



DEVELOPING
ANTI-VIOLENCE
AGAINST
WOMEN LAWS

Discussion
Paper Part 1

Background
Information

Gender Equality Network
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1. Background

In early 2011, the Department of Social Welfare indicated that it wanted to commence the process of drafting new laws to prevent violence against women (VAW) in Myanmar. Current laws, including descriptions in the Penal Code (1861), indicate that offences involving sexual and gender-based violence do not adequately address women's experiences of violence, or reflect the contemporary values of Myanmar society. Additionally, legislative reform is needed to bring the body of Myanmar's laws into greater compliance with CEDAW¹. In line with international commitments made under CEDAW, the initiative to develop laws on VAW in Myanmar is part of a broader initiative to effect law reform in other areas related to and impacting on gender equality, including laws on property, employment, social security, health, family, and trafficking.

The creation of new Violence Against Women laws could effectively fill the gaps in existing legislation, particularly with respect to sexual violence, and clarify issues of conflict between laws by superseding inadequate, inappropriate or discriminatory measures. It could provide specific provisions addressing domestic violence and victim support, where no legislation currently exists. A new law could also strengthen existing provisions in the Constitution and provide a definition of discrimination that harmonizes with CEDAW. Drafting new VAW laws could present an opportunity to mandate training for law enforcement officers and the judiciary in gender and women's human rights issues, and specific measures could be included to contribute to the development of mechanisms for monitoring enforcement of the laws.

Under international law, gender based violence – violence which is *'disproportionately directed against women because she is a woman or affects women disproportionately — is recognized as a violation of women's human rights and fundamental freedoms, and as constituting an*

impediment to the realization of equality, development and peace' (CEDAW Committee General Recommendation 19).

The Declaration on the Elimination of Violence Against Women (DEVAW), acknowledges violence against women as both a cause and consequence of women's inequality in relation to men. Addressing VAW, therefore, entails tackling root causes of the problem from the home to the international arena. Countries are obligated to eliminate all forms of discrimination against women, as well as act with 'due diligence' to prevent the violation of rights. Under the due diligence standard, countries have a duty to take positive action to prevent and protect women from violence, punish perpetrators of violent acts, and compensate victims of violence.

Any process of amendment should be undertaken with the direct input of women and women's organizations, other stakeholder groups in the community, as well as legal experts and government officials, and should recognize that culture is not static but capable of adapting to new understandings of women's status and rights.

2. Understanding VAW and Domestic Violence

When drafting legislation on violence against women it is important to understand the difference between the broader category of violence against women, and its more specific manifestation as domestic violence.

The Declaration on the Elimination of Violence Against Women defines violence against women (VAW) to mean "any act of gender-based violence that results in, or is likely to result in, physical, sexual, psychological harm or suffering to women, including threats of such acts, coercion, arbitrary deprivation or liberty, whether occurring in public or private life."

Domestic violence is considered to be one of the most insidious forms of VAW in all societies.

¹ In 1997 Myanmar acceded to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

According to CEDAW General Recommendation No. 19:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

Studies have shown that not only acts of violence, but also threats and fear of violence, places permanent constraints on women's mobility and their access to resources and basic activities. Violence against women is associated with high costs, including social, health and economic costs, to individuals and to the society as a whole. Where violence is ongoing, a woman will live in constant fear of further abuse and will adapt her lifestyle to minimize it. Thus, rather than a succession of isolated events, domestic violence is often a long-term, chronic condition which has a substantial cumulative effect on women's overall wellbeing. Violence when perpetrated within intimate relationships, also poses substantial obstacles to seeking help. Studies conducted globally, including in Vietnam, Australia and Zimbabwe, have shown that victims may not seek help for 10 years or more after the abuse has started.

The root cause of domestic violence is unequal gender relationships within the home, which is often exacerbated by economic, social and cultural factors. Lack of options, financial dependencies, low education levels and awareness of legal rights and remedies, fears of stigmatization, inadequacy of state sponsored support services place significant hurdles for women seeking legal redress and support. It is therefore, essential to capture and respond to a woman's experience of domestic violence in its

local manifestations. For instance, the Vietnamese law includes forced marriages and forced child marriages within its definition of domestic violence; and denial of maintenance is included as a form of economic abuse under the Indian law on domestic violence.

3. Relationship with Other Laws

In addition to providing a just way to resolve disputes, laws serve two important functions:

- a. They set out our aspirations as a society, explaining the principles and ideals that we agree should govern social interactions
- b. They mandate actions, by spelling out what different parties must or must not do. This may include requiring a government to supply or establish certain programs, benefits or services; or prohibiting individuals from engaging in criminal acts.

It is important to remember these functions when deciding which elements to include in a law. Typically, common law legislation is very formal and aims to eliminate internal repetition. It is based on the same drafting principles that are used in writing contracts. However, it is not always easy for a lay person to read and understand. Increasingly, in the developing world and in countries noted for progressive social legislation, the aim is to draft laws that are easy to read and interpret, but still internally consistent.

New VAW laws must include provisions that clarify their relationship with other existing laws. This assumes added significance in the context of an evolving legal system as in Myanmar. A good approach is to allow women to access as many reliefs as available under other laws, while at the same time guarding against creating a multiplicity of forums.

To illustrate, in India domestic violence is addressed under criminal law provisions and under a civil law (recognizing protection orders etc.). Women can also claim (limited) relief, such as maintenance under family laws and the Criminal Procedure Code (same provision as Section 488 of the Myanmar Criminal Procedure Code). Hence the Indian Domestic Violence Act, addresses this issue by including two provisions:

- a. First, to allow applications for protection orders to be filed in pending proceedings (such as divorce proceedings) - this reduces the multiplicity of forums and, as protection orders are emergency in nature, facilitates access to immediate reliefs
- b. Second, it also provides that the law, which is primarily oriented at granting civil orders, acts in addition to and not in derogation of any other law. This provision is useful, as reforming family laws is a sensitive topic in India. It also allows women to claim reliefs under other forums (for instance, to proceed simultaneously under criminal and civil law while seeking redress for an act of violence). This provision is reflected in the Malaysian law on domestic violence, which provides that the law shall be read together with the provisions of the Penal Code (NB- it is the same code as the one applied in Myanmar)

The option of using the Penal Code cannot be discounted. Also, procedural laws (Code of Civil Procedure Code of Criminal Procedure, Evidence Act) may be required in processing claims under this law.

The relationship of this law with other laws can be clarified in two ways. First - the inclusion of an overall provision at the beginning of the law, which includes the following components:

- a. This law will apply in addition to other laws, except in cases of conflict, in which case provisions of this law shall prevail over provisions in all other laws
- b. An aggrieved person may file an application for protection orders and other orders available under this law in any legal proceeding before a court involving the aggrieved person and the abuser.

The second option is, not to mention conflict of laws in an overall section as above, but draft

specific non-obstante clauses under those provisions of this law that may be in conflict with Penal Code or other laws. A non-obstante clause is a legislative tool, which is used to give overriding effect to certain provisions of a law over contrary provisions in other laws. For instance, this law may contain a more expansive definition of rape than that contained in Section 375 of the Penal Code. Therefore, to avoid any conflict in interpreting both these laws, the rape provision in this law should include a non-obstante clause, which may read as: "Notwithstanding provisions in the Penal Code, 'rape' will include acts of....."

4. Definitions

It is important to note that provisions on definitions are crucial in demarcating the extent and coverage of the law, so that there is no argument in interpreting them. Definitions should be compiled after drafting the main clauses of the law.

Hence some issues that need to be defined as accurately as possible are:

- a. Rights holders- including aggrieved persons, complainants, applicants, children etc.
- b. Duty bearers – including perpetrators/abusers, respondents, employers, those involved in trafficking
- c. The relationship between rights holders and duty bearers- e.g. domestic relationships, employment relationships, fiduciary relationships, etc.
- d. Implementing agencies and other mechanisms
- e. Orders e.g. *Protection order* means a legally recognized document issued by a competent authority of the state to prevent violence against women and their children by restraining another person from taking proscribed actions.

5. Legislative Approaches to VAW

In developing laws to address violence against women, one of the most significant decisions is how broad the scope of the law/s should be. Some ASEAN countries have laws just on domestic violence. Some have gender equality laws that address violence against women and discrimination in a variety of situations. There are pros and cons to each approach.

Since the 1990s, countries across the world have adopted different approaches to legislating on VAW — most have either reformed existing laws incrementally, or at one time; or enacted special legislation on VAW. A few countries have also

adopted constitutional provisions on VAW - Nepal and Thailand being examples in this regard. Legal reforms have varied significantly in terms of the forms of violence covered, the types of actions mandated and the area under law reform.

Special legislation in most countries mostly covers one or two forms of VAW. There are, however, a few states that have adopted laws that address multiple forms of violence.

Examples of different approaches that can be taken to developing anti-violence against women laws include, but are not limited, to the following:

Approach A	Approach B	Approach C
<p>Individual, specific laws:</p> <ul style="list-style-type: none"> – Domestic Violence Law – Sexual Assault Law – Sexual Harassment Law 	<p>One law that includes multiple forms of violence:</p> <ul style="list-style-type: none"> – Domestic violence – Marital rape – Sexual violence – Sexual harassment – Psychological violence 	<p>One broad Gender Equality Law that includes areas such as:</p> <ul style="list-style-type: none"> – Equality and Non-Discrimination – Domestic Violence – Sexual Assault – Stereotyping of Women in the Media – Exploitation of Prostitution of Women – Participation in Political and Public Life – Nationality, Citizenship & Domicile – Education – Employment – Health – Social and Economic Benefits – Rural Women – Civil Equality – Marriage and Family Relations

Laws to address violence against women act in two ways:

- a. Criminalize acts of violence against women by stipulating penalties
- b. Provide civil remedies such as protection orders, restraining orders, etc (civil orders).

Criminal provisions, which result in arrest and convictions, act as a deterrent; while civil remedies serve to provide an array of immediate reliefs to protect women from

further acts of violence. The violation of civil orders is treated as a criminal offence.

The UN Handbook for Legislation on Violence Against Women recommends that a comprehensive and multi-disciplinary legislative approach must be adopted in dealing with VAW — this includes criminal sanctions, civil remedies, as well as provisions on prevention, training, etc. This means that no matter how many forms of VAW a law addresses, such a law should be comprehensive in laying methods to achieve

prevention of the forms of VAW covered and protection to victims.

5.1 Laws Addressing Domestic Violence

An approach that has been adopted in countries sharing a common legal history with Myanmar is to use Penal Code provisions or other criminal law provisions to penalize acts of domestic violence, in addition to a special civil law to provide protection orders and access to support services. Civil laws to address domestic violence were adopted in Malaysia in 1994, followed by India in 2005, Bangladesh in 2010 and most recently in Pakistan in 2012. These laws are not strictly only civil, as breaches of protection orders are deemed to be offences and penalties are prescribed therein.

For instance, the Malaysian civil law — the Domestic Violence Act, 1994, does not classify domestic violence as a crime or provide new penalties. However, it is attached to the Penal Code under definitions and procedures for hurt, criminal force and assault. On the other hand, the Indian Penal Code (IPC) was amended in the 1980s to recognize cruelty within marriages as an offence, thus recognizing domestic violence as a specific offence in the IPC, even if the offence is limited to spousal violence.

Very few exercises have been undertaken so far to monitor the grassroots implementation and impact of these legislative approaches. In the absence of such evaluations it is difficult to assess the efficacy of such legislation.

Advantages:

- a. It will probably be easier to pass, because it is less likely to be controversial
- b. It will be shorter, less complicated and require less negotiation; most domestic violence only laws contain three main elements: 1) prohibition of various forms of domestic violence, and 2) protection orders and 3) provisions to prevent violence

- c. It can be drafted with more precision to ensure local applicability and build on existing laws and systems
- d. It would allow stakeholders to take time to consider how to address other aspects of gender discrimination as the law in Myanmar evolves in general

Disadvantages:

- a. It may not allow the possibility to tie domestic violence to other forms of sexual and gender-based violence and to implement comprehensive anti-violence and anti-discrimination measures
- b. Separate implementing mechanisms and authorities under each law may place substantial implementation burdens, unless such mechanisms and service delivery under the separate laws are linked.

5.2 Laws Addressing Multiple Forms of Violence/Comprehensive Gender Equality Law

While special legislation in most countries mostly covers one or two forms of VAW, some States have adopted laws that address multiple forms of violence; these include Austria, Bangladesh, Rwanda and San Marino.

The Bangladeshi law (Anti-Women and Children Oppression Act, 2000) is purely criminal in nature and covers sexual violence, rape, sexual harassment, trafficking, dowry related violence and acid throwing. Bangladesh has also recently enacted the Domestic Violence Act, 2010 for civil orders in cases of domestic violence. The laws in Austria, San Marino and Rwanda include criminal provisions and civil orders, as well as provisions on prevention, coordination, training and enforcement. Enacted in 2008, the Rwandan law includes *inter alia* domestic violence, marital rape, sexual harassment, sexual violence, and trafficking as well as specific local forms of violence such as polygamy, adultery, concubinage, sexual slavery and sexual torture.

San Marino's Law No.97 of 2008 on the prevention and elimination of violence against women and gender violence is comprehensive in terms of its scope. It is divided into four chapters. The first outlines principles underlying awareness and prevention measures in order to prevent the dissemination of messages that are detrimental to the identity and dignity of women and impede their access to social services. The second chapter provides for the reform of criminal law to ensure enhanced protection to victims of domestic violence and introduces new crimes into criminal law such as slavery, group violence, abduction and human trafficking. The third chapter is on judicial measures for protection and safety of victims. These include provisions on procedural safety, confidentiality, privacy, legal assistance, etc, protection measures during criminal trials, civil protection measures, preventive measures by law enforcement agencies, etc. The final chapter is on mandatory reporting of violence against women, if such cases come to the attention of law enforcement agencies, public or private health care professionals, teaching staff, etc. The failure to report attracts penalties that are provided for in the law.

The most comprehensive approach has been that of the Spanish law on gender based violence. Although this law primarily addresses violence within the home, it contains a broad definition of violence that includes psychological forms of violence, sexual aggression, threat, compulsion, coercion and deprivation of free will. Other than criminal and civil provisions, this law also contains detailed provisions on preventive and educational measures as well as provisions for the protection and assistance of victims. The Spanish law provides a good example of a comprehensive law on violence against women as it covers all aspects of prevention and protection.

Another good example in this regard is the Philippines Anti-Violence Against Women and their Children Act, which covers violence in intimate relationships. This law includes a

general definition of violence as well as a definition of a 'crime of violence' and provides for a range of penalties. It also provides for civil remedies, including detailed provisions on different forms of protection orders including restraining orders, ouster orders, orders for custody of children, financial support, compensation, etc; and temporary protection orders. The breach of such orders are treated as offences and accordingly penalized. The law then provides detailed duties for police, prosecution, administrative officials (Punong Barangay), health care workers, etc. It sets out procedures for obtaining orders and jurisdiction, mechanisms for inter-agency coordination, provisions for services for victims and trainings.

The Philippines has also enacted separate laws on rape, sexual harassment and trafficking. In so far as the issue of rape is concerned, the Anti-Rape Law of 1997 redefines and expands the definition of rape from being a crime against chastity to a crime against person. However, there are some major limitations in the definitions and sentencing provisions adopted. Subsequently, it adopted the Rape Victim Assistance and Protection Act, 1998 to establish rape crisis centers to provide a range of services to rape victims. The Anti-Sexual Harassment Act, 1995 penalizes sexual harassment at the workplace and educational institutions. It also sets out duties of employers and heads of offices/institutions to prevent sexual violence (including providing trainings, laying out procedures, etc.) and liabilities for breach of duty.

Globally, however, countries address sexual harassment by including provisions in broader equality laws, labor/service laws, and criminalize such conduct under penal codes. Furthermore, most countries address trafficking through provisions in penal codes and by enacting special laws on trafficking. Issues of trafficking and sexual harassment are usually covered in separate laws from those used to address domestic violence and sexual violence because each form of violence requires different forums and remedies. For

instance, crimes of sexual violence are dealt with through the criminal justice system; sexual harassment claims may be mediated in labor tribunals, while trafficking raises broader issues of migration that are covered under immigration laws. It is therefore, not advisable to club trafficking and sexual harassment into the same law as that dealing with sexual and domestic violence.

If it is decided to include provisions on workplace harassment and gender discrimination in the law (which may be unwieldy), the Law could be divided into three overall sections, the first dealing with violence (and therefore crimes, to which the definitions under Sexual and Gender-based Violence apply); the second dealing with human rights abuses for which the remedies are compensation and mediation-related processes; and the third dealing with administration and government responsibilities. Remedies appropriate in cases of sexual harassment and gender based discrimination are different from those appropriate to cases of gender and sexual based violence. Combining these issues into a single law poses a major drafting challenge and is therefore, not advisable.

Advantages:

- a. A comprehensive, holistic approach is more in keeping with CEDAW and recommendations of various CEDAW-based commentaries on good legislative practices, and recognizes the various forms of violence against women as interrelated human rights abuses
- b. It will allow for streamlining the delivery of support services to women victims of violence
- c. The provisions in the Constitution on equality and gender discrimination do not currently meet the standard of substantive equality as set out in CEDAW; a comprehensive law would provide an opportunity to include provisions that do. The standard equality set out in the CEDAW requires States to not only prohibit discriminatory acts but also create

equality by taking proactive steps to take steps to respect, protect, promote and fulfil women's equality rights

- d. There are many aspects of the Penal Code that require updating from a gender perspective, and making a number of reforms in one law means that these could be more easily harmonized
- e. It makes sense to include protections for women in the criminal justice system, including protection orders and procedural measures into one law, as they may apply in a variety of situations

Disadvantages:

- a. The drafting of this law is much more complicated
- b. Other than posing a major drafting challenge, a comprehensive law must accurately set out the remedies applicable to each form of violence. In some cases, there may be conflict in the scope of remedies offered. For instance, some cases of sexual harassment may be dealt with mediation. However, it is internationally recommended that mediation should not be used in cases of VAW and that the law should expressly prohibit mediation in VAW cases. [UN Handbook for Legislation on Violence Against Women, Para 3.9.1)
- c. Involving an array of enforcement agencies to address the concerns of different victims (e.g. victims of sexual harassment, trafficking, domestic violence, etc.) may make the law too bulky for effective implementation. For instance, the Lao Law on Development and Protection of Women, 2004, includes guarantees of equality in all CEDAW recognized sectors, as well as provisions to combat trafficking and domestic violence. However, almost no claims for the violation of equal rights have reached courts. One of the reasons is that the law is bulky and not easily translatable to suit the local context. Hence, despite awareness of the special law, members of the criminal justice system are more

inclined to use existing penal laws with which they are more familiar.

If there is an intent to draft broader equality legislation at a later date, it will be important to consider the aims of this particular law and focus it on what it needs to address.

6. Consultation Processes

There are many ways to undertake consultation in the drafting of a law. Stakeholders will need to find processes that work for the situation in Myanmar. The law reform process should be used as an opportunity for building the capacity of stakeholders. This, in turn, will aid in creating a core constituency of stake holders who can be called upon not only to lobby for the enactment of the law, but also to monitor its implementation, post enactment.

In any law reform process, there are a variety of stakeholders. They can include civil society and non-government organizations devoted to special issues, government agencies with responsibility for certain programs, UN agencies, private entities, service providers, lawyers, members of the justice system, and interested individuals such as elected politicians or citizens directly affected. It will be essential to ensure that many interests are represented, including organizations specifically dealing with programs for women and children.

A facilitated process will need to be devised so that stakeholders engage with each other to find out points of commonality and difference. Small interest groups (for example, those that provide medical services to particular communities or assistance to survivors of domestic violence) may wish to begin by holding group discussions focusing on their individual issues and narrowing them down into the key points that they believe need to be addressed. It is important to include those who will be directly affected by a law in consultations. Any consultation process should always try to ascertain as directly as possible how someone who is a

complainant would perceive or experience proposed changes.

During this process, it is important to come together to identify and discuss stakeholder differences, but before that is done, stakeholders need to be clear about their objectives, and that requires capacity development in this area. The Briefing Paper, *Myanmar Laws and CEDAW: The Case for Anti-Violence Against Women Laws*, produced by the Gender Equality Network (GEN), provides relevant background information and legal analysis specific to Myanmar, as well as law reform in Cambodia, Thailand and Vietnam.

It will be necessary to have a broad discussion with all stakeholders, or likely a series of discussions. These could start by trying to break the aspects of the law into topics. Try to pick a neutral person to facilitate and agree in advance on an agenda, setting time frames for discussion.

Ideally, stakeholders will be able to agree on a draft that contains key stakeholder non-negotiable elements and as many desirable elements as possible, and that is drafted in the language and conventions of Myanmar's legal system. Ultimately, stakeholders will probably need to settle on something that has broad support. The near-to-final draft should be distributed among stakeholders for feedback, and those working in the legal system should review the draft for consistency, to eliminate duplication and to ensure that its provisions are possible under the constraints of the existing system.

Once a law is passed, there still remains a great deal of work to do making sure that implementation goes ahead.



Gender Equality Network