caused by rape, or failure of any device or method used by any married woman for the purpose of limiting the number of children are examples of injuries to women's mental health. The woman's actual or reasonably foreseeable environment must be considered before termination. In the case of minors (below 18 years of age), the consent of the guardian is required before such termination. Since the father is the natural guardian this often result in young pregnant women seeking out quacks out of fear of informing the male members of their family. The law gives wide leeway and though the statute was partially in response to the number of deaths that were taking place due to illegal abortion, it also served the interest of the state in its population control program. Under the Act, only a registered medical practitioner can terminate the pregnancy, which should not exceed 20 weeks.¹⁷² Any other termination resulting in miscarriage amounts to an offence under the Penal Code. These include causing miscarriage with or without a woman's consent, and if it results in the death of the woman, the offence is punishable with imprisonment for life.¹⁷³ The law treats abortion as a woman's right to choice (except in the case of minors). Since the consent of her husband or partner is not required, courts have held that termination of pregnancy without the consent of the husband amounts to cruelty for the purposes of divorce.

In Maldives, abortion is legal on two grounds only: at any time during the pregnancy, if the mother's life was in danger; and up to the 120-day mark, if one or both of the parents was a thalassaemia carrier and a doctor confirmed that the fetus was a thalassaemia major. There are moves to permit the same in cases of rape of minors but it has yet to shape into law.

In the Islamic Republic of Iran, under the Abortion Act of 2005, abortion before 19th week of pregnancy, is now allowed if the mother's life is in danger, and also in cases of fetal abnormalities. The consent of the father is not a requirement and the mother is required to show the opinion of three specialist physicians.

¹⁷¹ The Divorce Act of 1869 and section of the Code of Criminal Procedure

¹⁷² Section 3 of the Medical Termination of Pregnancy Act of 1971.

¹⁷³ Sections 312, 313, and 314 of the Indian Penal Code.

Child Marriage

The practice of child marriage is common in most of the countries in the study except Sri Lanka. The Child Marriage Restraint Act of India, Pakistan and Bangladesh prohibit child marriages and have different ages of consent. In India, the age of consent is 18 years of age for a female and 21 for a male. Marriages below the age of consent are voidable at the option of the person who wishes to repudiate it, provided it is done by any of the party to the marriage, within two years of attaining 21 years.¹⁷⁴ The Act has been repealed in India, and such marriages are declared void at the option of the children. However, while child marriages are prohibited under the legislation, statutory Hindu law and Muslim law do not consider such marriages void. The law only punishes parents, clergy, priests, etc. As a result of this, all child marriages in India among Hindus and Muslims are valid under the law. The reasons for non-interference by the state authority are complex. One view is that given the premium placed on the institution of marriage and its gendered structure, declaring child marriages as null would affect women more adversely given the practice of *dowry*, the low status of women, and social norms that stigmatize her since re-marriage is harder for Hindu women.

In Pakistan, the age of consent is 16 years for a female and 18 years for a male, while in Bangladesh the age of marriage is 18 for girls and 21 for boys. The age of marriage for both men and women is 18 years in Bhutan.¹⁷⁵ However, under its common law, marriages below the stipulated age are legal.. In the Islamic Republic of Iran, the age of marriage is 13 lunar years for girls, and 15 lunar years for boys. Marriage before that age is valid if the guardian (*Vali*) approves the same.¹⁷⁶ In Sri Lanka, the legal age of marriage is 18.

In the Islamic Republic of Iran, boys older than 15 years may freely choose their wives, while women who have reached adulthood can choose their spouses only if their guardian have granted permission.¹⁷⁷ However, if her family members refuse to grant permission, she can obtain the permission from the court. The legality of a marriage is contingent on the father or grandfather's approval.¹⁷⁸ One of the difficult areas is with reference to puberty in Bangladesh, India, Islamic Republic of Iran, and Pakistan. While the various state measures stipulate a minimum year of marriage, puberty is often taken as a yardstick for adulthood. In Pakistan, in the absence of puberty, adulthood is considered 16 for females. Since puberty is attained at the girl's first menstruation, with some girls attaining it as early as 11 or 12 years of age, they can be considered adults for the purpose of customary marriage. In the Islamic Republic of Iran, they can be prosecuted for *Zina*. A similar opinion is indicated in Pakistan where the term "puberty" is used in the Protection of Women Act 2006.¹⁷⁹

¹⁷⁴ Child Marriage Restraint Act 1929 The Act has been repealed in India with the prohibition of Child Marriage Act 2006

¹⁷⁵ Marriage Amendment Act 1976 (Bhutan).

¹⁷⁶ Article 1041 of the Civil Code of the Islamic Republic of Iran .

¹⁷⁷ Article 1043 of the Civil Code of the Islamic Republic of Iran

¹⁷⁸ Article 1105 of the Civil Code of the Islamic Republic of Iran.; Immigration and Passport Regulations, ratified in 1971.

¹⁷⁹ Second Shadow report, Undermining Cedaw in Pakistan, April 15, 2007, submitted to the CEDAW Committee.

7. The Impact and Application of the Law in the Justice System

The *de jure* provision indicates that legislation not only fall short of addressing concerns in areas such as violence against women, sexual harassment at the workplace, and family law, but are also discriminatory. Most of the laws are based on the formal model of equality, and does not take note of the reality of women's lives.

In all the countries studied, despite constitutional guarantees, discrimination persists. Currently discrimination, as applied by law, only protects individuals against the state. The absence of laws prohibiting non- state discrimination makes it impossible to address gender inequalities. The fundamental rights provisions in the constitutions do not extend to situations of discrimination by private parties. While courts in some of the countries, notably Bangladesh, India, Pakistan, Nepal and Sri Lanka, have expanded the right to life guaranteed under their constitutions to address violations by private parties, the concept has not been extended in detail to the private sphere. In the absence of legislation or even a definition on discrimination, this has its limitations since judicial precedents often depend on the views of the judge.

Another factor to be noted is that equality is guaranteed in most of the constitutions only with reference to public employment. But with greater privatization and the state withdrawing itself from its role in many areas including education and health, this poses a great challenge for addressing *de facto* equality since the private sector lacks sufficient legal restrictions. In India, the debate on the extension of provisions of affirmative action to the private sector has met with sharp opposition from the industrial sector that sees its freedom of employing persons being curbed with such policies. But unless there is affirmative action in this area, minorities, *Dalits*, women and others from marginalized groups will continue to be denied equal opportunities.

Further, despite the constitutional provisions of equality, the persistence of inequalities in the personal laws of different religions– in matters of divorce, inheritance, custody, maintenance and other matters pertaining to the family– is a matter of critical concern. As an example, despite legislation prohibiting child marriage, the practice continues in the region except in Sri Lanka. But even in Sri Lanka, it is prevalent among the Muslims in small numbers. In Bangladesh, in 50 per cent of the marriages that take place, the girls are below 15 years of age.¹⁸⁰

The impact of corruption on the justice system is not clearly analyzed. In Pakistan, there are allegations against the police of bribery, manipulation of evidence and using provisions of law that are lesser offences.¹⁸¹ The same situation exists in other countries too.

Gender Equity in the Justice System

The justice system in the region is based on a combination of common and religious laws. The structures of the legal systems draw their sources from their constitutions, which in turn have many provisions based on common law. Thus, there are unifying features in the formal body of the justice system of the region especially with reference to fundamental rights, fair trial standards, the presumption of innocence of

¹⁸⁰ Summary records of CEDAW, 5th periodic report of Bangladesh, 9th July 2004.

¹⁸¹ Hina Jilani, Violence against the legal system, page 163.

the accused and the various tiers of the courts. The formal laws and constitutional provisions, while providing for substantial rights, raise problematic issues in the context of gender.

In the context of *de facto* equality, what is required is to link the connections between non-discrimination, equality and equity. \ The application of the law to particular situations would depend on the justice system and it is in this arena that understanding equity is of great importance. Equity is the remedial justice that addresses the imperfection of laws, taking note of the fact that what is legal is not always just.¹⁸² The development of cases in the region indicates that while courts have taken note of inequality within the constitutional right, they have also used equity as a measure to address substantial justice.

The complexities in the region make the task of addressing gender equity daunting and challenging. The justice system has had both a positive and negative role in this direction. Sometimes, despite the *de jure* law granting certain rights, the justice system fails to protect rights and is also misused by powerful interests as indicated below. At times, despite the *de jure* law's failure to protect the rights of women, the justice system has stepped in and rectified the situation.

The judgment of the Lahore High Court addresses the constitutional right of the woman to have a family, has given an interpretation that has a harmonious construction with religious injunctions in addressing the right to choice and is a good example of gender equity (Box 32). Despite such positive interpretations in the region, problems persist.

¹⁸² *ibid* 647

Box 32: Pakistan High Court Judgement–Mst Sajida Bibi and another vs Chouki 2 Police Station, Saddar, Sahiwal

An adult woman who married a man of her choice was harassed by her family members who filed police cases against them. Under Article 35 of the Constitution of Pakistan, the State shall protect the marriage, the family, the mother and the child."

The couple filed proceedings against the station house officer protesting the harassment. The Lahore High Court observed, "Major and sane persons, both male and female have the right to contract marriage with their own free will. When a marriage is contracted by a woman without the consent of her parents, it is often seen that effort is made by her parents to undo the marriage. In most of the cases this is done on account of the tribal customs or social taboos or on account of barbarism. However, such considerations have to yield to the constitutional commands, law and the Islamic Injunctions. The divorce obtained through coercion or the recovery of the girl secured otherwise by the parents in most of the cases results in very awful situation. As a result of the consummation of marriage, except in rare cases, the wife conceives and the parents of the girl in the first instance try to kill the still born child in the womb of the mother through abortion. If such efforts fail and the child is born, it leads to still more serious consequence. First, the legitimacy of the child is called in question and secondly, the responsibility to bring up the child is not shared by the parents of the mother and thirdly, she is compelled to marry elsewhere against her wishes. In this the poor lady is put to immense mental torture and is shattered. However, it is heartening to note that these social taboos are gradually loosening their grip on the society, partly on account of religious education by the learned Ulemas and partly due to the awakening through print and electronic media. International exposure of a large number of people of Pakistan through traveling abroad is also making contribution in that behalf. The court further observed, "If the spouses are deprived of their right to live together and they are compelled to live separately against their wishes then it will be a worst kind of violation of their fundamental right guaranteed under Article 9 of the Constitution. The duty of the police is to act in aid of the Constitution and the law. Neither the police nor any other functionary of the State has any right to cause harassment to a married couple or their family members with a view to cause separation between the spouses. The duty of the police lies in protecting the marital life of a duly married couple and not to cause any hindrance therein. The police should not lend a helping hand in depriving the spouses of their fundamental right to live together peacefully.

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law.

Source: Pakistan Law Digest, 1997, Lahore, page 666.

Despite the *de jure* law permitting such marriages and relationships, and with higher courts recognizing the rights of parties to marry a person of their choice, there are many instances of the criminal justice system being put in motion to contest the validity of such marriages. For example, if a heterosexual couples (same sex behavior is an offence in the region), belonging to two different religions or castes, decide to marry they face opposition from their community that is further fueled by fundamentalism, with the communities getting involved in using the criminal justice system to harass young couple. The first objection is made with reference to the age of the woman. If the woman is unable to prove her age, charges are made that she is a minor using the various provisions of kidnapping from lawful guardianship in the penal codes. Proof of age is a major requirement in such cases and school certificates are considered valid evidence. But since there a high degree of drop outs and illiteracy, in addition to lack of age documentation in the region, matters are compounded as the woman is unable to prove that she is above the age of consent. The woman is then detained in "protective custody", a concept peculiar to the region.

In Pakistan, young men who marry women, defying parental norms, can also be charged of kidnapping and if the girl refuses to testify against her husband they are charged of *Zina*.¹⁸³

All systems in the region recognize the right of the court to detain women in protective custody in shelter homes or in homes run by the government where other women offenders are housed even when they have not committed an offence. Even adult women are detained if during a course of a criminal proceeding the court is of the opinion that she does not have a proper place of residence. This concept, where the woman is kept in protection for her own good, does not apply to men. There are many instances of adult rape victims being kept in protective custody while the perpetrators of the offence are released on bail. These are not legislative interventions but advanced by courts in the region. In Bangladesh the Suppression of Violence against Women and Children Act 2000 (*Nari o Shishu Nirjaton*), and the Suppression of Violence against Women and Children Act 2000 (*Nari o Shishu Nirjaton Daman Ain*) prevent the practice of placing women in “safe custody”. However, judges still place adult women in “safe custody” in shelter homes without even ascertaining their consent. Apart from violating her right to liberty and movement, besides restricting all her freedoms, there is a grave concern of safety and security. Conditions in such shelters are often inadequate and women in “safe custody” are reported to have been subjected to physical and psychological abuse.¹⁸⁴ In India, the remand home in Agra became a hub where women were sexually assaulted and exploited resulting in public interest litigation.¹⁸⁵ In Bhutan, it has often been explained as necessary since there was no safe custody law and judges had no other option to ensure their security.¹⁸⁶

In the area of trafficking, women often enter the host country on false promises, and become illegal immigrants thus violating various legislation. Laws that are required to prevent trafficking and sexual abuse of women, including the sale of women into prostitution are rarely implemented, with a low rate of convictions among traffickers. On the one hand, many countries do not treat the “sex worker” as an offender. But the definition of soliciting as an offence results in many “sex workers” being charged with an offence under the law. In the context of HIV/AIDS, the problem is more complex. While health departments of various governments identify sex workers as major stakeholders in their policies, the police harasses and subjects sex workers to violence.

The introduction of *Qisas* in Pakistan and its recognition in the Islamic Republic of Iran and Afghanistan has privatized certain categories of criminal law that has had severe implications for women. Men who kill their wives are assured from the outset that such murder will not be punished in the same manner as the murder of other people, but merely with a sentence of few years’ imprisonment.¹⁸⁷ The custom of *Karo Kari* (women and men involved in illicit relationships) results in honor crimes, where mere allegations and public perceptions of persons having affairs are sufficient to prove their guilt. The custom is sometimes used to legitimize murder and some

¹⁸³ The report of the commission of enquiry of women 1997 observed that 40 to 45 per cent of women in jail have been accused of *Zina*. Page 70.

¹⁸⁴ Shadow report of Bangladesh submitted to the third periodic report, page 12.

¹⁸⁵ *Upendra Baxi vs State of U.P.* 1983 (2) SCC page 308.

¹⁸⁶ Bhutan summary reports to the cedaw committee

¹⁸⁷ Violence against women in the name of honour Amnesty International, September 1999.

studies indicate that after killing their enemies, men kill a woman of their own family to pass it off as an honor killing.¹⁸⁸

The *Hudood* ordinance confers adulthood to men once they become 18, and to women once they turn 16 years or otherwise attain puberty. This age differential on the basis of gender is extremely problematic.

Problems arising from sexual stereotypes also persist in the region. Sexual violence is still an area that is difficult to address since in most of the cultures in the study matters relating to sex are not discussed openly. However, common law expects women to narrate their experiences in a factual manner. The system also expects her to describe her experience to various persons. Investigations are not carried out by women police. Courts view evidence from a hyper technical approach and acquit offenders on the slightest doubt. While the right of the accused is not challenged here, what is of concern is that the recording and collection of evidence is not taken in a scientific manner either deliberately or negligently causing miscarriage of justice.

One of the difficulties in handling cases of violence is in the evidentiary requirement. The procedural rules in many countries often require that a victim of violence receive a requisition from the police before being treated in a hospital. Valuable evidence is often lost since private hospitals often refuse to treat victims of crimes arguing that it is a medico-legal case. Bangladesh has changed its rules whereby such victims first see a doctor, who then sends a report to the police. Apart from providing timely help to the person, such a practice also helps to prevent the destruction of valuable evidence.

Despite medical research proving the contrary, courts in India still rely upon the intact nature of the hymen in rape cases. Doctors often perform what is called a “two finger test” to determine whether the rape victim was subject to sexual intercourse. It is a technique that verifies whether the hymen is broken or not, and whether it is distensible or not. A large part of the cross examination of defense lawyers then rests on the argument about the women’s body to put forth a case that she was not a virgin and was by implication habituated to sexual relationships. Rather than addressing the violence, such an approach encourages stereotypes of women. Apart from being highly interventionist and disturbing, this test is also misleading and not borne by scientific evidence.

8. De Facto Gender Equity in the Political Sphere

The representation of women in elected bodies assumes significance since their experience can make a great difference in the enforcement of policies that are based on equality laws. Women’s representation at the national and local levels remains low. Legislation to address this has had mixed success as indicated earlier. Temporary special measures such as quotas are essential besides providing a critical mass for addressing equity at the political sphere, but it can only be the beginning. Despite constitutional provisions for a reservation for *Dalits* and other marginalized sections in India, women face tremendous hurdles in their participation. . They are either sexually assaulted if they persist or are boycotted by other communities who

¹⁸⁸ Yasmeen Hassan, *Heaven becomes Hell; A study of domestic violence in Pakistan* 1995 page 28.

abstain from meetings, forcing a lack of quorum for the proceedings that results in decisions not being taken.¹⁸⁹

A solution would be to offer sufficient opportunities and facilitate the process so that women can participate actively in politics. Currently, the prohibitive expenses, violence and corruption in electoral practices are not conducive for women's participation. \

Representation of women in the judiciary is low in the region. \There are many instances of positive state interventions in the region.

Under the Gram Sarkar Act of 2003, women parliamentarians are designated as advisors of each *Gram Sarkar*, an associated body of the local Union Parishad or local self governments. Such interactions between women parliamentarians and local self bodies would give a gender vision to ground-level policy, encourage leadership potentials of grassroots women leaders and serve as role models for other women. In the civil service, ten per cent of the entry-level places are reserved for women. Women can also be directly appointed at the decision-making level under a presidential quota.

Bhutan had its first national assembly election in March 2008. Prior to the elections, women occupied 26 per cent of civil service posts. While participation in elections for public office at the village and national levels was low, 12 of the 100 people's representatives recently elected to the National Assembly and one of the six Royal Advisory Councilors were women. Although Bhutan had achieved excellent development and growth in a number of areas, including literacy, health and education, men benefited more from the development process than women.¹⁹⁰ Currently, three women have been elected to the government.

The Islamic Republic of Iran has a clear institutionalized structure to address corruption in the judiciary.

9. De Facto Gender Equity in the Economic Sphere

The region has achieved many positive developments in the area of employment, but with greater privatization the role of non-state actors has to be critically examined and existing mechanisms need to be strengthened. Sexual harassment in the workplace is an area of concern where the absence of legal interventions has impeded the advancement of women in the social and economic spheres of life. Despite a strong labor movement in the organized sector, in most countries in the region there is still a lack of understanding about the magnitude of the problem. While there is no separate law to address it in the workplace, general criminal law provides a mechanism by treating it as an offence. While this could only be a reactive solution to the problem, effective enforcement mechanisms in the workplace are required to address the concern. The judgment of the Indian Supreme Court in Visaka's case is a step in that direction.

¹⁸⁹ Alternate report of NGOs to the CEDAW committee, 2006.

¹⁹⁰ Summary records of CEDAW, combined initial, second, third, fourth, fifth and sixth periodic report of Bhutan January 2004.

The conditions of women in the unorganized sector indicate that there is hardly any law in the region that addresses even their basic legal rights of employment such as hours of work, leave and other rights. While all countries in the region have laws relating to minimum wages, these do not apply to individual employees such as domestic workers. Exploitation in this area in the absence of substantive law and procedural mechanisms is a matter of concern.

Access to justice implies that a woman who wants to access the system must not only have good lawyers, but also access to various services. A woman who has suffered violence would first require shelter and medical attention should she decide to leave her violent spouse. A search for employment would be the next priority. Only then would she be able to contemplate legal recourse. On the other hand, a man who wants to leave a spouse would not require any such measures. Thus, access to justice in the context of gender is wide and far reaching. Legal services should include not only the services of lawyers but also other support structures such as shelters, medical facilities, education for children, and employment opportunities.

Pro bono legal service is a right recognized in all the countries studied. But these are not linked to services that would address women's needs. Legal services must have a link with social and economic services so that a woman has access to justice. The mobile courts of Afghanistan are another example of an innovative method of expanding the judicial process for greater access.

It enables the court to go to the people, rather than the people having to go to court. In efforts to provide speedier justice, ADRs supported by the judiciary are seriously considered as an alternative to the existing formal legal systems in Bangladesh and India. They are not bound by the formal rules of evidence and if applied properly, would facilitate access to justice. For example, in a case on validity of marriage before an ADR, the mediator would not look immediately at the legality of marriage but try to address the issues beneath the surface. Cases relating to inheritance laws where there a party faces discrimination, could be better addressed in an ADR. A formal court, on the other hand, would have to address the case based on the evidence provided. However, members in ADRs should be experts in law and be sensitized to gender and equity as otherwise it could be counter-productive. There is a tendency in India to consider ADRs as an alternate mode of disposal rather than one where the rights of the parties can be addressed without much formality. In order for ADRs to be effective, they must be considered as evocating an imaginative way of resolving the dispute and not as one that disposes litigation merely because the formal system is overburdened. Otherwise, the system would focus only on increasing the disposal rate and providing statistics, rather than serving as an effective tool of justice.

Family courts have been established in some countries to address disputes in civil laws relating to the family. The Family Courts Act of India, however, does not permit parties to have legal representation as a matter of right, but lawyers can appear only on discretion of the court. This makes the issue extremely burdensome for the litigant since substantial laws on marriage, divorce, custody, etc are extremely complex and the denial of a lawyer affects the woman adversely since she is generally less educated than the man.

The establishment of women's commissions and human rights commissions in Pakistan, Nepal, Bangladesh and India has highlighted the concerns of women's human rights.

10. De Facto Gender Equity in the Social Sphere

Declining Sex Ratio and Feticide

While various factors determine sex ratio, clear correlations exist between the proliferation of sex determination tests, increase in sex selective abortions, and declining sex ratios in urban areas. Within the region, India has introduced legislation that addresses this problem. But the law imposes mild punishment for the first offence and increase it gradually, the penalty structure itself defeat the purpose. The conspiracy of silence and non-reporting, especially by the medical fraternity, even when definite information of the commission of this offence is available is yet another dimension of the problem. In its concluding observations on India, the CEDAW committee noted with concern that the maternal mortality rates and infant mortality rates in India are among the highest in the world.¹⁹¹ It also observed that the adverse sex ratio and the incidence of sex-selection abortions, despite being banned by law.¹⁹² Since then a number of policies have been formulated and legislations such as the Medical Termination of Pregnancy Act have been reviewed. The problem persists due to a cultural factor that stresses the importance of a boy child and devalues a girl child. It is an area where, apart from legislative interventions, proactive measures and major interventions such as campaigns are required.

In the context of child marriages, despite legislations, the practice continues since it is believed that a child bride would adapt well to inter-or intra-familial responsibilities imposed on her. The repercussions of child marriage results in poor health and educational status of women, lack of socio, political and economic opportunities, and alternatives and resources.¹⁹³

There are hardly any convictions under these laws. If one were to take legal remedy against child marriages, in Pakistan a girl child can legally repudiate her marriage before she turns 18. Similar provision exists in India under the Hindu Marriage Act. The reality however, is that despite a provision that addresses child marriages, it would be impossible for a girl married as a child to take legal recourse and seek nullification of her marriage just before she turns eighteen while being under the control of her family. Not surprisingly, there are hardly any case laws under this legal provision in the region.

Marriage and Family Life

The interplay of family law and violence has a serious impact on marriages of persons of different religions. One example is with reference to marriages of choice between adults under civil law in India. The Special Marriage Act in India is a civil law permitting such marriages and requires parties to put a notice in the office of the marriage registrar for one to three months. Radical religious organizations track notices of such marriages and then harass the families. Thus, even despite the *de jure*

¹⁹¹ The MMR is 540 deaths per 100,000 births.

¹⁹² Concluding observations of the CEDAW committee India 1/2/2000 A/55/38 para 78.

¹⁹³ alternate second and third NGO report on CEDAW.

position permitting such marriages, at a *de facto* level, adults are not able to exercise their rights. Violence both before and after inter-caste and inter-religious marriages is often the norm, with the purported threat of the breakdown of law and order being used by the police and the executive to retrieve the woman.¹⁹⁴

From a *de facto* position, in terms of access to justice, the Family Courts Act in India provides for special courts to try disputes relating to personal laws. These courts have brought an entire gamut of cases under one umbrella, however only in cities. In other places, cases are tried in regular civil courts. While family courts have made the process easier, they give greater importance to preserving the family than upholding gender justice and addressing economic issues when a marriage ends. Delayed trials are also a problem. Courts deal with a wide variety of cases that include issues of caste, class, religion and ethnicity. Judges are not aware of how each aspect of identity combines to create particular forms of disadvantages and impact women's rights.¹⁹⁵ The evidentiary requirements of fault based divorce often results in hardships to parties in the context of collecting evidence. The practice of *triple talaq* is a very problematic area since the husband can divorce his wife at will, leaving no scope for her to seek any remedy. Since she is not entitled to maintenance beyond the period of *Iddat*, this often results in her impoverishment. Further, though *dower* is a beneficial right to the woman, in practice, the sums that are fixed are small. The decisions of courts that direct the husband to pay a reasonable and fair maintenance by which lump sums are ordered actually benefits only women who are married to husbands who can raise and pay a large sum. The legislative impetus in Bangladesh and Pakistan under the family law ordinance, the Civil Code of the Islamic Republic of Iran, and the family laws of Maldives all create a structure to address matrimonial disputes. These legislative changes are worth considering in other countries of the region.

In the context of Islamic law, the practice of *ijtihad* involves interpreting sharia law and Islamic doctrine according to the needs of the people, should be revived. One of the key factors contributing to the stagnant laws has been the lack of *Ijtihad* and its replacement with *Taqleed*. To quote Iran's Supreme Leader Ayatollah Ali Khamenei, "some issues about women, which exist in religious jurisprudence, are not the final say. It is possible to interpret new points through research by a skillful jurist".¹⁹⁶ In the present context, it is more practical to work from such a framework in law.

In the region there is significant abuse and misinterpretation of religion and the role of women, running counter to tolerant *sharia* laws. The judgment of the Bangladesh High Court that declared *Fatwas* as violating fundamental rights and that of the Lahore High Court that held freedom of choice in marriage was a fundamental right, are positive examples of judiciary responses in addressing gender equity.

¹⁹⁴ Uma Chakravarti, from fathers to husbands; of love, death and marriage in North India, Honor Crimes, paradigms and violence against women edited by Lynn Welchman and Sara Hossain, Zed Books, London 2005.

¹⁹⁵ National Conference on women and access to justice A report organized in December 2006 by Partners for law in development

¹⁹⁶ quoted from the web site, Naseer Karimi, "Iran Leader signals flexibility on woman" A.P. July, 5, 2007 in Iranian law and women's rights, Mehrangiz Kar, Muslim World Journal of human rights Vol4, 2007 page 11.

11. Key Issues Emerging from the Study

One of the key issues emerging from the study is that there is no clear understanding on discrimination.

While the constitutions stress equality and the principle of non-discrimination, in the absence of legislation, it is often left to the subjective interpretation of courts. Further, non-state actors do not have any liability in this regard.

Another key issue emerging from the study is that criminal law that impact the lives of women is often a measure of oppression and harassment resulting in the deprivation of her rights. Even stringent legislation, such as rape law that are substantive in nature, fail to address gender discrimination due to procedural laws. Thus the substance, culture and procedure of laws can be a major obstacle to gender justice.

The study indicates that in the area of family law, complete reform of secular legislation cannot be easily achieved. On the other hand, critical areas can be identified for proposed reforms that will integrate human rights norms and harmonize domestic laws with international standards that governments are bound to integrate into the legal system. The CEDAW committee has approved the practice of women's groups studying their religious and customary traditions to engage in a reform process that harmonizes the law with constitutional and international human rights norms.¹⁹⁷

Customary practices and the findings by alternate resolutions of disputes through communities are discriminatory.

The study indicates that there is no legislation to address discriminatory or lack of rights of persons with HIV/AIDS.

Same sex behaviour is criminalized in all the countries.

The study finds that in all the countries, certain endemic problems in the context of the legal system remain.

The lack of law enforcement is a major hindrance to equity justice in the region.

The non-registration of cases by law enforcers due to a lack of gender awareness and corruption is extremely problematic.

Necessities of evidentiary requirements and proof of age and marriage are common in the region.

Currently there is no law to address sexual harassment, despite it being a matter of serious concern.

¹⁹⁷ CEDAW concluding comments on Maldives (2001), Egypt (2001) Tunisia (2002) and Sri Lanka (2002)

The laws of nationality continue to discriminate against women in some countries of the region, but discussions on change have also emerged.

Registration of marriages is not yet part of the law except in Bangladesh and Pakistan.

Child marriages are permitted under the law.

There is currently no comparative review of existing legislation and judicial precedents.

The study indicates that cross border trafficking and repatriation are often detrimental to the interests of justice. It also indicates that the problem is acute, despite regional conventions and efforts by the states.

Efforts to address domestic violence through legislation has fructified as laws in India and Sri Lanka, while Bangladesh, Pakistan and Nepal are in the process of evolving their own legislation.

Current laws are inadequate in addressing reproductive techniques used to determine the sex of the child and then abort it if it is a female.

The development of public interest litigation has led to many positive judgments in the region.

Structures to address corruption are not in place in many countries of the region, such as Iran.

The importance of sufficient training for members of the judiciary, lawyers, and the police can never be over-emphasized. Training must focus on measures to introduce legislative reforms aimed at eliminating discrimination.

Police protocols need to evolve with reference to rights of persons especially in the context of gender.

There is a need to develop a witness protection scheme.

12. Conclusion

The findings narrated in this paper broadly indicate the concerns emerging in the region. While legislative changes are essential, the paper also highlights that despite such intervention at the *de jure* level, there are many hurdles in its implementation. The dynamics of the interplay of civil, criminal and constitutional law with custom is extremely complex and gender equity has to be nuanced in addressing these areas. A combination of various agencies can facilitate addressing this situation by generating awareness in sustained campaigns, highlighting positive developments in the area, and sharing information on best practices in the region that have a cultural context for the various countries.

The paper has its limitations. There are many areas that were not covered or adequately covered in the study. The study has chosen a sample of concerns in the region and looked at them through the prism of international human rights and

constitutional rights. This is to provide an indicator that can serve as an impetus for more research in the region.

Way forward

- In Bangladesh, a rape victim must first go to the doctor, whereas women in most of the other countries in the study have to go to the police first. This is a positive factor in addressing sexual violence.
- The initiatives of NGOs in Pakistan and other countries in establishing shelter homes in urban centers for victims of rape, incest and other forms of violence¹⁹⁸ need to be replicated in rural areas with sufficient state funding.
- Coordination between health officials and the police must be established to address the concerns of sex workers and victims/survivors of trafficking.
- Archaic tests like the “two finger tests” in rape cases should be abolished. Lawyers, judges, and the police must be trained on medical evidence in cases of sexual violence since it is a highly gendered crime.
- Temporary special measures such as quotas and reservations are essential, not only limited to legislature and local bodies but also in the judiciary and executive as they provide a critical mass for addressing equity at the political sphere. Sufficient opportunities must be provided to facilitate the process of women’s participation in the electoral process. Currently, prohibitive expenses, violence and corruption are not conducive for women’s participation. Such concerns have to be seriously addressed.
- In Bangladesh, under the Gram Sarkar Act of 2003, women parliamentarians are designated as advisors of each *Gram Sarkar*, an associated body of the local union *Parishad*, or local self governments. Such interaction between women parliamentarians and local self bodies would give a gendered vision to ground-level policy, encourage leadership potential of grassroots women leaders, and provide role models for other women.
- The Islamic Republic of Iran has a clear institutionalized structure to address corruption in the judiciary.
- In cases of sexual harassment in the workplace, mechanisms that address the concern are required. Such mechanisms include setting up committees, transferring or suspending employment of the perpetrator, and other civil measures such as compensation.
- With regards to the role of private actors in cases of employment, existing redress mechanisms need to be strengthened.
- Access to justice in the context of gender is wide and far reaching. Legal services should include not only the services of lawyers but also other support structures such as shelters, medical facilities, education for children, and employment opportunities. Legal services must have a link to social and economic services so that a woman can gain access to justice.
- The mobile courts of Afghanistan are an example of an innovative method of expanding the judicial process to areas where people formerly did not have access to justice.
- ADRs are not bound by the formal rules of evidence, and if applied properly would facilitate access to justice. Such dispute resolutions must be institutionalized structures with clear cut accountability.

¹⁹⁸ <http://www.unfpa.org/swp/1999/chapter4b.htm>

- In cases of maintenance, attachment proceedings take a very long time where the onus is on the woman to prove the worth of the person. An alternative would be for the state to evolve a policy to provide sums for a woman seeking recourse to maintenance and recovering the sum from the errant spouse.
- The legislative impetus in Bangladesh and Pakistan under the family law ordinance, the Civil Code of the Islamic Republic of Iran and the family laws of Maldives all create a structure to address matrimonial disputes. The sensitivity of minority rights, notwithstanding these legislative changes, is worth considering in other countries of the region.
- In Pakistan and Bangladesh, the law requires registrations of marriages. The region also needs to develop a system of such nature.
- In the context of Islamic law, the practice of *ijtihad*, involving the interpretation of *sharia* law and Islamic doctrine, needs to be revived.
- NGOs can take note of best practices in the region and start the impetus for law reforms through sustained campaigns.
- Training programs for judges on comparative law and judicial practices in the region would facilitate gender sensitization.
- Networking of lawyers in the region, to share legal information and litigation, especially in areas of trafficking, is crucial.
- The media can initiate sustained campaigns on positive practices, judgments and legislation in the region and also disseminate such information.

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