

Women's Access to Justice: Identifying the Obstacles & Need for Change

THAILAND



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International Commission of Jurists

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A project of the International Commission of Jurists
and Justice for Peace Foundation

This report is based on research conducted by Nuntaporn Masupap and Angkhana Neelapaijit and supplemented by Mary Jane Real and Leah Hoctor. The report was written by Leah Hoctor and reviewed by Ian Seiderman. Antonina Vikhrest provided research assistance.

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Forward

Ensuring access to justice in respect of human rights violations and abuses is at once both a fundamental component of the rule of law and an indispensable element of human rights protection. Yet, in a wide range of contexts and places across the world, and for a variety of reasons, women's access to justice often remains illusive.

Addressing this is of vital importance as law and justice systems provide the building blocks of our societies. Where law and justice systems work for women they create the foundations necessary for women's empowerment in all aspects of their lives. They foster an environment of respect for dignity and equality, and enable progressive human development in each facet of shared endeavor.

In the last decade Thailand has taken commendable steps to advance the protection of women's human rights and access to justice through law reform as well as structural and practical measures. These efforts evidence a commitment to advance women's ability to seek and benefit from legal protection and justice. However significant problems appear to persist and for many women in Thailand justice remains an illusive prospect.

In 2011, in order to contribute to efforts to address these issues, and as part of a broader initiative on women's access to justice, the International Commission of Jurists (ICJ) and the Justice and Peace Foundation (JPF) initiated a process of consultation, research and discussion to explore the obstacles to justice that women in Thailand continue to face and identify ways in which to address them. This report outlines our main findings from that process. It encapsulates what we heard from women human rights defenders, legal experts, representatives of civil society organizations and other stakeholders and presents a series of recommended action steps.

On behalf of the ICJ and JPF we would like to express our sincere gratitude to all those who shared their experiences and participated in discussions, thereby making the initiative possible. We have been inspired by the women who spoke to us and by all those who work with them throughout Thailand to advocate for change. We are very grateful to those State officials and members of the Thai judiciary who so openly engaged with this process.

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Abbreviations: International Authorities & Standards

International Treaty Monitoring Bodies

CEDAW	Committee on the Elimination of all Forms of Discrimination against Women
HRC	Human Rights Committee
CESCR	Committee on Economic, Social and Cultural Rights
CERD	Committee on the Elimination of Racial Discrimination
CAT	Committee against Torture

General Comments/Recommendations of the Treaty Monitoring Bodies

CEDAW

- No. 19 CEDAW, *General Recommendation 19, Violence Against Women*, U.N. Doc. CEDAW/C/1992/L.1/Add.15, (1992).
- No. 21 CEDAW, *General Recommendation 21, Equality in Marriage and Family Relations*, U.N. Doc. A/49/38 at 1, (1994).
- No. 25 CEDAW, *General Recommendation 25, On Article 4, Paragraph 1, on Temporary Special Measures*, U.N. Doc. HRI/GEN/1/Rev.7 at 282, (2004).
- No. 26 CEDAW, *General Recommendation 26, Women Migrant Workers*, U.N. Doc. CEDAW/C/2009/WP.1/R, (2008).
- No. 28 CEDAW, *General Recommendation 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/GC/28, (2010).

HRC

- No. 3 HRC, *General Comment 3, Article 2 Implementation at the National Level, (Thirteenth session, 1981)*, U.N. Doc. HRI/GEN/1/Rev.6 at 125, (2003).
- No. 15 HRC, *General Comment 15, The Position of Aliens under the Covenant*, U.N. Doc. HRI/GEN/1/Rev.6 at 140, (2003).
- No. 18 HRC, *General Comment No. 18, Non-Discrimination*, U.N. Doc. HRI/GEN/1/Rev.6 at 146, (2003).

- No. 28 HRC, *General Comment 28, Equality of Rights between Men and Women* (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10, (2000).
- No. 31 HRC, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, (2004).
- No. 32 HRC, *General Comment No. 32, Right to Equality before Courts and Tribunals and to a Fair Trial*, U.N. Doc. CCPR/C/GC/32, (2007).

CESCR

- No. 9 CESCR, *General Comment No.9, The Domestic Application of the Covenant*, U.N. Doc. E/C.12/1998/24, (1998).
- No. 14 CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4, (2000).
- No. 16 General Comment No. 16, *The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2005/4, (2005).
- No.18 CESCR, *General Comment No. 18, The Right to Work*, E/C.12/GC/18, (2005).
- No. 19 CESCR *General Comment No. 19, Right to Social Security* (art. 9), U.N. Doc. E/C.12/GC/19 (2008).
- No. 20 CESCR, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights*, U.N. Doc E/C.12/GC/20, (2010).

CERD

- No. 25 CERD, *General Recommendation 25, Gender Related Dimension of Racial Discrimination*, U.N. Doc. A/55/18, Annex V, (2000).
- No. 30 CERD, *General Recommendation No.30, Discrimination against Non Citizens*, U.N. Doc. HRI/GEN/1/Rev.7/Add.1, (2005).

CAT

- No. 2 CAT, *General Comment No. 2, Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2, (2008).

1. Introduction & Project Description

In the last decade Thailand has taken extensive steps to advance the protection of women’s human rights and access to justice through the enactment of new legal provisions and the repeal or expansion of existing laws. Efforts are also reported to include a range of practical, structural and policy measures.¹

For example, significant law reform initiatives to update old laws have been undertaken, in many instances bringing existing laws into compliance with Thailand’s international obligations to ensure gender equality and non-discrimination in the enjoyment of rights.

In 2007 a new Constitution was adopted, incorporating many of the constitutional protections of gender equality and non-discrimination that the 1997 Constitution had previously enshrined, as well as introducing new provisions specifically directed at improving access to justice in general and for women. Previous guarantees of equal rights for men and women, equality before the law and equal protection under the law, and a prohibition on discrimination on grounds of origin, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious belief, education or political views were included once more.² In addition a new section on rights in the judicial process proclaims that individuals should be able to access justice, “easily, comfortably, quickly and indiscriminately,”³ and provides that women must be accorded protection with regard to appropriate trials and afforded the right to proper treatment in cases related to sexual violence.⁴ Another newly incorporated provision specifies that the State must protect women against violence and unfair treatment and must afford them the right to receive rehabilitation in the event of such circumstances.⁵

Meanwhile, in respect of Thai penal law, legal amendments have included noteworthy changes to the criminal prohibition of rape. A marital rape exception, which did not make it a crime for a husband to rape his wife, has been abolished.⁶ Meanwhile the extent of the conduct that will be deemed to constitute the crime has broadened significantly. The law now specifies that not only women, but also men, may be victims of rape, and now

1 For examples of reported practical initiatives in the sphere of violence against women see the UN Secretary-General’s Online Database on Violence Against Women, Country Page on Thailand, for information provided by the Thai Government on practical measures taken.

2 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Sections 5 & 30

3 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Section 40(1)

4 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Section 40(6)

5 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Section 52

6 Section 276 revised by Criminal Code Amendment Act (No. 19), B.E. 2550 (2007), Section 3

encompasses not only vaginal, but also oral and anal penetration, by different instruments.⁷ The Criminal Procedure Code has also been revised in a manner designed to take account of the particular needs of women survivors of sexual violence, for example through the introduction of provisions specifying that survivors should be interviewed by female police investigators and should not be required to confront the alleged perpetrator.⁸ Considerable progress towards filling legislative gaps has also been achieved. For example 2007 saw the adoption, for the first time in Thailand, of dedicated legislation on domestic violence.⁹

Law reform has also extended beyond the criminal law. A series of amendments to the Civil and Commercial Code were enacted in 2007, revising discriminatory provisions which previously allowed men but not women to seek a divorce on grounds of adultery, and allowed men but not women to claim compensation from persons who had sexual intercourse with their fiancés or committed adultery with their wives. Now these provisions apply equally to men and women.¹⁰ Meanwhile similarly discriminatory requirements that required married women to take their husbands' surnames were also abolished,¹¹ and legislation was introduced enabling married and divorced women to choose their titles.¹²

Taken together these developments reflect significant progress in Thailand's efforts to ensure its legal frameworks and procedures are compliant with its international obligations to protect women's human rights and enhance their ability to access justice. They evidence a sizeable commitment to ensure that Thai law does not continue to pose obstacles to women's ability to seek or benefit from legal protection and justice.

The Need for Further Progress

However despite these recent gains there remains a substantial need for further progress.

In March 2011 the International Commission of Jurists (ICJ) and the Justice for Peace Foundation (JPF) initiated a process of exploration, consultation and reflection on obstacles to access to justice that may arise for women in Thailand. Through extensive conversations with over 70 women, human rights defenders, lawyers, civil society representatives and other stakeholders we learned of a pervasive sense that for many women in Thailand access to

7 Section 276 revised by Criminal Code Amendment Act (No. 19), B.E. 2550 (2007), Section 3

8 Section 133 revised by Criminal Procedure Code Amendment Act (No. 28), B.E.2551 (2008), Section 9

9 Domestic-Violence Victim Protection Act B.E. 2550 (2007)

10 Section 1445 and 1516 revised by Civil and Commercial Code Amendment Act (No.16), B.E.2550 (2007), Sections 3 & 5

11 Name Act (No.3), B.E.2548 (2005), Section 6

12 The Female Title Act B.E.2551 (2008), Sections 5 & 6

justice remains a distant or inaccessible prospect. This report outlines our main findings from that process.

In *Section 3* we describe some of the legal provisions and gaps in the law that continue to disable women's access to justice in certain instances. We consider the absence of gender equality and non-discrimination legislation, review some of the laws and procedures dealing with gender-based violence and consider certain labour rights matters through the lens of domestic workers.

In *Section 4* we explore the ways in which those we interviewed indicated that the application of a number of legal provisions, and the operation in certain communities or provinces of plural state and informal justice systems, can impact access to justice for particular groups of women. There we outline in particular the accounts we received regarding specific issues facing migrant women workers, Muslim women in the Southern Border Provinces, women from Burma living in displaced persons camps on the border and women who carry out sex work.

In *Section 5* we consider the way in which many of those we spoke to said that the conduct and behaviour of officials impedes women's access to justice. We outline the views expressed regarding the impact of certain communities' general fear and mistrust of authorities and describe the ways in which we were told gender discrimination and attitudes towards gendered abuses may manifest themselves in the justice sector and effect women's ability to access legal protection and remedies.

In *Section 6* we describe the accounts we received of practical factors that present barriers for women seeking justice. We focus in particular on cost issues, language barriers and lack of legal information.

In *Section 7* we outline a series of responsive recommendations and action steps.

Purpose & Scope

Most of the issues detailed in this report are common knowledge to those working to advance women's rights, human rights protection and access to justice in Thailand. They are the obstacles they encounter every day. A number of the problems identified have been subject to previous in-depth consideration and analysis in reports by a range of organizations and experts working throughout Thailand. Our purpose has not been to identify new problems or to replace or duplicate fuller analysis found elsewhere.

Rather, in this report we seek to bring together in one place the voices of many different groups of women in Thailand and those who work with them. Our purpose has been to transcend community lines and identify the ways

in which different groups of women experience similar obstacles to justice. While setting forth some applicable international legal standards, we do not offer extensive legal commentary. Nor do we purport to undertake an empirical study or present comprehensive data. Rather we provide an overarching description of common problems that have been identified by those we spoke to across the country.

In addition we have focused on access to justice as a thematic focus, rather than women's human rights issues more generally. Within these strictures, we do not limit our scope to access to justice in respect of any one abuse or circumstance. In this way, we seek to highlight the ways in which certain obstacles will impede women's access to justice whatever the differently shaped human rights abuses they may face.

At each point, we have sought to translate the identification of problems into policy considerations, to make the connection between normative barriers and practical problems, and to continuously situate the issues raised with reference to Thailand's international human rights obligations.

It is important to underline that at no point is our coverage comprehensive. We have simply sought to highlight those issues that were repeatedly raised by those we consulted. Moreover, in some instances, we have not addressed complex legal areas that have already been the subject of extensive research and legal commentary. As a result many legal provisions¹³ and legal frameworks deserving of review, such as those concerning trafficking,¹⁴ and reproductive rights and abortion,¹⁵ are not included or addressed at all.

Key Concepts

Access to justice is a term that has divergent meanings when used in various contexts and by different stakeholders. For the purposes of this report we conceive of access to justice with reference to human rights principles. We consider it to include the insurance that rights and their correlative legal protections are recognized and incorporated in law and the right to an effective, accessible and prompt legal remedy for the violation or abuse of rights. It entails the ability and empowerment to claim rights as legal entitlements, to seek the accountability of those who transgress them and to turn to the law for viable protection and meaningful redress. We have developed this working definition with reference to the range of relevant

13 For example we do not address remaining discriminatory provisions in the Nationality Act B.E. 2508 (1965) that affect Thai women who marry foreign men. We also do not address the way those we spoke to noted that the application of the Land Code Promulgating Act B.E. 2497 (1954) can sometimes result in discrimination against Thai women married to foreign husbands.

14 For more on Thailand's legal framework combating trafficking in persons see e.g. Pollock J., *Thailand, in Collateral Damage*, GAATW, 2007; Human Trafficking Laws, Legal Protection for Victims, UNIAF Report.

15 See for a discussion, *Women of the World: Laws and Policies Affecting their Reproductive Rights*, Centre for Reproductive Rights & Arrow, 2005.

international human rights obligations that we outline and explore in *Section 2* below.

The thematic focus of this process has not been discrimination against women vis-à-vis men, but the obstacles women face in access to justice. As a result we adopt a holistic and integrated human rights approach. This means that the issues we consider are not limited to those obstacles that may also constitute gender discrimination. In addition many of the obstacles we address are not limited to women but also affect men in significant and equally serious ways. Our focus on women should not be seen as an overstatement of the gender dimensions of access to justice problems in Thailand. Rather we have simply sought to capture the ways in which women experience these shared obstacles.

Additionally we have defined the scope of the process as inclusive of all women in Thailand, no matter what their nationality, ethnicity or legal status. Significant parts of the report address particular obstacles faced by those who do not hold Thai citizenship or do not self-identify as ethnically Thai. Moreover we include those of differing gender-identities within the scope of the analysis to the extent that they self-identify as women.

Methodology

Interviews, focus group discussions and workshops provided the primary method of information gathering, exploration and consultation during this process. We also carried out legal review and analysis of the content and effect of relevant Thai laws. In total the research process took place over approximately 10 months, beginning in March 2011. The majority of the research was carried out by a Thai research consultant and was augmented in December 2011 by follow-up interviews and focus-group discussions involving a regional gender-expert.

A research framework and series of detailed questions were drawn up to guide the inquiry. This ensured a cohesive approach was taken towards interviews and focus-group discussions with similar issues and questions being explored with all participants. Meanwhile workshop discussions were also framed with reference to these documents and structured around priority issues identified in interviews and focus-group discussions.

While maintaining a common framework and scope, a flexible approach was adopted, and was imperative so as to enable conversations to respond and adapt to the perspectives of the participants and the particular issues and concerns raised by them. This flexibility was necessary to ensure that the identification and analysis of obstacles was authentic and information gathered was valid and reflective of realities.

Similarly the legal review and analysis carried out with a view to identifying problems and gaps in Thai law impacting women's access to justice was also undertaken within the parameters of the research framework and on the basis of issues raised by participants and with reference to relevant international law and standards.

Interviews, Focus-Groups, Workshops

In total the process involved consultation and conversation with over 75 individuals in Thailand through over 45 interviews and focus group discussions. In addition two in-depth workshops bringing together a cross-section of these and other stakeholders were held in September 2011 in *Bangkok* and *Hat Yai*.

Interviews and focus-group discussions took place in *Bangkok, Chiang Mai, Hat Yai, Khon Kaen Province, Mai Ai, Narathiwat Province, Pattani Province, Samutsakorn Province, Udon Thani Province, Yala Province*.

The majority of interviews, focus group and workshop discussions took place in Thai. A small number of interviews and focus-group discussions took place through English.

No participant was paid remuneration. Where participants needed to travel to attend interviews or workshops their travel costs were reimbursed, as were accommodation and subsistence costs when relevant.

Sources and Attribution

A list of those who participated in these interviews, focus-group discussions and workshops is provided at the end of this report. They included women from a range of marginalized groups, human rights defenders, representatives of civil society organizations and service providers, lawyers, gender experts and academics. They also included members of the judiciary and representatives of the Royal Thai Police, the Internal Security Operation Command, Provincial Governors, the Ministry of Justice and Ministry of Social Development and Human Security.

In certain instances we do not list the individual names of those who spoke to us either because they asked us not to or because we decided it was necessary for security reasons.

For similar reasons in many places throughout the report we include direct quotes from interview and workshop discussions without naming the individual concerned.

Peer Review & Final Workshop

In March 2012 draft sections of this report were shared with a number of individuals who had participated in interviews and workshops and their review sought. Additionally in March 2012 a third workshop was held, bringing back together over 30 participants from different communities and places in Thailand. The participants discussed the draft report and provided corrections and suggestions that were taken on board. Meanwhile as outlined in *Section 7* the recommendations and action steps outlined there were developed jointly with the workshop participants.

The responsibility for the content of the report and its accuracy rests with the ICJ and JFP.

2. Thailand's International Obligations & Access to Justice

International law and standards require Thailand to respect, protect and fulfil the civil, cultural, economic, political and social rights of all those within its territory and jurisdiction without distinction of any kind. These obligations are enshrined in the international human rights treaties to which it is a party, including: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁶ the International Covenant on Economic, Social, and Cultural Rights (CESCR), the International Covenant on Civil and Political Right (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC),¹⁷ and the Convention on the Rights of Persons with Disabilities (CRPD).¹⁸

These obligations necessitate that the Government, including its agents and those it empowers to act on its behalf, refrain from interference with the enjoyment of human rights. They also require that the Government protect individuals from the impairment or nullification of rights by third parties, including non-State actors, and take a range of other proactive steps to enable the enjoyment of rights. To this end Thailand must ensure every individual's ability to access justice through: the legal recognition of rights, the provision of effective legal protection from abuses and ensuring access to legal remedies and reparation.

In the following paragraphs we provide a general overview of the nature of these obligations while in subsequent sections we provide more detail regarding the particular requirements and implications they entail for women's access to justice.

A Legal Framework Enabling Access to Justice

Ensuring a legal framework is in place that gives effect to the rights in the international instruments to which Thailand is party is a fundamental step

16 Thailand is also a party to the Optional Protocol to CEDAW.

17 Thailand is also a party to both Optional Protocols to the Convention on the Rights of the Child.

18 In relation to these international human rights obligations, Thailand maintains a number of reservations and has made a number of declarations. Reservations: CEDAW Article 16 and Article 29(1); CAT Article 30(1); CERD Articles 4 and 22; CRC Article 22. Declarations: ICESCR Article 1(1), ICCPR Article 1(1), Article 6(5), Article 9(3) and Article 20; CRPD, Article 18. In 1996 Thailand withdrew a number of its reservations to CEDAW. Its only remaining reservations are to Articles 16 and 29. CEDAW has stated that Thailand's reservation to Article 16 is contrary to the object and purpose of the Convention on the Discrimination of All Forms of Discrimination against Women, and has urged the government of Thailand to "to expedite its efforts towards the withdrawal of its reservation to article 16 of the Convention within a concrete time frame."

towards compliance with the treaties.¹⁹ This obligation has a number of interconnected implications for domestic legal frameworks and is a crucial component in enabling access to justice for abuses of human rights.

Legal Recognition of Rights: Putting in place an adequate legal framework necessitates that the rights enshrined in the relevant treaties be recognized in the domestic legal order and that domestic law be reformed or developed in a manner to bring it into line with international provisions.²⁰ The precise means of incorporation and implementation of international obligations into domestic law is not prescribed expressly in human rights treaties. However, the obligations will be most effectively discharged where there is implementing legislation, and it is optimal for the rights themselves to be codified in law.²¹ Indeed the legal recognition of rights is a vital component in efforts to enable access to justice in relation to human rights abuses. Simply put it provides the foundation for individuals to claim their rights as entitlements under the law and where a right is not recognized in law an individual may not be able to invoke it or seek justice for its breach.

Legal Protection: Thailand's legal system must also provide individuals with effective protection from human rights abuses.²² It must adopt effective legislative, administrative and other appropriate measures that provide fair, effective and prompt access to justice.²³ It is not enough to simply recognize rights. The legal system must also effectively regulate the conduct of public and private actors in a range of circumstances so as to protect them.²⁴ This obligation requires that certain conduct be prohibited, including, for the most serious misfeasance, through the criminal law. Procedures and mechanisms must be put in place to ensure the enforcement of rights and relevant laws and provide for appropriate accountability and sanctions. In certain instances international requirements impose precise and stringent requirements regarding the form such procedures must take. For example Thailand is required to protect the rights to life, personal integrity and freedom from

19 See for example Article 2(2) ICCPR; Article 2(1) ICESCR; Article 2 (a)-(g) CEDAW.

20 See for example: Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, Para. 13 (hereinafter HRC General Comment No.31); Committee on Economic, Social and Cultural Rights, *General Comment No.9, The Domestic Application of the Covenant*, E/C.12/1998/24, 3 December 1998, Paras. 4-8 (hereinafter CESCR General Comment No.9). See also Article 2 (a)-(g) CEDAW and Committee on the Elimination of Discrimination against Women, *General Recommendation 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/GC/28, 16 December 2010, Para.31 (hereinafter CEDAW General Recommendation 28).

21 *Ibid.*

22 See for example in general, HRC *General Comment No.31*; CEDAW *General Recommendation 28*.

23 Principle 2(b); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by United Nations General Assembly Resolution 60/147 of 16 December 2005.

24 See for example CESCR, *General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2005/4, 11 August 2005, Para. 20 (hereinafter CESCR General Comment No.16); HRC, *General Comment No.31*, Para. ; Article 2(b)-(f) CEDAW and *CEDAW General Recommendation 28*, Paras. 17,31,36.

torture and other forms of ill-treatment through the enactment of criminal laws prohibiting certain conduct and forms of violence and the establishment of effective procedures and mechanisms for prevention, investigation and legal accountability.²⁵ This requires ensuring effective law enforcement, investigation, prosecution and the imposition of penalties. Other examples of required legal protection include regulation of health care²⁶ and of workplace conditions and entitlements.²⁷

Legal Remedies and Reparation: Thailand must also ensure that individuals have meaningful access to effective legal remedies and reparation when they face human rights abuses.²⁸ This obligation is not only set out in the major human rights treaties, but is also a principle of general international law and expressed in UN Principles and Guidelines, adopted by consensus of all UN member States at the General Assembly.²⁹ It requires that Thailand make available “adequate, effective, prompt and appropriate remedies, including reparation.”³⁰

Indeed without this *access to justice* is impossible. The right to an *effective remedy* means that the law must provide individuals with recourse to independent and impartial authorities with the power and capacity to investigate and decide whether an abuse has taken place and order cessation and reparation. In order to be effective a remedy must not be theoretical or illusory but meaningful in practice. It must be affordable and timely. In a wide range of circumstances access to a judicial remedy must be provided and even in situations where access to a judicial forum is not required at first instance, an ultimate right of appeal to a judicial body will be necessary. Meanwhile ensuring the right to *reparation* requires a range of available reparative measures, including restitution, rehabilitation, satisfaction, guarantees of non-repetition and compensation. The stated needs and wishes of the victims are paramount in determining the appropriate forms of reparation. For example, in practical terms, appropriate reparation may involve bringing the perpetrators of the abuse to justice, public recognition of wrongful behavior and apologies, the taking of measures to address the

25 See for example Articles 2,4,12 & 16 CAT and in general Committee Against Torture, *General Comment No.2, Implementation of Article 2 by States Parties*, CAT/C/GC/2, 24 January 2008. See also ICCPR Articles 2, 6 & 7 and HRC, *General Comment No.31*, Para. 8. And see CEDAW, *General Recommendation 19, Violence Against Women*, U.N. Doc. CEDAW/C/1992/L.1/Add.15, Paras. 19, 24(b) and 24(t) (hereinafter CEDAW General Recommendation 19); CEDAW, *General Recommendation 28*, Para. 34;

26 CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, 11 August 2000, Paras. 48 & 51 (hereinafter CESCR General Comment No. 14)

27 CESCR, *General Comment No. 18, The Right to Work*, E/C.12/GC/18, 24 November 2005, Paras. 32 & 35.

28 For a general account of what constitutes effective remedy and reparation see for example Article 2(3) ICCPR and HRC *General Comment No. 31*, Paras. 15-20; Article 2 CEDAW and CEDAW *General Recommendation 28*, Paras. 32,34,36; CESCR *General Comment No. 9*, Para. 9 et seq.

29 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by GA resolution 60/147 of 16 December 2005.

30 *Ibid.*

cause of the abuse and the systematic reform of laws, policies or practices.³¹

Enabling the Realization of Rights In Practice

Although vital, in and of themselves the existence of adequate legal frameworks recognizing rights, providing legal protection and outlining effective remedies and reparation will be insufficient. International law and standards also oblige Thailand to ensure the practical realization of rights, including through taking effective implementation measures to ensure the ability of individuals to actually access these protective and remedial frameworks in practice.³²

This gives rise to specific requirements in different contexts. However in a general sense it requires Thailand to take effective steps to address and remove practical barriers that impede access to justice. For example, the Government must find ways to make legal processes affordable for ordinary people including through providing viable and accessible legal aid services to those without financial means.³³ In addition the Government bears the responsibility to address language barriers through ensuring interpreters and translators are provided when necessary.³⁴ It also requires that the Government identify and implement measures designed to provide individuals with good quality legal information and knowledge so that they know about their rights and the content of relevant laws and procedures.³⁵

Implications for Women's Access to Justice

In this context, Thailand's international obligations to respect, protect and fulfil women's human rights on a basis of equality and non-discrimination³⁶ give rise to a range of specific requirements applicable in a range of circumstances. We provide more detail on these at relevant points in Sections 3 -7 below.

31 HRC *General Comment No. 31*, Paras. 15-20; CEDAW *General Recommendation 28*, Paras. 32,34,36; CESCR *General Comment No. 9*, Para. 9 et seq, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by GA resolution 60/147 of 16 December 2005.

32 HRC, *General Comment 3, Implementation at the National Level*, HRI/GEN/1/Rev.1, 1981 (hereinafter HRC *General Comment 3*); CEDAW, *General Recommendation 28*; CESCR, *General Comment 16*, Para. 21; CESCR, *General Comment 9*, Paras. 2-3.

33 CEDAW, *General Recommendation No. 28*, Para. 34; HRC *General Comment No. 32, Right to Equality before Courts and Tribunals and to a Fair Trial*, Para. 10 (hereinafter HRC *General Comment No. 32*). Also see CESCR *General Comment No. 19, Right to Social Security*, E/C.12/GC/19, 4 February 2008, Paras. 77-78.

34 See for example, HRC *General Comment No. 32*, Paras. 13, 32 & 40.

35 See for example, HRC *General Comment No. 3*; CEDAW *General Recommendation 28*, Para.2; CEDAW, *General Recommendation 26, Women Migrant Workers*, U.N. Doc. CEDAW/C/2009/WP.1/R (2008), Para. 26 (hereinafter CEDAW *General Recommendation 26*).

36 For an account of these obligations see: Article 2, CEDAW; Articles 2,3 & 26 ICCPR; Article 3 ICESCR; CEDAW, *General Recommendation 28*; CESCR, *General Comment No. 16*; CESCR *General Comment No. 20*; HRC, *General Recommendation 28*.

In a general sense they mean that in taking proactive legal and practical measures to ensure access to justice Thailand must specifically take account of and address the particular needs and situations facing women. For example ensuring the legal recognition of women's human rights not only entails recognizing women as equal rights bearers, but also ensuring that the definition of legal rights takes account of the particular needs of women as women, arising for example from biological differences as well as social and culturally constructed differences.³⁷ Meanwhile enabling and empowering women to claim their rights as legal entitlements requires Thailand to address the practical factors that can often impede women's ability to claim their rights, including the status of women and gender-based stereotypes, prejudices and norms in operation in a society.³⁸ Providing legal protection, accountability and remedies against abuses of women's human rights means ensuring laws and law-enforcement procedures effectively prohibit and safeguard against human rights abuses which women face as women or which affect women in distinct or disproportionate ways. It also necessitates the establishment of gender-sensitive legal procedures and processes and ensuring reparations are designed to respond to the particular needs of women.³⁹

37 CEDAW, *General Recommendation 25, On article 4, paragraph 1, on temporary special measures*, U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004) (hereinafter CEDAW General Recommendation 25).

38 Article 5 CEDAW, CEDAW *General Recommendation 28*.

39 See in general Article 2 CEDAW, Article 3 & 26 ICCPR, CEDAW *General Recommendation 28*, CEDAW, *VK v. Bulgaria*, Communication No. 20/2008, 25 July 2011, Para. 9.9 and 9.11-9.16; CEDAW, *Vertido v. Philippines*, Communication No. 18/2008, 16 July 2010, Paras. 8.5-8.9; CAT *General Comment No. 2*.

3. Normative Obstacles: Problematic Laws & Legal Gaps

In the last decade Thailand has implemented significant law reform initiatives abolishing a range of legal provisions that discriminated against women and upgrading the forms of legal protection available to women in certain situations. However throughout the past year those we spoke to across Thailand highlighted that problematic laws and legal gaps remain. In the following sub-sections we outline some of the issues they identified and in Section 7 we detail a range of responsive recommendations.

3.1. **The Absence of Generally Applicable Laws On Gender Equality & Non-Discrimination**

International law and standards require Thailand to incorporate the principles of equality between women and men and of non-discrimination in the enjoyment of human rights in domestic law and give them overriding and enforceable status.⁴⁰ In addition to constitutional protections, and particularly because CEDAW is not directly applicable in Thailand, domestic law and legislation guaranteeing equality and prohibiting discrimination in all fields of women's lives should be adopted.⁴¹ Among other things this legislation should define discrimination in conformity with CEDAW, should prohibit discrimination by both public and private actors (including public authorities, the judiciary, private organizations, business enterprises or individuals) and should clearly outline appropriate sanctions and remedies, including access to courts or tribunals established by law.⁴² Additionally, international law requires States to protect women from forms of multiple or intersectional discrimination and in this regard the adoption of legal provisions that prohibit discrimination on a range of grounds other than sex is also indispensable, not least to protect women from high-risk or marginalized groups.⁴³

Although the Thai Constitution includes strong guarantees of gender equality and non-discrimination, the relevant provisions are broadly framed. They do not define key concepts, such as discrimination, do not indicate which actors are subject to the guarantees and prohibitions enshrined, and do not outline applicable remedies. Indeed, constitutional provisions are not

40 Article 2, CEDAW; Articles 2,3 & 26 ICCPR; Article 3 ICESCR; CEDAW, *General Recommendation 28*, Para. 31.

41 CEDAW, *General Recommendation 28*, Para. 31. See also, CESCR, *General Comment No. 20*, Para. 40.

42 Article 2, CEDAW; CEDAW, *General Recommendation 28*, Paras. 17, 31-34; HRC, *General Recommendation 28*, Para. 31. See also CESCR, *General Comment No. 20*, Para. 40; CESCR, *General Comment No. 16*, Paras. 19 & 21.

43 Articles 2(1) & 26 ICCPR; Article 2(2) ICESCR; CEDAW, *General Recommendation 28*, Paras.18 & 31; CESCR, *General Comment No. 20*, Para.17; CERD, *General Recommendation 25, Gender Related Dimension of Racial Discrimination*, U.N. Doc. A/55/18, Annex V. (2000).

usually the place for such specificity, and its absence does not necessarily give rise to difficulties as long as adequate implementing legislation is enacted. However, no subsidiary legislation, dealing either with gender equality or non-discrimination more broadly, is currently in place in Thailand. As a result, no generally applicable law currently provides the requisite precision and detail as to the content of relevant protections and rights, and the corresponding responsibilities on the State. Although some ad hoc equality provisions have been included in different pieces of legislation, they are relatively slim in number and their application is confined to very specific circumstances. For example, the Labour Protection Act includes certain specifications regarding women's equal rights in the workplace, such as requirements of equal treatment and equal pay for equal work, as well as prohibitions on pregnancy-related discrimination and guarantees of maternity leave.

In the absence of such generally applicable legislation, it has been left to the Courts to delineate, on a case-by-case basis, what discrimination entails and what conduct is prohibited. Their pronouncements, which under the Thai legal system do not constitute binding precedent, have typically been limited to issues arising from the circumstances of each complaint. Moreover, in a generally non-litigious society, such decisions are not frequent. This places a significant burden on individual women to challenge conduct before the courts without clear legislative guidance as to the parameters or content of the protection available.

Towards a Gender Equality Act?

Many of those we interviewed expressed concern regarding this protection gap and highlighted that gender equality legislation could have a significant and positive impact in terms of preventing gender discrimination and positively enabling women's access to justice.⁴⁴ It would not only offer legal clarity and certainty, allowing public and private actors to measure their conduct against a defined standard of conduct and take steps to bring it into compliance, but women would be provided with a clear legal basis against which to assess treatment and on which to challenge discriminatory behaviour.

Indeed, in response to calls from domestic and international actors⁴⁵ and in acknowledgement of the need for such legal frameworks, a process to elaborate a gender equality act was initiated in 2005. However, the drafting

44 e.g. ICJ & JPF Interviews with: Naiyana Supapung, Teeranat Kanjanauksorn Foundation, Bangkok, 20 July 2011 & 16 December 2011; Benjamaporn Loimee, Chiang Mai University, Chiang Mai, 1 August 2011; Alisa Hasamoh, Prince of Songkhla University, Songkhla, 20 August 2011; Sutada Mekrungruengkul, Gender and Development Research Institute, Chiang Mai, 14 December 2011; Usa Lertsrisuntad, Foundation for Women, Bangkok, 15 December 2011; Bundit Panwiset, Friends of Women Foundation, Bangkok, 12 January 2012.

45 See for example CEDAW, *Concluding Comments, Thailand*, U.N. Doc. A/54/38/REV. 1(SUPP), 29 January 1999. See also the *Concluding Comments, Thailand*, U.N. Doc CEDAW/C/THA/CO/5, 3 February 2006.

process appears to have been protracted and legislation has still not been adopted, although over the years a number of drafts have been developed by the Ministry of Social Development and Human Security.⁴⁶ Most recently significant concerns on the part of women's rights advocates and other civil society actors regarding the latest version of the draft law led them to elaborate a separate draft proposal.⁴⁷ Those we spoke to indicated that the Government draft may now be undergoing revision and that a new draft may be presented in 2012. This process provides the Government with a key opportunity to address and take account of their concerns.

Exceptions: A particular cause for concern which many of those we spoke to highlighted is the inclusion of three far-reaching and generally applicable exceptions to the prohibition on discrimination between men and women, which would make discrimination permissible when based on reasons of academic, religious or public need.⁴⁸ Such exceptions would jeopardize the equal treatment of women in academic institutions, including schools and universities and would allow for women's equal rights to be restricted on the basis of religious claims, or for other reasons which would on a case-by-case basis be justified as "public need." If enacted into law such exceptions would lead to substantial restrictions on the application of the gender equality law, thereby undermining its purpose and limiting women's ability to obtain justice when facing discrimination. The term "public need" may be open to extremely broad interpretation, and its inclusion as a justification for discrimination would diminish the act's capacity to offer women and other actors improved legal certainty and clarity as to when conduct is impermissible under the act. Meanwhile the inclusion of religious reasons as a validation of otherwise discriminatory conduct would significantly reduce the legal protection available to women of different religions placing them in a vulnerable position and undermining their equality before the law.

Indeed if adopted such exceptions would lead to non-compliance with the provisions of CEDAW, which hold that discrimination is, "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." This specification does

46 The Promotion of Opportunity and Gender Equality Bill B.E. 2550 (2007) (Government Draft)

47 The Promotion of Opportunity and Gender Equality Bill (Civil Society Draft Proposal).

48 The Promotion of Opportunity and Gender Equality Bill B.E. 2550 (2007) Section 3, (Government Draft). Concerns were also expressed regarding the sanctions for discriminatory conduct envisaged by the draft that include a maximum of 6 months imprisonment or a fine of not more than THB 20,000 or both. Those we spoke to expressed the view that the maximum amount of the fine is far too low and the civil society draft proposes a maximum fine of baht 180,000. Meanwhile, it appears that the Government draft is ambiguous regarding remedies for victims of discrimination, not making provision for redress or reparations, but rather referring to compensation through social welfare.

not allow for any exceptions.⁴⁹ Nor do Thailand's remaining reservations to CEDAW justify such exemptions.⁵⁰ Meanwhile in its guarantee of women's equal rights and equality before the law the Thai Constitution does not foresee any exceptions.⁵¹

Addressing Intersectional Forms of Discrimination: The Needs of Marginalised Groups

Women will often face discrimination not only on the basis sex, but also on other grounds, for example ethnicity, nationality, religion, marital status, social and economic status, age, place of residence, descent, including caste, sexual orientation and gender identity. Such *intersecting* forms of discrimination will often have compounded negative impacts on these women and will often affect them differently than it will male members of these groups.⁵² Yet those we interviewed expressed the view that current Thai law does not adequately address such forms of discrimination, ultimately leaving many marginalized groups of women without recognition.

Indeed, although the Constitution lists a wide range of grounds on which it is not permissible to discriminate, the lack of definition and clarity as to the scope and responsibilities of the general non-discrimination prohibition appears to present similar problems as those outlined above in relation to gender equality. Meanwhile the Constitution does not identify certain essential protected groups in its prohibition. For example the grounds of marital status, sexual orientation and gender identity⁵³ are not explicitly listed and although there may be room for the Courts to interpret the constitutionally protected ground of personal status as inclusive of marital status, sexual orientation or gender identity, so far it does not appear that they have done so.

Moreover, the constitutional protections do not directly address or acknowledge the *intersectional* nature of the discrimination facing women members of marginalised groups. For example, in Thailand such groups

49 Article 1, CEDAW; CEDAW, *General Recommendation 28*, Paras. 31 & 33; And see by way of example, regarding discrimination against women on grounds of religion: Concluding Comments of CEDAW, *Indonesia*, U.N. Doc. CEDAW/C/IDN/CO/5, 10 August 2007, Para. 12; *Malaysia*, U.N. Doc. CEDAW/C/MYS/CO/2, 31 May 2006, Para. 14; *Philippines*, U.N. Doc CEDAW/C/PHI/CO/6, 25 August 2006, Para. 12.

50 In 1996 Thailand withdrew a number of its reservations to CEDAW. Its only remaining reservation to Articles 16 and 29 does not justify such broadly applicable exceptions to the guarantee of gender equality and non-discrimination. In any event CEDAW has stated that Thailand's reservation to Article 16 is contrary to the object and purpose of the Convention on the Discrimination of All Forms of Discrimination against Women, and has urged the government of Thailand to "to expedite its efforts towards the withdrawal of its reservation to article 16 of the Convention within a concrete time frame," *Concluding comments of the Committee on the Elimination of Discrimination against Women: Thailand*, U.N. Doc CEDAW/C/THA/CO/5, 3 February 2006, Paras. 11-12.

51 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Section 30

52 CEDAW, *General Recommendation 28*, Paras. 18, 26 & 31; CESCR, *General Comment No. 20*, Para.17; CERD, *General Recommendation 25*.

53 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Section 30

include migrant women, hill tribe women, Muslim women, poor women and rural women. Yet international law and standards indicate that domestic law should legally recognize and prohibit such intersecting forms of discrimination facing women. Legal frameworks and justice systems must take account of and be able respond to the particular risks and obstacles to justice that they may encounter.⁵⁴

The ongoing revision of the draft gender equality act provides the Government with an important opportunity to address the intersectional forms of discrimination that women in Thailand often face, through the inclusion of a provision explicitly acknowledging and prohibiting such discrimination. The inclusion of such a provision would go some way towards ensuring the legislation's relevance to groups of women in Thailand who are often excluded from legal protection and justice. It would also create a legal basis for challenges to other legislation and practices with reference to the lived experiences of women facing intersectional forms of discrimination. Meanwhile, in the longer-term, some of those we spoke to about this matter underlined that in addition to the gender equality act, the drafting and adoption of general non-discrimination legislation that would prohibit discrimination against men and women on a range of grounds should become a priority for the Government.

3.2 Legal Framework on Gender-Based Violence – The Need for Further Reform

International law and standards require States to exercise due diligence to prevent, investigate, punish and ensure access to remedies in instances of gender-based violence by public and private actors.⁵⁵ This has a number of implications for domestic legal systems: legislative frameworks, dealing with various forms of gender-based violence, and providing adequate protection to all women, respecting their integrity and dignity, must be adopted and implemented; such frameworks must provide for penal sanctions, civil remedies, and remedial and protective provisions; following instances of all such violence, States are obliged to carry out an effective investigation with a view to instigating criminal proceedings, bringing the perpetrator to trial and imposing appropriate penal

54 CEDAW, *General Recommendation 28*, Paras. 18, 26 & 31; CESCR, *General Comment No. 20*, Para.17; CERD, *General Recommendation 25*.

55 CEDAW, *General Recommendation 19*, Para. 9; CEDAW, *General Recommendation 28*, Para.19; CAT, *General Comment 2*, Para. 18; Article 4(c), *UN Declaration on the Elimination of Violence Against Women*, 20 December 1993, General Assembly, Resolution A/RES/48/104; CEDAW, *Vertido v. The Philippines*, Communication No. 18/2008, 16 July 2010, Para. 8.4; *Şahide Goekce v. Austria*, Communication No. 5/2005, 6 August 2007, Para. 12.1.4; *Fatma Yildirim v. Austria*, Communication No. 6/2005, 6 August 2007, Paras. 12.1.2. and 12.1.5. See also, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, *Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61, 20 January 2006, Para. 29. See also, HRC, *General Comment 31*, Para.8 (regarding private actors generally).

sanctions.⁵⁶ Moreover, States must ensure a gender sensitive judicial process in cases of such violence.⁵⁷ Among other things this necessitates that legal definitions of acts of gender-based violence and relevant evidentiary rules are not overly restrictive or predicated on gender stereotypes or discriminatory approaches, but rather facilitate the survivor's access to justice.⁵⁸ It also requires that relevant legal procedures, including courtroom procedures and investigative processes, are responsive to the particular needs of survivors.

In the past decade Thailand has taken considerable steps towards the establishment of a legal framework that adequately deals with acts of violence against women. Yet many of those we interviewed expressed concerns regarding the ways in which Thailand's legal framework continues to pose obstacles for women survivors of violence in terms of their ability to access justice. We address a number of these concerns here.

Domestic Violence

We discussed the Domestic Violence Victim Protection Act with a number of experts and representatives of organizations that provide assistance to women facing violence.⁵⁹ They noted that the Act had introduced several positive elements into Thai law. For example, some of them highlighted provisions enabling government officials to make medical, social and psychological assistance available to survivors of domestic violence,⁶⁰ as well as provisions providing for a range of provisional remedial measures intended to protect a person at risk of domestic violence.⁶¹ However, simultaneously they raised significant concerns regarding the Act, especially its approach in emphasizing and promoting mediation, conflict resolution and settlement as the preferred mechanisms by which to address instances of domestic violence.

Indeed, although the Act makes domestic violence an offence,⁶² it is a

56 CEDAW, *General Recommendation 19*, Paras. 24(b) and 24(t); CEDAW, *General Recommendation 28*, Para. 34; CAT, *General Comment 2*, Para. 18; HRC, *General Comment No.31*, Para. 8. See also, Concluding comments of CEDAW, for example: *Myanmar*, U.N. Doc CEDAW/C/MMR/CO/3, 7 November 2008, Para. 23; *Vietnam*, U.N. Doc CEDAW/C/VNM/CO/6, 2 February 2007, Para. 17; *Cambodia*, U.N. Doc CEDAW/C/KHM/CO/3, 25 January 2006, Para. 16.

57 CEDAW, *VK v. Bulgaria*, Communication No. 20/2008, 25 July 2011, Para. 9.9 and 9.11-9.16; CEDAW, *Vertido v. Philippines*, Communication No. 18/2008, 16 July 2010, Paras. 8.5-8.9.

58 *Ibid.*

59 e.g. ICJ & JPF Interviews with: K. Jaded, Friends of Women Foundation, Bangkok, 11 May 2011; Naiyana Supapung, Teeranat Kanjanauksorn Foundation, Bangkok, 20 July 2011 & 16 December 2011; Sutada Mekrungruengkul, Gender and Development Research Institute, Chiang Mai, 14 December 2011; Usa Lertsrisuntad, Foundation for Women, Bangkok, 15 December 2011; Bundit Panwiset, Friends of Women Foundation, Bangkok, 12 January 2012.

60 Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 8

61 Domestic Violence Victim Protection Act, B.E. 2550 (2007), Sections 10 & 11

62 Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 4

compoundable offence.⁶³ This means that a victim may withdraw a complaint and/or reach a settlement with the alleged perpetrator, in which case any legal proceedings initiated by the State must cease.⁶⁴ Meanwhile, in all instances, in order for a legal process to be initiated, the victim must decide to pursue a case and must file a complaint within three months of the incident. It is only after this that an official investigation into a situation will be initiated.⁶⁵ The Act also specifies that when dealing with cases courts should work towards a case settlement that promotes the peaceful cohabitation of the family.⁶⁶ It provides that courts should be guided by four principles: the rights of the victim, the prevention of separation or divorce by cohabiting men and women, the protection and assistance of the family, and the provision of assistance which can enable married couples and family members to cohabit in harmony.⁶⁷ It further specifies that in order to promote the settlement of cases, state officials and judges may appoint a mediator who shall endeavor to work with the parties to settle the case. Such mediators may include fathers, mothers, brothers or sisters of the parties.⁶⁸

Each of those with whom we discussed the Act indicated that in their experience in the vast majority cases that do reach the courts the parties negotiate for settlement under the supervision of court-appointed mediators. Meanwhile, the Director of one NGO providing services for survivors of violence pointed to statistics they have collected revealing a significant gap between the number of incidents reported to police and those that reach the courts.⁶⁹

Indeed, the overriding view expressed was that the Act does not challenge the prevailing notion that violence against women is a private matter. In the words of one legal expert it conveys the impression that the priority is to “preserve the family at the expense of women’s human rights.”⁷⁰ Concerns were outlined that in its preference for settlement rather than sanctions for

63 Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 4

64 Criminal Procedure Code, Section 39.

65 Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 7 & 8. See also Criminal Procedure Code, Section 121, generally applicable to compoundable offences, which specifies that in such cases an official investigation cannot be initiated unless the victim makes an official complaint. It should be noted that Section 5 of the Domestic Violence Victim Protection Act does state that where a victim is “in a condition that he is unable to file a complaint on his own or has no opportunity in so doing the competent official may file a complaint on his behalf.” In some respects this could leave open the possibility that officials could pursue investigations and legal proceedings on their own initiative and volition in certain instances. However the Act does not define the circumstances in which this exception will apply, and those we spoke to indicated that the likelihood is that the clause is intended to apply in situations where the victim is physically unable to file a complaint.

66 Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 15

67 Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 15

68 Domestic Violence Victim Protection Act, B.E. 2550 (2007), Section 16

69 ICJ & JPF Interview with Usa Lertsrisuntad, Foundation for Women, Bangkok, 15 December 2011.

70 ICJ & JPF Interviews with Naiyana Supapung, Teeranat Kanjanauksorn Foundation, Bangkok, 20 July 2011 & 16 December 2011.

the perpetrator, the regime may place those facing domestic violence at risk of continued violence and abuse.

As highlighted by the analysis in *Section 5* below, many of those we spoke to expressed the view that significant hurdles in access to justice for women may arise in Thailand because police officers, prosecutors and judges will sometimes treat cases of domestic violence as exclusively private, personal or family matters. It appears that reliance on the reconciliation centered approach favoured under the Act may hinder the development of more robust approaches that are necessary in respect of domestic violence.

Indeed, as outlined above, international legal authorities have affirmed that in all cases of violence against women, including domestic violence, States are obliged to exercise due diligence to conduct official investigations, initiate criminal proceedings, bring the perpetrator to trial and impose appropriate penal sanctions. Among other things these obligations mean that where such violence is brought to the attention of the authorities, they must of their own motion, immediately, thoroughly, and impartially investigate such violence, and where warranted by that investigation vigilantly and in a speedy manner prosecute those responsible.⁷¹ A legal regime that treats all instances of domestic violence as compoundable offences and predicates the initiation of an official investigation and prosecution in every case on a woman's decision to initiate legal proceedings, while simultaneously promoting settlement and mediation, will not result in compliance.

In order to ensure that officials treat domestic violence as criminal conduct in relation to which accountability of the perpetrator is important, many countries have adopted mandatory arrest and prosecution policies in respect of domestic violence. Best practice specifies that, at a minimum, legal regimes dealing with domestic violence should take a pro-arrest and pro-prosecution approach.⁷² This means that the domestic law should require state officials to conduct effective official investigations into all incidents of domestic violence of their own volition and, without waiting for a complaint to be made, outline fully to women which legal avenues are available to them and offer them the necessary support and assistance to proceed with the complaint. Additionally, officials should bear the responsibility to initiate legal proceedings in certain circumstances, even where a woman does not file a complaint or withdraws the complaint. For example this may be necessary in cases involving occurrences or threats of physical violence,

71 CEDAW, *General Recommendation 28*, Para. 34; CEDAW, *AT v. Hungary*, Communication No. 2/2003, 26 January 2005, Paras. 9.2-9.6; CEDAW, *Şahide Goekce v. Austria*, Communication No. 5/2005, 5 August 2007, Para. 12.3.b; CEDAW, *Fatma Yildirim v. Austria*, Communication No. 6/2005, 1 October 2007, Para. 12.3.b.

72 United Nations, *Handbook for Legislation on Violence against Women*, New York: Division for the Advancement of Women; 2010, pp. 37-38; United Nations, *Domestic Violence Legislation and its Implementation: An Analysis for ASEAN Countries based on International Standards and Good Practices*, revised 2nd edition, Bangkok: UN WOMEN; 2011, p. 49.

a history of violence or where there are other risks of repeated incidents. Meanwhile the victim's safety and wellbeing should always be the priority and considerations such as marital unity or cohabitation should not feature. Mediation or settlement should only be contemplated in exceptional cases and should only be pursued at the instigation of the survivor, should be subject to court oversight, including an inquiry into the reasons why the person has chosen that course of action, and should be conducted by an independent third party and not a family member of a concerned party.⁷³

Sexual Assault

The Thai Penal Code criminalizes different forms of sexual violence through provisions on rape,⁷⁴ indecent assault⁷⁵ and a variety of provisions on sexual conduct involving children under 15.⁷⁶ Other provisions of the Code and of the corresponding Criminal Procedure Code, detail the way in which these crimes shall be investigated and sanctioned. Despite recent reforms, problems persist.

Thai law specifies that where rape or indecent assault does not take place in public and does not involve use of a weapon or result in grievous bodily harm or death, it shall be treated as a compoundable offence.⁷⁷ As with cases of domestic violence this means that where the State then initiates an investigation and prosecution, it must cease legal proceedings if the victim withdraws the complaint and/or decides to reach a settlement with the alleged perpetrator.⁷⁸ It also means that an official investigation cannot be initiated unless the victim makes an official complaint.⁷⁹ As in instances of domestic violence such a system places a significant onus on a woman to seek out and request an official investigation and prosecution, rather than situating the responsibility firmly on the shoulder of State officials. Once again, when considered in light of the requirements outlined above, such a system does not meet the standards required by Thailand's international obligations regarding violence against women.

Indeed, the legal experts and NGO representatives with whom we discussed this matter again expressed the view that this legal regime perpetuates the impression that such instances of sexual violence are personal matters and

⁷³ *Ibid.*

⁷⁴ Criminal Code Section 276-277 revised by Criminal Code Amendment Act No.19, B.E. 2550 (2007).

⁷⁵ Criminal Code Section 278-279 revised by Criminal Code Amendment Act No.8, B.E. 2530 (1987).

⁷⁶ Criminal Code Section 277 revised by Criminal Code Amendment Act No.19, B.E. 2550 (2007); Section 279 revised by Criminal Code Amendment Act No.8, B.E. 2530 (1987); Section 282(3rd paragraph), 283(3rd paragraph) and 283 bis (2nd paragraph) revised by Criminal Code Amendment Act No.14, B.E. 2540 (1997).

⁷⁷ Criminal Code Section 281 revised by Declaration of the Revolutionary Council No.11, 21st Nov B.E. 2514 (1971).

⁷⁸ Criminal Procedure Code, Section 39

⁷⁹ Criminal Procedure Code, Section 121

are of less importance than other crimes.⁸⁰ As with domestic violence and as discussed in *Section 5* below, interrelated with this are the accounts we received indicating that sometimes key justice sector actors such as police, prosecutors and judiciary, do not effectively deal with reports of sexual violence. In addition some of those we interviewed queried whether the law promotes a preventative approach to sexual violence. For example, one representative of an NGO providing direct legal and social assistance to survivors of violence spoke of instances where due to the negotiation of monetary settlements a perpetrator did not face criminal consequences for his conduct and was alleged to have subsequently committed repeat offences.⁸¹

Another legal gap that was brought to our attention is the absence of legislative provisions, regulations or guidelines for prosecutors and the judiciary regarding the applicable rules of evidence in cases of sexual violence and what the requirement of *consent* entails. Those we spoke to indicated that in the absence of such guidance, factors such as whether there is proof of injury or other physical evidence of struggle, the time-lapse between the alleged incident and the victim's bringing it to the attention of the authorities, the victim's background and sexual history, and the nature of the relationship between the victim and alleged perpetrator are often determinative criteria in decisions to pursue a prosecution and in Courts' decisions.⁸²

International authorities have clearly indicated that recourse to most such criteria will undermine compliance with the requirement that justice processes be gender sensitive as they reflect reliance on gender stereotypes or discriminatory assumptions. For example, CEDAW has held that Courts must not be guided by notions of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence.⁸³ It has outlined that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.⁸⁴ It has also criticized situations

80 e.g. ICJ & JPF Interviews with: K. Jaded, Friends of Women Foundation, Bangkok, 11 May 2011; Naiyana Supapung, Teeranat Kanjanauksorn Foundation, Bangkok, 20 July 2011 & 16 December 2011; Usa Lertsrisuntad, Foundation for Women, Bangkok, 15 December 2011; Bundit Panwiset, Friends of Women Foundation, Bangkok, 12 January 2012.

81 ICJ and JPF Interview with Bundit Panwiset, Friends of Women Foundation, Bangkok, 12 January 2012.

82 ICJ and JPF Interviews with Naiyana Supapung, Teeranat Kanjanauksorn Foundation, Bangkok, 20 July 2011 & 16 December 2011; Usa Lertsrisuntad, Foundation for Women, Bangkok, 15 December 2011; Bundit Panwiset, Friends of Women Foundation, Bangkok, 12 January 2012. ICJ and JPF Interview with Justice Dol Bunnag, Chief Judge of the Office of the President of the Supreme Court, Bangkok, 16 December 2011; See also for an in depth exploration: Research on Gender Insensitivity in Judicial Decisions of the Supreme Court, Report, Law Faculty of Chiang Mai University, 2008, http://cedaw-seasia.org/docs/thailand/T1_research_gen_insensitivity.pdf

83 CEDAW, *Karen Tayag Vertido v. Philippines*, Communication No. 18/2008, 1 September 2010, Paras. 8.5-8.9.

84 CEDAW, *Karen Tayag Vertido v. Philippines*, Communication No. 18/2008, 1 September 2010, Para. 8.5.

where undue attention is paid to the fact that the woman and the alleged perpetrator knew each other, explaining that it indicates reliance on gender-based myths and misconceptions.⁸⁵ In addition laws or regulations should prohibit courts from drawing any adverse inference from a delay of any length between the alleged incident and the victim's report,⁸⁶ and should prohibit the introduction of evidence of a woman's sexual history.⁸⁷

Investigation & Court Procedures: As outlined above Thailand's Constitution provides that women must be accorded protection with regard to appropriate trials and afforded the right to proper treatment in cases related to sexual violence. In this context amendments to the Criminal Procedure Code have also introduced requirements specifying that survivors of sexual violence should be interviewed by female police investigators and should not be required to confront the alleged perpetrator during the legal process. However those we spoke to repeatedly expressed the view that further legislative and regulatory detail regarding the necessary procedures is vital. They indicated that detailed regulations and guidelines must be put in place which outline what is required by the Constitutional guarantees and detail the specific procedures relevant officials and institutions should follow as a result when dealing with cases of gender-based violence. They highlighted that recourse to such procedures must be mandatory rather than discretionary. Pointing to the facilities and procedures in operation at the Thonburi Criminal Court as a positive example, many expressed the view that required measures should include: conducting interviews in private rooms, ensuring female interpreters are available where necessary, establishing appropriate mechanisms for women to give testimony and putting in place proper Court facilities, including separate waiting rooms and entrances for complainants and defendants. Many also underlined the importance of ensuring the particular needs of certain groups of women are taken into account. For example we were told of specific difficulties which can arise for disabled women in seeking justice, and of the need for procedural rules to address these.

Women Police Officers: Almost all those we spoke to also underlined the need for the number of women in key professions, and particularly law enforcement, to be increased. Indeed although the Criminal Procedure Code provides that women who have faced sexual violence should be interviewed by female police investigators, in August 2011 only 144 of 6,542 investigators were women (*Statistics, Office of Royal Thai Police, 2011*). This very small number makes it difficult in practice to ensure compliance with the legislation.

85 CEDAW, *Karen Tayag Vertido v. Philippines*, Communication No. 18/2008, 1 September 2010, Para. 8.6.

86 United Nations, *Handbook for Legislation on Violence against Women*, New York: Division for the Advancement of Women, 2010, pp. 42-43.

87 *Ibid.* pp. 43-44.

Sexual Harassment

A particular legislative gap which was brought to our attention relates to sexual harassment.⁸⁸ Although, depending on the circumstances and context, a number of different laws may be applied to instances of sexual harassment offering the victim a route to remedy and providing for accountability of the perpetrator, such legal protection does not cover all contexts or kinds of sexual harassment. As a result, in a range of situations women who face sexual harassment appear to be left without adequate legal protection and a clear basis on which to access justice.

Where sexual harassment also constitutes *rape* or *indecent assault* it will be covered by the relevant criminal prohibitions. However, beyond such conduct sexual harassment is not covered by the criminal law and there is no law that cohesively deals with sexual harassment in all relevant contexts. Although the Labour Protection Act now prohibits sexual abuse, harassment and nuisance against employees by their superiors,⁸⁹ it only applies in certain employment contexts.⁹⁰ For example it does not apply to public officials, and the penalty is a relatively small fine.⁹¹ Meanwhile the Civil Service Act prohibits sexual harassment by civil servants working in government departments.⁹² Once again the possible penalties are low, ranging merely from salary reductions to dismissal.⁹³ In addition, the Act does not apply to military and police officials, in whose case such conduct can only be dealt with under internal disciplinary rules which do not explicitly refer to sexual harassment but treat it as “misconduct” in relation to which a range of internal sanctions, such as salary reductions, lack of promotion, termination may be applicable.

Meanwhile although sexual harassment can occur in any number of circumstances, it appears that except in the case of conduct by civil servants, Thai law currently does not address the matter beyond the employment context.⁹⁴ Nor do any of the existing laws define the concept even in relation to the limited circumstances of their application. As a result, it appears that

88 e.g. ICJ & JPF Interviews with: K.Jaded, Friends of Women Foundation, Bangkok, 11 May 2011; Naiyana Supapung, Teeranat Kanjanauksorn Foundation, Bangkok, 20 July 2011 & 16 December 2011; Sutada Mekrungruengkul, Gender and Development Research Institute, Chiang Mai, 14 December 2011; ICJ and JPF Interview with Justice Dol Bunnag, Chief Judge of the Office of the President of the Supreme Court, Bangkok, 16 December 2011. See for a comprehensive overview and analysis, *Sexuality Education and Sexual Harassment: Two Critical Issues on Sexual Reproductive Health and Rights in Thailand*, Suchada Thaweessit and Pimpawan Boonmongkon, 2009, Arrow ICPD+15 Publication.

89 Labour Protection Act B.E.2541 (1998), Section 16 as amended by Labour Protection Act (No. 2), B.E. 2551 (2008), Section 8.

90 Labour Protection Act B.E.2541 (1998), Section 4 and Section 22.

91 Labour Protection Act B.E.2541 (1998), Section 147 (fine not exceeding 20,000 THB).

92 Civil Service Act B.E. 2551 (2008), Section 83(8)

93 Civil Service Act B.E. 2551 (2008), Section 88

94 In certain contexts, for example educational institutions, Government policies have been issued which most schools and universities seek to follow through making sexual harassment the subject of internal institutional regulations.

decisions as to whether a course of conduct constitutes sexual harassment is left to the assessment of a relevant individual, official or judge. Studies have indicated that only a small set of actions are considered to be sexual harassment and many forms of harassment are often not considered to be part of the problem or in breach of the law.⁹⁵ For example, often sexual harassment may be mistakenly considered as only capable of occurring between superiors and subordinates, rather than between other individuals where there are not necessarily unequal power relations (e.g. between co-workers or co-students).

The lack of such legal definitions and parameters means that women who are faced with unwelcome behavior of a sexual nature (but which they do not identify as rape or sexual assault) may be left without clarity as to whether the conduct was lawful or not. Those we spoke to indicated that it may also mean that women do not self-identify instances of sexual harassment as such or even if they do, those to whom they complain may similarly not do so. This lack of clarity and mistaken impressions necessarily impact the ability to seek justice, even in those instances where the legal prohibition does apply.

It appears that the Ministry for Social Development and Human Resources has taken steps towards the elaboration and adoption of new legal provisions on sexual harassment, which may involve amendments to the criminal code as well as the inclusion of relevant provisions in draft gender equality legislation. Those we spoke to expressed the view that among other things it will be key for any new legislation to define sexual harassment in accordance with international standards and best practice, ensure that all forms of harassment, and a wide range of relevant contexts, are clearly encompassed within its remit, and provide for effective remedies and appropriate penalties.

Indeed such steps are necessary to ensure Thailand's compliance with international obligations. International authorities have clearly specified that, as with other forms of violence against women, States must exercise due diligence to prevent, investigate, and punish sexual harassment.⁹⁶ This necessitates the establishment of a clear legal prohibition and corresponding remedial framework that women can access directly and which applies in a variety of contexts (e.g. buying and selling goods, service provision, sporting activities, property transactions), that clearly defines what constitutes sexual harassment and that puts in place clear and accessible procedures for remedy and accountability.

⁹⁵ For a comprehensive analysis see, *Sexuality Education and Sexual Harassment: Two Critical Issues on Sexual Reproductive Health and Rights in Thailand*, Suchada Thaweessit and Pimpawan Boonmongkon, 2009, Arrow ICPD+15 Publication, pp. 20 – 21; Examples of Court decisions include: Supreme Court's Decision No.9021/2544(2001).

⁹⁶ See obligations in relation to violence against women summarized above, and see CEDAW, General Recommendation 19, Para. 9.

Indeed, best practices indicate that sexual harassment should be subject to prohibitions on discrimination and that certain forms of harassment should be criminalized.⁹⁷ Definitions should clearly encompass behaviour in both horizontal and vertical relationships and should include a wide range of conduct (e.g. physical conduct, requests for sexual favours, verbal or non-verbal conduct of a sexual nature, and display of sexually explicit material).⁹⁸

3.3 Labour Protection & Domestic Workers

International law and standards require that women in Thailand be afforded equal workplace protection and rights, which includes the right to social security and protection of health and safety in working conditions.⁹⁹ This has a number of repercussions for Thailand's domestic legal system. For example, it means not only that the law must guarantee equal treatment and non-discrimination on the basis of gender at work, but also that forms of work, which are predominantly carried out by women, such as domestic work, must be regulated and subject to labour rights protection and effective remedies so that all women workers can seek justice and claim their rights.¹⁰⁰

Although Thailand's labour law includes a range of legislative provisions the purpose of which is to protect the rights of workers, including female workers' enjoyment of equal treatment and rights at work, those we spoke to indicated that a number of legal gaps and weaknesses persist. We are not able to offer a comprehensive human rights or gender equality analysis of these matters here. Rather we briefly explore some of the issues brought to our attention through consideration of the legal situation of domestic workers.

Indeed although the terms of Thailand's Labour Protection Act do not themselves exclude certain classes of workers or spheres of employment from its scope, they specify that regulations may do so in certain areas of work.¹⁰¹ As a result, in this manner, any domestic work that is not part of a business operation has been excluded from the scope of many protective provisions in the Act¹⁰² and although a positive development in the form of a Homeworkers Protection Act entered into force in 2010, its provisions apply only to those working at home in the employ of industrial enterprises.¹⁰³

97 United Nations, *Handbook for Legislation on Violence against Women*, 2010, pp. 27-28.

98 *Ibid.*, p. 27.

99 Article 11, CEDAW; Articles 2(2) and 7, ICESCR.

100 CEDAW, *General Recommendation 26*, Paras. 26 & 34. See also, HRC, *General Comment 28, Equality of Rights between Men and Women (article 3)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), Para. 31.

101 Labour Protection Act B.E.2541 (1998), Section 22

102 Ministerial Regulation issued under the Labour Protection Act (B.E. 2541). Meanwhile Agricultural work and other forms of work have been excluded altogether Ministerial Regulation No. 9 issued under the Labour Protection Act. For a comprehensive overview and analysis, see *Domestic Workers in Thailand, Their Situation, Challenges and the Way Forward*, ILO Situational Review, 2010.

103 Homeworkers Protection Act B.E.2553 (2010), Section 3

As a result, the women workers who comprise the vast majority of Thailand's domestic cooks, cleaners, and caregivers are not subject to the majority of legal provisions that seek to protect the human rights of individuals in the workplace. While they are covered by limited protections they are excluded from entitlements to minimum wage and overtime pay, maximum working hours of 48 hours per week, rest periods during the working day, at least one day off per week, a minimum of 13 national holidays, sick leave and maternity leave.¹⁰⁴ They also fall outside social security protection as regulated by the Social Security Act.¹⁰⁵

These exclusions ultimately appear to leave domestic workers without a clear legal basis in domestic law on which to claim most of the workplace protections to which they are entitled under international standards, thereby significantly limiting their ability to access justice. While perhaps in theory many of the rights protections enshrined in the Constitution could potentially provide a basis for claim, no one we spoke to was aware of such a route to justice ever having been attempted. Indeed, representatives of organizations working with women domestic workers we spoke to repeatedly highlighted the serious effects this lack of regulation and legal protection can have on domestic workers who are left in an extremely precarious situation, almost entirely dependent on the attitudes of their employers and subject to significant workplace abuses without access to a remedy.¹⁰⁶ In addition, as explored in *Section 4* below, because domestic workers are often migrant women, these realities are often compounded by a range of additional barriers to justice they encounter.¹⁰⁷

Those we spoke to noted that a draft Ministerial Regulation Concerning the Protection of Domestic Workers is under discussion. In order to ensure compliance with international obligations, it will be vital that such a regulation extend effective and comprehensive protection to domestic workers. Indeed, CEDAW has specified that in order to ensure substantive equality, occupations dominated by women, such as domestic work, must be protected by labour laws, including wage and hour regulations, health and safety codes and holiday leave regulations.¹⁰⁸ The HRC has made similar pronouncements highlighting that women are often employed in areas that are not protected by labor law and that States must address resulting

¹⁰⁴ Ministerial Regulation issued under the Labour Protection Act (B.E. 2541).

¹⁰⁵ Social Security Act B.E.2533 (1990), Section 5

¹⁰⁶ ICJ & JPF Interviews with Jackie Pollack, Migrants Assistance Programme, Chiang Mai, 13 December 2011; Bundit Panwiset, Friends of Women Foundation, Bangkok, 12 January 2012. For a comprehensive analysis and overview of the particular issues facing migrant domestic workers see: *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme (advance copy shared with ICJ & JPF). See also, *Domestic Workers in Thailand, Their Situation, Challenges and the Way Forward*, ILO Situational Review, 2010.

¹⁰⁷ ICJ & JPF Interview with Jackie Pollack, Migrants Assistance Programme, 13 December 2011. For a comprehensive analysis and overview see: *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme (advance copy shared with ICJ & JPF).

¹⁰⁸ CEDAW, *General Recommendation 26*, Para. 26(b).

inequalities through enacting relevant legislation.¹⁰⁹ Meanwhile, CESCR has stated that domestic and agricultural work must be properly regulated by national legislation so that workers in those sectors enjoy the same level of protection as other workers¹¹⁰ and has held that special attention must be paid to the social security needs of informal sector workers and domestic workers, among others.¹¹¹

109 HRC, *General Comment 28*, Para. 31.

110 CESCR, *General Comment 18: The Right to work (Article 6)*, U.N. Doc. E/C.12/GC/18, adopted 24 November 2005, Para. 10.

111 CESCR, *General Comment 19: The Right to Social Security (Article 9)*, U.N. Doc. E/C.12/GC/19, 4 February 2008, Para. 31.

4. Conflicting Laws & Plural Justice Systems

Although progress remains to be made, through the recent enactment of new legal provisions, the repeal or expansion of existing laws, and the adoption of policy and practical measures, Thailand has taken a number of steps to advance the legal protection of women's human rights and access to justice. Meanwhile, the enactment of legislation and regulations in the foreseeable future dealing comprehensively with gender equality, sexual harassment, reproductive health, and the rights of domestic workers, offers an opportunity to reinforce the ability of the Thai legal framework to respond to the realities of women's lives.

Nonetheless, those we spoke to throughout Thailand expressed the view that, for certain groups of women in Thailand, laws recognizing rights and providing legal protection and avenues to justice are largely irrelevant. For these women their ability to access justice and claim their rights may be hindered by a range of factors. As we explore in *Section 5* sometimes inappropriate conduct and practice of key justice sector officials persists, as do practical obstacles related to financial means, language barriers and lack of legal literacy, which we address in *Section 6*. But in addition there is the parallel application of a number of other legal provisions, and the operation in certain communities or provinces of plural state and informal justice systems.

Again and again, those we interviewed highlighted that in practice for migrant women, many of the avenues to justice offered by Thai law are largely inaccessible and effectively illusory. They explained that the operation of strict and inflexible immigration legal regimes prevent women migrant workers from making complaints to authorities or seeking assistance in relation to the human rights violations and abuses they encounter. Similarly we heard how sex workers will not report violations or abuses they suffer or seek justice due, among other things, to fears of detention, prosecution and fines under a range of criminal prohibitions related to prostitution.

In many respects the impression we received from those we spoke to among these communities about the legal system was one of betrayal. It seems that in their experience the law holds out something with one hand, and takes it away with another. For although in some respects the system is seeking to guarantee women's rights and offer them legal protection and avenues to justice, their experience is that it simultaneously places significant barriers between women from certain communities and those protections. Meanwhile the legal framework does not in any way acknowledge or address this perceived contradiction, which at least among those we interviewed appears to increase a sense of disavowal.

Meanwhile we were told of somewhat differently shaped problems faced by women seeking justice in the context of plural justice systems in operation in certain locations. Women from Burma living in camps for displaced persons, where internal camp justice systems apply in relation to certain conduct while other issues are handled within the Thai justice system, told us of difficulties that arise for women as a result of the absence of legal clarity and certainty as to what rules and processes apply, coupled with insufficient or poor quality support systems, practical measures and coordination. Meanwhile our conversations with Muslim women in the Southern Border Provinces revealed certain access to justice issues that arise for them in the context of the application of Islamic family and inheritance law in the provinces.

A range of Thailand's international obligations necessitate that the Government take urgent steps to address these issues. As outlined in *Section 2* above, the adoption of laws that recognize and protect women's human rights, gender equality and outline avenues to effective remedies in case of abuses and violations is an important step towards compliance with relevant international obligations. However, by themselves the existence of such legal frameworks will be insufficient. International law and standards also require Thailand to ensure the practical realization of rights, including through taking effective implementation measures to ensure the enforcement of rights and enable individuals' meaningful access to protective and remedial frameworks in practice.¹¹² Meanwhile, Thailand must guarantee the rights of every woman in Thailand, regardless of nationality, legal status, ethnicity, religion, or occupation.¹¹³ In this context Thailand is required to guarantee equality before law and equal protection of the law, to eliminate direct and indirect forms of discrimination on grounds of sex and on grounds such as nationality, legal status and religion,¹¹⁴ as well as intersectional forms of discrimination,¹¹⁵ and to guarantee substantive equality in the enjoyment of rights.¹¹⁶ These obligations mean that Thailand must not only ensure its laws, policies, programmes and practices do not *explicitly* discriminate on prohibited grounds, but also that its laws, policies, programmes or practices, which appear to be neutral on their face, do not have a discriminatory effect in practice i.e. do not result in de facto impairment of the enjoyment of human

112 HRC, *General Comment 3*; HRC, *General Comment 31*; CEDAW, *General Recommendation 28*; CEDAW, *General Recommendation 26*; CESCR, *General Comment 16* Para. 21; CESCR, *General Comment 9*, Paras. 2-3.

113 See generally, Articles 2.1, 26 ICCPR; Article 2.2, ICESCR; HRC, *General Comment No. 18, Non-Discrimination*, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003); HRC, *General Comment No. 31*; CESCR, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/GC/20, (2010). An exception relates to the political rights outlined in Article 25, ICCPR, which limits their application to citizens.

114 Articles 2.1, 26 ICCPR; Article 2.2, ICESCR; Articles 1 & 2 CEDAW; CERD, *General Recommendation No.30, Discrimination against Non Citizens*, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (2005); CEDAW, *General Recommendation No. 28*; HRC, *General Comment No. 18*; CESCR, *General Comment No. 20*.

115 CEDAW, *General Recommendation 28*, Paras.18 & 31; CESCR, *General Comment No. 20*, Para.17; CERD, *General Recommendation No. 25*.

116 CEDAW, *General Recommendation No. 25*; CEDAW, *General Recommendation No. 28*; CESCR, *General Comment 20*; HRC, *General Comment No. 18*.

rights or ability to access justice and legal protection.¹¹⁷

In the sub-sections below we briefly outline the accounts of these issues that we received during the exploration process, dealing first with accounts received of how the application of certain legal provisions impacts access to justice by migrant women from neighboring countries and sex workers. We then discuss the way in which parallel justice systems in operation for certain communities in Thailand, effect women. We outline the accounts we received from women from Burma living in displaced persons camps. We then turn to consider the somewhat distinct issues that may be facing Muslim women in the Southern Border Provinces.

Our focus on each of these groups of women has resulted from our ability to access information and interview women from, or those working with, these communities. However, it is in no way comprehensive. There are many other groups of women in Thailand who may potentially face similar obstacles in access to justice.

4.1 Migrant Women Workers

"A woman was raped and she informed us and asked for advice. We advised her that she could make a complaint and seek justice. But we also had to ask if she had legal documents proving she could work in Thailand. If not she would be sent back to her country. We had to explain that if she wanted to get one thing, she would lose another thing. She made the decision. She did not come back again to our office."¹¹⁸

The vast majority of migrants workers in Thailand are from neighboring countries, and specifically Burma/Myanmar, Cambodia and Laos. Many of these are low-wage migrant workers who are documented under Government registration, nationality verification or imported worker schemes for migrant workers.¹¹⁹ Many also remain undocumented, without legal status to reside or work in Thailand. Those we interviewed expressed the view that often no matter what their status, certain immigration laws and policies hamper the ability of migrant workers from these countries to seek justice when they face human rights abuses.

Undocumented Migrants

According to Thai immigration law, undocumented migrants brought to the attention of the authorities should be arrested and deported.¹²⁰ Except

¹¹⁷ *Ibid.*

¹¹⁸ Bundit Panwiset, Friends of Women, ICJ & JPF Workshop on Women's Access to Justice, Bangkok, September 2011

¹¹⁹ Thailand Migration Report 2011, IOM Thailand.

¹²⁰ Immigration Act B.E.2522 (1979), Section 54.

in trafficking cases the terms of the law do not specify that undocumented migrants who have faced human rights abuses in Thailand may be enabled to remain, even for the duration of relevant legal proceedings or investigations.¹²¹

As a result, according to those we spoke to, most undocumented women migrants in Thailand will simply not seek legal protection or justice in relation to the human rights abuses and violations they face, including for example labour and equality rights abuses and sexual violence, harassment and domestic violence. In their experience, receiving legal assistance or seeking remedies or the accountability of the perpetrator are just not within the range of accessible options. In the words of one woman, it is a fact of life that, "you cannot complain because you are illegal."¹²² Although those we spoke to told us that undocumented migrant women who have faced abuses often wish to seek justice and the accountability of the perpetrators, they do not know how to do so without facing arrest and deportation. As one human rights defender from Burma explained, "women may want the perpetrators to be punished, but the process ends, since the women do not have legal documents or legal status."¹²³

In the rare cases where women migrants do seek help or make a complaint those we interviewed said that they are usually arrested and deported or released following the payment of a bribe. As a representative of one organization that provides direct assistance to women survivors of violence explained, "whenever they ask for protection, they will be arrested,"¹²⁴ as "the Thai authorities, especially the police officers, usually have immediate recourse to the immigration law, while other laws on rights protection will only be a subsequent consideration."¹²⁵ Meanwhile, the impression is that in general the original allegation of abuse is almost never followed up or investigated. In the experience of those with whom we discussed these issues, such instances only serve to confirm for undocumented migrant women that seeking justice is not a viable or worthwhile prospect.

Even in those few cases where, despite a woman's deportation the human rights abuse does become the subject of legal proceedings, in the experience of those we spoke to, it almost always ends in a settlement due to the length of the process and the difficulties she will face in traveling back to Thailand to give testimony. In the words of one service provider in the end "almost all of the undocumented migrant women agree to accept a payment by the

121 The Anti Trafficking in Persons Act B.E 2551 (2008), Section 37. Section 17 of the Immigration Act B.E.2522 (1979) does specify that the Government may decide on exceptions to the Immigration Act, allowing a migrant or group of migrants to remain in Thailand.

122 Participant, ICJ & JPF Workshop on Women's Access to Justice, Bangkok, September 2011

123 Participant, ICJ & JPF Workshop on Women's Access to Justice, Bangkok, September 2011

124 Participant, ICJ & JPF Workshop on Women's Access to Justice, Bangkok, September 2011.

125 *Ibid.*

alleged perpetrator and finish the criminal case.”¹²⁶

We were told that as a consequence of these obstacles, gender-based violence or equality rights violations against undocumented women migrants almost always remain unpunished and are therefore perpetrated with impunity. As a number of organizations have documented, this places undocumented women in an extremely precarious situation, continuously at risk of serious violence and human rights abuses.¹²⁷ In the words of one organization working extensively with migrant communities, many live, “in a constant state of insecurity in all aspects of their lives: in public spaces, in the workplace, and in the home.”¹²⁸ Meanwhile as we address in *Section 5* below, reports indicate that instances of sexual violence and harassment by government officials are not uncommon and include the extortion of sex in exchange for not arresting a woman and rape and assault following arrest.¹²⁹

Documented Migrants

At first glance, for migrant women workers from Burma, Cambodia and Laos who are legally working in Thailand, the legal situation appears different. For unlike undocumented migrants they are not subject to arrest and deportation upon contact with officials. However, those we spoke to indicated that in practice a range of other legal requirements, related to their status as migrant workers, can similarly limit the extent to which they will seek legal protection. For example, legal status is linked to a migrant worker’s employer and regulations do not allow for a change of employer, except in a small number of cases.¹³⁰ Meanwhile, recently introduced systems assign migrant workers to a particular category and nature of work on registration and do not permit movement to another sector or even type of work within the same sector or for the same employer.¹³¹ In addition, in certain instances migrant workers are prohibited from traveling outside a specific province.¹³²

In varying ways, in the experience of those we interviewed such restrictions impact the ability in practice of affected migrant women workers to seek

126 ICJ & JPF Interview with Bundit Panwiset, Friends of Women Foundation, Bangkok, 12 January 2012

127 For comprehensive analysis, overview and testimonies see: *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme (MAP) (advance copy shared with ICJ & JPF). See also Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, 2010.

128 *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme, p. 82 (advance copy shared with ICJ & JPF). See also Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, 2010.

129 *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme, pp. 83-84 (advance copy shared with ICJ & JPF). See also Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, 2010.

130 Alien Work Act B.E. 2551 (2008), Section 26; Handbook for Employers on Migrant Registration B.E.2554 (2011), Conditions and Responsibilities of Employer Page 30, Ministry of Labor.

131 Alien Work Act B.E. 2551 (2008), Section 26.

132 Interior Ministerial Declaration (issued by the Cabinet Resolution 26 April B.E.2554 (2011)) 25 May B.E.2554 (2011), Section 4(3), allowing some migrant workers to travel in particular cases.

and enjoy the legal protection and remedies that the law enshrines. As one representative of an organization providing direct assistance to migrant women explained, as a result of restrictions on migrant workers travel and/or change of employer many migrant women facing gender-based violence at home or in the workplace cannot physically leave abusive situations without breaching the terms of their work permit and thereby losing legal status and becoming undocumented.¹³³ Meanwhile we were told that women who do leave abusive situations in breach of these requirements do not believe they can then seek legal assistance, remedy or the accountability of the perpetrators without significant risk of arrest and deportation.

An exception to the prohibition on changing employers specifies that where making a complaint against the employer migrants will not lose legal status or face arrest and deportation if they find a new employer within seven days.¹³⁴ However those we interviewed explained that in their experience this exception does not increase the extent to which migrant workers are willing to make complaints and pursue justice in cases of workplace abuse by their employers, because in practice it can be very difficult to find a new employer within the designated period.

We were also told that there is a widespread practice by employers of holding migrant work permits and passports that in turn compounds the situation. In such circumstances, if a migrant woman wishes to leave or seek justice she must often do so without her ID and work permit and in the experience of those we spoke to is thereby at risk of being treated as an undocumented migrant and arrested and deported or subject to bribes or extortion.

International Obligations

Although the terms of Thailand's Constitution, Criminal Code and Criminal Procedure Code, Domestic Violence Victim Protection Act and Labour Protection Act in no way exclude migrant women from the rights and protections they offer individuals in Thailand, the practical effect of a range of other laws and legal frameworks appears to limit their ability to benefit large groups of migrant women. This undermines Thailand's compliance with international law and standards and the identification of solutions is imperative. For as outlined above, all individuals in Thailand, regardless of nationality or legal status, must be able to exercise their rights in practice, including through real and effective access to protective and remedial frameworks.

A number of international authorities have addressed the content of these

¹³³ ICJ & JPF Interview with Jackie Pollack, Migrants Assistance Programme, Chiang Mai, 13 December 2011. See also, *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme (MAP) (advance copy shared with ICJ & JPF).

¹³⁴ Handbook on Process for Alien Employees to Return their Work Permit Card, Ministry of Labor.

obligations in the context of migration, specifying that States must identify non-citizen, migrant, refugee, asylum-seeking and stateless women within the jurisdiction of the State party as rights-bearers, and pay particular attention to the protection gaps they may face. For example, CEDAW has outlined that although States are entitled to control their borders and regulate migration, in doing so they must protect the human rights of documented and undocumented migrant women.¹³⁵ For its part the HRC has stated that the enjoyment of rights in practice, “must be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons.”¹³⁶ Meanwhile CESCR has specified that, “rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”¹³⁷

In this context CEDAW has observed that often both documented and undocumented migrant women workers, “may not enjoy the protection of the law of the countries concerned, at either *de jure* or *de facto* levels,”¹³⁸ and has underlined that their, “access to justice may be limited.”¹³⁹ It has emphasized that undocumented women migrants, “are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the risk of exploitation ... they may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws.”¹⁴⁰ It has underlined that international obligations require that States must ensure that documented and undocumented women migrant workers have the ability to access legal protection and remedies in practice and has specified that this requires them to repeal or amend laws that prevent women migrants from using the courts, and other systems of redress.¹⁴¹

4.2 Sex Workers

“Sex workers in Thailand cannot get access to justice. They very rarely get past the police station.”¹⁴²

“Because sex workers are often outside the protection of the law they are particularly vulnerable to coercion and rape...their basic human rights to protection and redress are commonly disregarded.”¹⁴³

¹³⁵ CEDAW, *General Recommendation 26*, Para. 3-7.

¹³⁶ HRC, *General Comment 31*, Para.10. See also, HRC, *General Comment 15*, HRC, *General Comment 15, The position of aliens under the Covenant* (Twenty-seventh session, 1986), Para. 1.

¹³⁷ CESCR, *General Comment 20*, Para. 30.

¹³⁸ CEDAW, *General Recommendation 26*, Para. 4.

¹³⁹ CEDAW, *General Recommendation 26*, Para. 21.

¹⁴⁰ CEDAW, *General Recommendation 26*, Para. 22.

¹⁴¹ CEDAW, *General Recommendation 26*, Para. 26.

¹⁴² ICJ & JPF Interview with Liz Hilton, Empower Foundation, Bangkok, 11 May 2011.

¹⁴³ UNFPA, *HIV/AIDS, Gender, and Sex Work Fact Sheet*, UNAIDs Interagency Task Team on Gender and HIV/AIDS, 2005, p. 3.

In Thailand a range of activities associated with selling sex, such as solicitation for the purpose of prostitution and living off the proceeds of prostitution, are criminal offences, and suspects may face arrest, prosecution and fines and potential imprisonment.¹⁴⁴ Those we spoke to regarding sex workers' ability to access justice explained that they will almost never report the abuses they face or seek legal protection or justice due to fear of being fined or prosecuted under these laws.

Where they are also undocumented migrants, their fears are compounded by the threat of deportation under immigration laws. As a result, those we spoke to explained that for most sex workers, taking steps to seek legal protection, remedies or the accountability of the perpetrator, when they face abuses, is simply not an option. In the words of one sex worker we interviewed, "you could lose everything if you complain and eight people are dependent on me, it's not worth it."¹⁴⁵

Meanwhile in the very rare instances where sex workers do seek to make complaints to police or other authorities, those we spoke to underlined that police reactions usually confirm the women's fears. "When they go to report assault, theft or rape police won't accept their complaints or will threaten to press charges against them."¹⁴⁶ In addition, as discussed further in *Section 5*, those we interviewed specified that sex workers sometimes face sexual violence and harassment by police officers and other officials.

Many expressed the view that ultimately sex workers are left in a *de facto* vacuum where legal protection and remedies are essentially unavailable to them. In the view of one representative of an organization working with sex workers throughout Thailand, "there is complete impunity for severe violence against sex workers."¹⁴⁷ In their experience this creates a permissive climate in which anything goes and sex workers are regularly subject to human rights abuses and violations by employers, clients, and state officials, including serious crimes such as rape, gang rape and physical assault, without any prospect of protection and redress.

Indeed the sense of exclusion and betrayal among the women sex workers we spoke to was substantial. The words of one woman sum up the views of many: "the laws do not protect us, the laws only punish us and leave us open to exploitation."¹⁴⁸

Thailand's international human rights obligations to guarantee the human

144 Prevention and Suppression of Prostitution Act, B.E. 2539 (1996), Section 5 – 7; Criminal Code Section 286.

145 Participant, ICJ & JPF group discussion with 6 sex workers and 2 activists, Chiang Mai, 13-14 December 2011.

146 ICJ & JPF Interview with Liz Hilton, Empower Foundation, Bangkok, 11 May 2011.

147 ICJ & JPF Interview with Liz Hilton, Empower Foundation, Bangkok, 11 May 2011.

148 Participant, ICJ & JPF group discussion with 6 sex workers and 2 activists, Chiang Mai, 13-14 December 2011.

rights of *all* women in Thailand necessitate the identification of ways in which to overcome this disconnect between the existence of laws guaranteeing human rights and prohibiting sexual violence and the ability of a group of women, often facing significant violations and abuses, to access them. International expert bodies have underscored the vital need to enable sex workers' enjoyment of the full range of their equal human rights, including access to effective remedies and legal protection.¹⁴⁹

Indeed, the obligation to guarantee the human rights of all women, including sex workers, applies irrespective of the applicable legal regime. Even where aspects of its criminal laws apply to elements of sex work, a State must take steps and put mechanisms in place that ensure that such laws do not effectively disable sex workers enjoyment of their human rights in practice. The UNAIDS Advisory Group on HIV/AIDS and Sex Work has specified that, "where criminal law applies, governments and donors should support sex workers' access to legal services, mechanisms of accountability for police abuse, information for sex workers on their rights, and removal of impediments to forming sex worker organisations."¹⁵⁰ It has underlined that laws concerning sex work "should be applied in ways that do not violate sex workers' rights or dignity and that ensure their enjoyment of due process of law."¹⁵¹

Meanwhile international experts have pointed to evidence indicating that the application of criminal laws to sex workers reduces their ability to claim their rights and seek legal protection and justice. They outline that best practice encourages a process of law reform. For example one United Nations Special Rapporteur has outlined that, "the criminalization of sex work often means that sex workers feel unable to enforce their basic rights, as their status and work are illegal. They "live in fear" of police and clients, and feel unable to report crimes against them due to fear of arrest."¹⁵² Meanwhile the UNAIDS Advisory Group has specified that, "sex workers who suffer violence or abuse at the hands of clients or other persons are too fearful to report these offenses to the police. They have little reason to expect that the police would help them. The application of criminal law to sex work is often associated with heinous abuses of the rights of sex workers. They are highly vulnerable to sexual and physical abuse."¹⁵³

149 See for example: *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/HRC/14/20, 27 April 2010; UNAIDS, *The Report of the UNAIDS Advisory Group on HIV/AIDS and Sex Workers*, 15 December 2011; UNFPA, *HIV/AIDS, Gender, and Sex Work Fact Sheet*, UNAIDS Interagency Task Team on Gender and HIV/AIDS, 2005.

150 UNAIDS, *The Report of the UNAIDS Advisory Group on HIV/AIDS and Sex Workers*, 15 December 2011, p. 9.

151 *Ibid.*, p. 8.

152 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/HRC/14/20, 27 April 2010, Para. 42.

153 UNAIDS, *The Report of the UNAIDS Advisory Group on HIV/AIDS and Sex Workers*, 15 December 2011, p. 7.

4.3 Women from Burma in Displaced Persons Camps

Throughout the past year we spoke to a number of women asylum seekers and displaced persons from Burma living in Thailand about the particular access to justice issues they face. Akin to other migrant women in Thailand their accounts of the obstacles they face in claiming rights and seeking justice indicate a complex interplay of legal and practical hurdles.

Thailand is not a party to the UN Refugee Convention and has not enacted domestic legislation regulating the granting of refugee status. Although the Government and the UNHCR established a process to register refugees and displaced persons, due to a range of factors, many remain unregistered and as a result, are simply considered to be undocumented migrants. We were told that where these women are not living in established displaced person camps, as is the case for other undocumented migrants, they will simply not feel able to seek legal protection or justice for human rights abuses or violations they face in Thailand for fear of arrest and deportation once they come into contact with the authorities. Their fear of deportation will often be significantly exacerbated due to a risk of persecution or human rights abuses on return. In addition those we spoke to explained that often women in this situation who may have suffered significant human rights abuses before entering Thailand, will not be in a position to access relevant trauma and health support mechanisms in Thailand.

Meanwhile, it emerged from our conversations that women living in border camps for displaced persons from Burma face a range of challenges when trying to access to justice. The camps, many of which have existed for over 25 years, are supervised by the Thai Government, with basic material assistance (food, shelter, medicines) and protection assistance being provided by international civil society organizations and UNHCR, and with Refugee Committees, comprising representatives of camp residents, running the daily affairs of the camps and acting as liaison with the Government and international organizations. An internal camp justice system is in operation in each camp where Camp Committees administer justice in a wide range of cases, considering incidents and outlining remedies and imposing sanctions. The applicable rules are largely unwritten and appear to be drawn on a discretionary basis from a mix of sources including Burmese law, traditional community practices, Thai law and international standards. A process of 'reform' conducted by international civil society organizations and the Refugee Committees is ongoing with the purpose of improving, synthesizing and codifying the applicable rules. Meanwhile the Government has also specified that certain crimes, denoted as "absolute jurisdiction offences," may not be dealt with by the camp justice systems and Camp Committees, but must instead be referred to the Thai Justice System and dealt with under the Thai Criminal Code and Criminal Procedure Code. In such cases UNHCR

or 'legal assistance committees' established by international civil society liaise with Thai officials. Such offences include non-compoundable rape, murder, assault resulting in grievous bodily harm, and sexual offences against children. It appears that if the victim so wishes other crimes may also be dealt with by the Thai justice system, but it is not mandatory.

This division of jurisdiction appears to be relatively recent and is indicative of attempts to make Thai laws offering legal protection and avenues to justice relevant to those living in the camps. Yet many of the women we spoke to expressed the view that a range of problems continue to arise as a result of the way in which this dual-track system is managed in practice.

We present a short summary of their accounts here. It is important to underline our appreciation of the fact that the situation in the camps is complicated and intricate. We did not undertake an in-depth study of the situation or a comprehensive rule of law or human rights analysis of these issues. In addition we have not considered more fundamental or general issues regarding the operation of plural justice systems and women's rights protection. Our purpose has been simply to capture those justice issues that were of concern to those we spoke to and which compellingly require attention.

The accounts we received indicate that for many women there is a significant degree of uncertainty as to the divisions of jurisdiction between the internal camp system and the Thai system. Although clear divisions may exist in terms of the delineation of absolute jurisdiction offences, in practice for many of those we spoke to the lines remain blurry and confusing. The way in which gender-based violence is dealt with provides an example of this problem. For although non-compoundable rape is included in the list of absolute jurisdiction offences, other sexual offences are not. Neither are other forms of gender-based violence. Yet we were told that in the only existing written list of Camp Committee rules which currently exists, the specification for how a Committee should deal with sexual and gender-based violence is simply denoted as: "turn over to Thai authorities." As a result, many of the women said that in practice there is often a grey zone between the two systems and that they do not know to whom they should turn. They said that they often receive conflicting information from various involved actors as to the applicable process.

Where cases are brought to the attention of relevant international organizations for referral to the Thai justice system, those we spoke to said that clear processes, support structures and coordination are often absent from the way in which the cases are handled. For example, they explained that in practice the assigned international organization plays a significant part in deciding whether or not to refer cases brought to their attention to the Thai

authorities. Where such cases are not referred onwards, they explained that in practice bringing them back within the Camp Committee's jurisdiction is complicated and sometimes impossible and as a result often they are not dealt with at all. This can give rise to particularly extreme situations given the nature of life in the camps where women simply cannot leave the vicinity of an alleged perpetrator. In addition, we were told that there are minimal resources or support services for those victims of crime whose cases are referred to the Thai justice system and who may require support throughout each step of a justice-seeking process. For example, one woman we interviewed said that she was not aware of any counselors being in place to support women interacting with the Thai justice system. In addition, many of the women expressed the view that at times practical needs that arise for those whose case is being dealt with by the Thai justice system, such as translation, financial assistance, or safe and private accommodation when outside the camps are overlooked. Simultaneously, they pointed to a lack of capacity and coordinated procedures designed to protect the interests and wellbeing of the victim in interactions with international organizations and the Thai justice system that in some cases has resulted in serious distress. Some of those we spoke to also indicated that where a case moves forward, sometimes the victim is not kept informed of progress or developments and it can be difficult for women's organizations and camp committees to assist her, despite her requests, due to a similar lack of updated information.

Meanwhile, beyond the treatment of absolute jurisdiction offences many of those we spoke to pointed to a serious lack of legal certainty as to the applicable rules within the internal Camp justice system. They said that there is currently no adequate standard set of rules in place that guide the internal camp justice system. While a process is underway to develop a cohesive set of internal camp regulations, many of the women we spoke to expressed concern, explaining that they had never been consulted on drafts and were not aware of progress made, although the effort has been underway for a number of years. Many also said that the one set of rules that currently exists does not provide legal certainty and clarity for those living in the camps. It is a very brief document of under three pages, and each rule is expressed in less than one sentence with almost no detail given both in terms of what conduct is prohibited and what the corresponding sanction and course of action will be for a breach of the prohibition. For example, as noted above, one rule simply states that violent or sexual abuses are prohibited and indicates that the appropriate course of action is to turn over to Thai authorities. In addition, the document covers only a small number of situations in which regulations may be necessary. Significant concern was also expressed regarding the facilities in the camps to effectively enforce the rules. Many of those we spoke to highlighted the absence of effective detention facilities and noted that in cases of violence crimes which are not referred to the Thai justice sector, the internal camp system often lacks adequate facilities

to effectively detain a suspect or perpetrator. We were told that this often deters women from reporting incidents or seeking justice as they will have significant fears of retribution and repeat violence from perpetrators who remain in proximity. In addition, it was unclear to us to what extent there is oversight of internal camp decisions and a meaningful possibility to appeal or seek review.

4.4 *Malay Muslim Women in the Southern Border Provinces*

Throughout the past year we have held numerous conversations with women and activists in the four Southern Border Provinces regarding the obstacles to justice faced by women in those provinces. The situation in the Provinces is complex and the hurdles between women and justice appear to be numerous and substantial. The accounts we received indicate that they result from or are exacerbated by multiple factors, including the conduct of justice sector officials and other authorities, high levels of general impunity in respect of serious human rights violations, ongoing violence between the State and insurgents, lack of legal knowledge and information, financial burdens, and perceptions of community and societal views regarding what should be spoken about and to whom. A number of these issues are explored in Sections 5 and 6 below.

In addition it also became apparent to us that specific difficulties may present themselves for Muslim women in the provinces in the context of plural laws and justice systems that are in operation. It appears that there is an absence of legal certainty and meaningful oversight of the application of Islamic law in the provinces in relation to family and inheritance matters. Furthermore, accounts we received of the operation of an informal community justice system in Yala province, in which community leaders regulate conduct with reference to religious codes and mores and impose extra-legal sanctions including corporal punishment, raised significant concerns for us as a result of the grave implications such systems can often have for women.

We address these two issues in the paragraphs below. At the outset it is important to underline that in our conversations with women in the provinces we were confronted by a number of challenges in exploring these matters which has necessarily shaped their treatment here. Indeed almost all of the women we spoke to expressed the view that they were not capable or qualified to speak about the effects which certain interpretations of Islamic law and/or its application to family and inheritance matters can have for them as women. In addition, our sense was that many were deeply uncomfortable, and sometimes afraid, to criticize the way in which religious law is applied and interpreted. While we were able to identify an underlying sense that the way in which the law is applied may sometimes give rise to discrimination against them as women, many of the women would not directly venture this

opinion. Meanwhile we encountered heightened levels of discomfort and fear when we sought to discuss the operation of an informal community justice system in Yala Province. Indeed, it became clear to us that in and of themselves these perceptions and fears speak to some of the underlying issues which appear to be impacting the ability of women in the provinces to claim their rights and seek justice and legal protection.

Application of Islamic Law & Women's Access to Justice

Since 1946, Thai law has specified that in the Southern Provinces of Pattani, Narathiwat, Yala and Satun, in the determination of civil cases concerning family and inheritance matters, and where both parties are Muslim, Courts of first-instance shall apply Islamic family and inheritance law, instead of the relevant provisions of the Thai Civil & Commercial Code.¹⁵⁴ It establishes a system whereby Datoh Justices join the Court of first-instance for consideration and determination of the case and provide the Court with an interpretation of relevant Islamic law principles and their application to the circumstances at hand.¹⁵⁵ As a result, Islamic law principles, rather than those in the Thai Civil & Commercial Code, apply in relation to matters such as marriage, divorce, determinations of personal status and inheritance.

As noted above, none of our conversations with women in the provinces involved situations where they themselves directly indicated that the way in which the system operates or the interpretation of Islamic law impeded their ability to seek justice and access legal protection. However, it became clear to us that problems exist from their descriptions of the 'self-help' mechanisms which women use to deal with certain situations and thereby circumvent or avoid the need to claim their rights through the legal system.

Although human rights and gender equality experts and authorities often raise concerns regarding the establishment of identity-based plural legal frameworks, we do not explore this issue here.¹⁵⁶ Rather, drawing on the accounts we received from women in the provinces about certain private sphere human rights abuses they face as women and the extent to which they were able to access justice in response, we simply seek to identify issues which we believe require comprehensive consideration and outline a number of concerns regarding the way in which the system operates.

Discriminatory Interpretations/Application of the Law: It has not been possible for us to undertake a gender equality or human rights analysis of the way in which Islamic law principles are interpreted and applied in the Southern

154 The Act of Implementation of Islamic laws in Pattani, Narathiwat, Yala and Satun Provinces B.E. 2489 (1946), Section 3

155 The Act on the Implementation of Islamic laws in Pattani, Narathiwat, Yala and Satun Provinces B.E. 2489 (1946), Section 4.

156 See e.g. UN Women, *In Pursuit of Justice: Progress of the Worlds Women 2011-2012*.

Border Provinces and the way in which relevant decisions of Courts of first-instance affect women and their compliance with international legal and Thai Constitutional rights protections. However from the accounts we received it became apparent that different rules regarding marriage, divorce and inheritance are currently applied to men and women under the system resulting in gender inequality and discrimination. For example, many of the women we spoke to indicated that when Muslim women in the provinces wish to seek a divorce, they typically do not pursue an application for divorce themselves. Rather, they will ask male relatives to encourage their husbands to divorce them, will pay their husbands to do so or will seek to provoke their husbands to divorce them at their own initiative. This is because prevailing interpretations grant men a unilateral right to pronounce a divorce, whereas women must seek dissolution of marriage in Court and only with reference to certain limited grounds. Meanwhile, none of the women we spoke to were aware of instances where following divorce women have sought to claim or enforce maintenance rights in Court. Similarly, many women told us of the difficulties they face as a result of the way the legal system allows men to engage in polygamous marriages. Some of the women we spoke to highlighted the ways in which the regular denial of equal inheritance rights to wives and daughters has significant repercussions in a society where many women are the primary family caregivers and breadwinners, due to widespread disappearances, killings and detentions of male relatives. Many of them expressed a sense of betrayal at how, having been at the forefront of efforts to seek information, truth-telling and accountability in relation to the death or disappearance of a male relative, they subsequently may find themselves denied equal inheritance rights.

Lack of Legal Clarity, Certainty & Information: As noted above, many of the women we spoke to expressed the view that they were not capable or qualified to speak about Islamic law and the way in which it is interpreted and applied in the provinces. Although there are a variety of reasons for this, the accounts we received indicate that a significant factor may be the lack of objective, transparent, and accessible information as to the content of relevant legal rights and obligations. Indeed there does not appear to exist an official codification of the relevant tenets and rules of Islamic law and the way in which they will be interpreted and applied in the provinces. This means that in practice the interpretation of what the applicable principles are and what remedy they dictate in a particular situation is based solely on the discretion and relevant interpretation adopted by an individual Justice Datoh. As a result basic rule of law requirements and general principles of law regarding legality and legal certainty appear to be absent. Such requirements necessitate that legal obligations and entitlements are delineated in a manner which is sufficiently accessible, precise and foreseeable, such as to enable individuals to foresee the consequences of their action. The guiding principle is that individuals must be able to regulate their conduct with a

reasonable degree of certainty as to the legal consequences of acting one way rather than another.

Lack of Effective Oversight: In practice the accounts we received indicate a significant lack of oversight and scrutiny of relevant legal decisions. For although in principle once a case has been dealt with by the Court of first instance the matter may be appealed to the Thai Court of Appeal, none of those we spoke were aware of any case in which such an appeal had been pursued. As a result it appears that crucial oversight mechanisms, involving scrutiny by senior Courts, are not felt to be available in practice.

Impact on Women's Access to Justice beyond Civil Law Matters: The accounts we received also indicated that significant levels of confusion arise in practice as to the limits of Islamic law jurisdiction in the provinces. The distinctions between what is required as a matter of law and what is simply a prevailing religious or social approach to a particular issue appear to be blurred in some instances. This can carry adverse impacts for women's access to justice beyond civil law matters, for example in relation to domestic violence and marital rape. For example, many women we spoke to who shared with us accounts of domestic violence they suffered were unaware of legal remedies available to them under the Thai Criminal Code or the Domestic Violence Victim Protection Act. Their experience has been that domestic violence between partners is treated as a 'family' matter by community leaders and justice sector officials. In addition, prevailing interpretations of religious principles in the provinces appear to be that women cannot refuse to have sex with their husbands and that sexual violence in marriage is not a matter that can be addressed by external interlocutors. As a result, there is often a mistaken assumption that such instances are outside the protection of the law or that Islamic law is applicable in such cases. In fact, domestic violence and instances of marital rape are crimes subject to Thai criminal law and as outlined above constitute conduct in relation to which stringent international obligations of investigation and accountability apply. Meanwhile the women we spoke to in the provinces explained that in practice, in order to escape such violence they will either physically leave the area or, as outlined above, will seek to convince their husband to divorce them. One way or another, seeking legal protection or justice does not appear to be something they consider.

Each of these aspects require urgent and effective consideration and action. A proposal to update the Act on the Implementation of Islamic laws in Pattani, Narathiwat, Yala and Satun Provinces is now under consideration. However, it is of significant concern that in the context of such a law reform initiative, no human rights analysis, including in respect of gender equality principles, has been carried out in relation to the way in which Islamic law principles are interpreted and applied in the Southern Border Provinces and women's ability to access justice under the current system. Nor have consultations

with women from affected communities on the draft legislation been undertaken. Yet such steps are vital at this juncture in order to ensure that any law reform process does not perpetuate or entrench obstacles facing women but instead meaningfully addresses and responds to the specific needs of women and risks they face.

International law requires Thailand to guarantee the rights of every woman in Thailand, regardless of ethnicity, religion, or place of residence.¹⁵⁷ In this context Thailand is required to ensure women's equality before law and equal protection of the law, to eliminate direct and indirect forms of discrimination on grounds of sex and on grounds such as nationality, legal status and religion,¹⁵⁸ as well as intersectional forms of discrimination.¹⁵⁹ The application of religious and customary laws can never be used as justification for failures to comply with these international obligations.¹⁶⁰

Many international authorities have addressed the implications of these obligations both as they apply to the general operation of religious legal systems and to the specific context of women's family and inheritance rights.

For example, the HRC has underlined that the right to freedom of religion does not authorize the violation of women's equal enjoyment of their human rights, including the right to equal protection of the law.¹⁶¹ It has specified that where a State entrusts religious courts with judicial tasks, it must ensure that proceedings before such courts are limited to minor civil and criminal matters, that they meet the requirements of fair trial by a competent, independent, and impartial tribunal established by law and other relevant rights guarantees, and that their decisions are validated by higher State courts and can be challenged by the parties in an appropriate procedure.¹⁶² Meanwhile, CEDAW has noted that all courts, including those applying religious law, should be required to apply the principle of equality and to interpret the law, in line with non-discrimination and equality requirements. Where it is not possible for them to interpret the law in this way, they should draw any inconsistency between the requirements of equality and non-discrimination and provisions of religious law to the attention of the appropriate authorities.¹⁶³

157 See generally, Articles 2.1, 26 ICCPR; Article 2.2, ICESCR; HRC, *General Comment No. 18*; HRC, *General Comment No. 31*; CESCR, *General Comment 20*. An exception relates to the political rights outlined in Article 25, ICCPR, which limits their application to citizens.

158 Articles 2.1, 26 ICCPR; Article 2.2, ICESCR; Articles 1 & 2 CEDAW; CERD, *General Recommendation No. 30*; CEDAW, *General Recommendation No. 28*; HRC, *General Comment No. 18*; CESCR, *General Comment No. 20*.

159 CEDAW, *General Recommendation 28*, Paras. 18 & 31; CESCR, *General Comment No. 20*, Para. 17; CERD, *General Recommendation No. 25*.

160 CEDAW, *General Recommendation 28*, Para. 33

161 HRC *General Comment No. 28*, Para. 32.

162 HRC, *General Comment 32*, Para 24. See ICCPR, Article 14.

163 CEDAW, *General Recommendation 28*, Para. 33. See CEDAW, Article 2.

Regarding women's rights in respect of marriage, divorce and inheritance, the HRC has specified that in order to meet international obligations States must also ensure that the procedures and grounds for divorce are the same for men and women.¹⁶⁴ It has also explained that compliance with international obligations requires that women should also have equal inheritance rights to those of men on the death of their spouse.¹⁶⁵ It has noted that polygamy is incompatible with the principle of equality with regard to the right to marry.¹⁶⁶ Meanwhile, CEDAW has underlined that laws granting men a right to a greater share of property on divorce or the death of a relative give rise to discrimination and are in breach of international obligations.¹⁶⁷ It has also specified that where constitutional provisions guarantee equality but polygamous marriage is permitted in accordance with personal or customary law this violates the constitutional rights of women.¹⁶⁸

Informal Justice Systems & Community Self Regulation

We also received accounts from those we spoke to of the relatively recent establishment of informal justice systems in a large number of villages in Yala province, in the context of which village authorities put in place *Hukum Pakat*, or local regulations based on religious and cultural principles, and enforce them through specific sanctions.

Our conversations with State officials indicate that this system has tacit, if not formal, State recognition and is seen as an attempt to minimize conflict through the devolution of greater levels of governance and decision-making autonomy and responsibility from the provincial governors and local State administration to the community.

These regulations and enforcement systems appeared to be a source of considerable fear for women we spoke to in the provinces. The accounts we received indicate that particular aspects of the system seek to police the conduct of women on the basis of strict religious beliefs. For example those we spoke to explained that regulations indicate certain dress codes for Muslim women, specifying that those who do not wear *Hijab* will be subject to tonsure and those who wear short sleeves will have their arms cut off. In

164 HRC General Comment No. 28, Para.26. See ICCPR, Articles 3 & 23.

165 *Ibid.*

166 HRC General Comment No. 28, Para.24. See ICCPR, Articles 3 & 23.

167 CEDAW, General Recommendation 21, Paras. 28 & 35. See CEDAW, Articles 15 & 16.

168 CEDAW, General Recommendation 21, Para.14. See CEDAW, Article 5.

It is important to recall in this context that as discussed in *Section 3* although Thailand maintains a reservation to Article 16 of CEDAW, regarding discrimination against women in the family, this does not limit its obligations to comply with the requirements outlined above, which do not derive only from Article 16, but from other provisions of CEDAW, including Article 2, as well as from provisions of the ICCPR in respect of which no reservations are in place. Meanwhile, as the CEDAW Committee has underlined, Thailand's reservation is contrary to the object and purpose of the Convention and as a result is contrary to Thailand's international obligations. CEDAW, *Concluding Comments, Thailand*, U.N. Doc CEDAW/C/THA/CO/5, 3 February 2006, Para.11. Article 19(c), Vienna Convention on the Law of Treaties.

addition they state that single Muslim women and girls who are alone in the company of a man who is not a family member must marry that man. Moreover, the regulations outline that rewards will be paid to members of the community who report women in breach of these rules to community leaders.

These indications give rise to significant concerns regarding the protection of a range of women's human rights, not least rights to personal integrity and freedom from torture and ill-treatment. International law and standards categorically prohibit torture and other ill-treatment.¹⁶⁹ International authorities have explained that acts of corporal punishment, involving violence or other infringements of personal integrity imposed intentionally against someone as a sanction in order to cause pain and/or humiliation and degradation, contravene the prohibition. They have clearly specified that this prohibition necessitates, not only that State actors do not participate in such conduct, but also that they exercise due diligence to prevent, investigate, and punish such conduct by private actors.¹⁷⁰ Notably CAT has underscored that, "any religious or traditional justification that would violate this absolute prohibition," must be rejected.¹⁷¹

169 e.g. Articles 2, 16 CAT; Article 7 ICCPR.

170 CAT, General Comment 2, Para.18; HRC, General Comment No. 20, Para. 2; HRC, General Comment 31, Para. 8; CEDAW, General Recommendation 28, Para. 34; See also, Report of the Special Rapporteur on Torture, 15 January 2008, A/HRC/7/3, Paras.31, 32, 44

171 CAT, General Comment 2, Para.5

5. Conduct & Behaviour of Justice Sector Officials and State Authorities

Over the past year our conversations throughout Thailand have involved a broad range of participants. From those working with undocumented women migrant workers in Chiang Mai and Samutsakorn Province to Hi So Thai women in Bangkok, from Lahu organisers in Mae Ai to a fisherwoman and human rights defender in Udon Thani Province, from sex workers to residents in displaced persons camps, from women activists in Pattani and Yala and Naratiwat Provinces to former members of the National Human Rights Commission and university professors.

From a certain perspective these women reflect a grouping of widely diverse lived experiences. Indeed many of those we spoke to may consider that they face obstacles to justice which have little in common with others. Yet, time and again they identified one issue which in their view seriously impacts women's ability to access legal protection and remedies in practice. Each of them expressed the view that in one way or another, the conduct of state officials, and particularly the police, often impedes women's access to justice.

One of the most common problems which almost every participant raised during our conversations related to the approach of many officials when dealing with various forms of gender-based violence. They cited for example, failures to apply gender-sensitive procedures, dismissive and derogatory treatment of survivors of violence or failures to effectively investigate and prosecute incidents. In addition to this 'shared' problem, a number of additional difficulties were set forth in discussions with representatives of certain communities. For example, we heard that for certain groups of women, Government officials are generally seen as potential perpetrators of abuses (including discrimination and violence), rather than a source of protection and assistance. Others were of the opinion that high levels of corruption and extortion among officials constitute significant impediments to justice.

In the sub-sections below we seek to synthesise and summarise the accounts we received of these perceptions. First we outline the views expressed regarding the way in which certain communities general fear and mistrust of the authorities may be impacting women's access to justice. Then we turn to describe the ways in which we were told gender discrimination and attitudes towards gendered abuses can manifest in the justice sector and may be effecting women's ability to access legal protection and remedies. We have divided the sections by cross cutting problems, rather than with reference to specific group or community. Although different groups of

women may be impacted in different ways, and to differing degrees, we have sought to point out what to us often appeared to be striking commonalities of perception and experience.

5.1 Human Rights Violations Generating Fear & Mistrust

"There is a general fear of officials. People think it's better to live with the problem than confront them."¹⁷²

Many of those we interviewed spoke of high levels of mistrust and fear among certain groups of women in relation to justice sector officials, in particular law enforcement. They related these perceptions to the fact that in their experience state officials are often the perpetrators of human rights violations against members of their communities and that these violations are committed with impunity. They expressed the view that such conduct and the corresponding absence of accountability gives rise to a lack of faith in the Thai justice system among women from these communities who do not see it as offering viable mechanisms of support, protection and remedy. They also were of the opinion that such violations can create a significant climate of fear, in which women will actively avoid contact with authorities, such as law enforcement officials, rather than seek out their assistance.

Violence & Impunity

Many of those we spoke to pointed to acts of violence by justice sector officials against members of certain communities which are perpetrated without investigation, accountability and redress.

For example, those we spoke to in the Southern Border Provinces pointed to the widespread human rights violations which have allegedly been perpetrated by police and military officers against members of the Muslim community. Widespread instances of enforced disappearances, extrajudicial executions, torture and ill-treatment and arbitrary detention by police and military officers of male members of this community, in the context of the Government's response to the ongoing insurgency, have been repeatedly reported and documented. Although in many instances their female family members have sought justice and accountability, many of the cases have not resulted in accountability.¹⁷³ In addition, we were told of numerous ongoing grievances regarding state compensation funds and of the fact that some of the women have faced security threats as a result of their efforts. In addition, we were told that a number of alleged acts of rape by police officers in the

¹⁷² Participant, ICJ & JPF Workshop, Songkhla, September 2011.

¹⁷³ "It Was Like Suddenly My Son No Longer Existed," Enforced Disappearances in Thailand's Southern Border Provinces, Human Rights Watch, 2007; Thailand: Torture in the Southern Counter-Insurgency, Amnesty International, 2009; Enforced disappearances in Thailand, Justice for Peace Foundation, May 2012 (forthcoming).

Souther Border Provinces have not been subject to effective investigations. In the words of one woman we spoke to, "in cases of rape, if the perpetrators are officials, the matter will be silenced."¹⁷⁴ In addition, many expressed the view that in the Provinces incidents of sexual harassment of Muslim women and girls by officials at check-points are relatively common.

Meanwhile, those from migrant communities also pointed to high levels of unlawful police violence against members of their communities. Indeed, reports document that acts of physical assault by police against migrants in the community are commonplace, some of which result in death.¹⁷⁵ They also report beatings and other violence against migrants in police custody.¹⁷⁶ Similarly, many of those we spoke to expressed the view that acts of gender-based violence by police against women migrants are common: "when migrant female workers are in a bus, the police usually stop the bus and arrest them, especially young women, and take them to somewhere else not the police station. The women might be "disappeared" for a week... They are raped... They dare not to speak because they are afraid."¹⁷⁷ Another representative of an organisation working with migrant women told us that, "many Burmese workers work in factories. The police usually park the car in front of the factories and take good-looking female Burmese workers with them. They send the women back on the next day. Those women do not dare to call for justice."¹⁷⁸ Such incidents have been repeatedly documented and reported, as have reports of undocumented migrant women being subject to sexual violence in custody following arrest and of the extortion of sex by police officers in exchange for undocumented migrants' release.¹⁷⁹ Those we spoke to were of the opinion that effective investigations of such incidents involving officials are virtually unheard of.¹⁸⁰

Similarly, as noted in Section 4 above, sex workers we spoke to also stated that incidents of rape and sexual assault of sex workers by police officers occur with regularity. One representative of an organization working with sex workers expressed the view that there can be regular abuse against sex workers by corrupt police, in which sexual harassment, assault and rape are frequent occurrences.

174 Participant at ICJ & JPF Workshop, Songkhla, September 2011.

175 See Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, 2010, Chapter III.

176 *Ibid.*

177 Participant & Human Rights Defender, ICJ & JPF Workshop, Bangkok, September 2011.

178 Participant & Human Rights Defender, ICJ & JPF Workshop, Bangkok, September 2011.

179 *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme (MAP) (advance copy shared with ICJ & JPF). See also, Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, 2010.

180 A number of indepth reports also document this. *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme (MAP) (advance copy shared with ICJ & JPF). See also, Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, 2010.

Denials of Due Process, Bias & Discrimination

In addition those we spoke to repeatedly expressed the view that high levels of bias and discrimination on the part of officials against certain communities regularly presents itself in law-enforcement contexts and justice processes and undermines due process and equality before the law. It appears from the accounts we received that this is a particular perception on the part of ethnic minorities, as well as communities in the Southern Border Provinces.

For example, representatives of hill tribe communities we spoke to said that members of their communities often face arbitrary arrest and detention which they believe to be as a result of their ethnicity. One said, “when the police meet us, they arrest us without investigation whether we are guilty or not...and before going through the legal process.”¹⁸¹ Another explained that when lands they have been farming for years have been zoned for forestry conservation many hill tribe people have been prosecuted for trespass and have received significant imprisonment sentences, including life sentences. He also said that while in detention many of them are pushed to sign “confessions” in Thai, which they do not understand.

Meanwhile those we spoke to explained that for many in the Southern Border Provinces the perception is that the justice system is not neutral: “It starts with the military and police indicating that they have received reports that the villagers they arrested are terrorists. The police send the people to court without further investigation. They often do not know the names of the people they arrested and have to ask the court officials. This makes us know that the legal process is unfair. In some cases where the suspect’s wife and children come to the courtroom, and when the children hug their father, the judge will say that he should have thought before committing the crime. This clearly indicates that the attitude of the judge is not neutral, since the judgement has not yet been given.”¹⁸²

Failures to Investigate and Respond

“There is an emergency telephone hotline which is supposed to help people in trouble, you dial 191, but it doesn’t work.”¹⁸³

“For the police and prosecutors, if their attitude is not good, their performance is not good.”¹⁸⁴

Many expressed the view that for members of these communities bias also reveals itself through officials’ failures to act and significant apathy towards

181 Participant, ICJ & JPF Workshop, Bangkok, September 2011.

182 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

183 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

184 Participant, ICJ & JPF Workshop, Bangkok, September 2011.

requests for assistance and complaints. One hill tribe representative we spoke to emphasized that police and other officials do not treat complaints or reports from members of hill tribe communities professionally and rarely investigate or follow up as they do not think they are “important cases.”¹⁸⁵

Migrant women and those working with them also raised similar problems, indicating that in their experience justice sector officials do not respond well to requests from migrants and do not follow up complaints or reports with appropriate investigations. They said that officials treat migrants as “second class” or as “outsiders” and underlined that, “officials do not pay attention to the migrant workers when they ask for help.”¹⁸⁶ Meanwhile, one of those we interviewed specifically described the failure of police to investigate instances of rape involving migrant women.¹⁸⁷ As we note in *Section 5.2* below, similar experiences were recounted by those working with sex workers.

Meanwhile, those we spoke to from the Southern Border Provinces told us that in their experience, Thai officials will not respond seriously to requests for assistance or complaints from Muslims in relation to matters which occur within the community and private sphere. One of those we spoke to said that “police, prosecutors and judges give off bad impressions, they are dismissive and their body language shows they don’t take the issues seriously.”¹⁸⁸ Another women told us, “I saw a woman being raped and I wanted to help her and went to some police and military officers nearby to ask them to help the woman but they did nothing and made excuses that they had to wait for their patrol or needed to consult their commander.”¹⁸⁹

Corruption and Extortion

We were also repeatedly told of acts of corruption and extortion by justice sector officials. In the words of one individual from the Southern Border Provinces, “you have to pay to get anywhere.”¹⁹⁰ Many indicated that certain communities are often particularly impacted, explaining that for example undocumented migrants and sex workers will often need to pay significant bribes in order to avoid arrest or be released. Indeed, sex workers we spoke to indicated that it is such a normal course of events that, “there are even standard rates for the bribes.”¹⁹¹

185 Participant, ICJ & JPF Workshop, Bangkok, September 2011.

186 Participant, ICJ & JPF Workshop, Bangkok, September 2011.

187 ICJ & JPF interview with Jackie Pollack, Migrants Assistance Programme, Chiang Mai, 13 December 2011. See also, *Stepping Into the Light*, Report on Women Migrant Workers, Migrants Assistance Programme (MAP) (advance copy shared with ICJ & JPF); Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, 2010.

188 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

189 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

190 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

191 Participant, ICJ & JPF group discussion with 6 sex workers and 2 activists, Chiang Mai, 13-14 December 2011.

Impact on Women's Access to Justice

It is clear that conduct by justice sector officials along the lines of that detailed in the accounts above will often have significant implications for the ability of individuals from concerned communities to seek and access legal protection and remedies. Indeed, in every instance where such conduct is not investigated and subject to appropriate accountability and provision of remedies, there will be a failure to ensure access to justice. But the impact will also be felt beyond the individual violation, perpetrator and victim. For example, where state officials are perceived to be the perpetrators of human rights violations against members of certain communities and these violations are perceived to be committed with impunity, high levels of mistrust will arise, as will fear of justice sector officials among those communities. As a result, members of those communities will work to avoid, rather than seek, contact with such officials. Meanwhile, where there are perceived failures on the part of the justice system to impartially or effectively investigate human rights violations and abuses, this will often give rise to a lack of faith among individuals in the system as a worthwhile option for seeking assistance and remedies.

These experiences arise both for women and men members of concerned communities. However sometimes certain additional impacts may arise for women's access to justice. For example, such fear or lack of confidence will mean that women will not seek legal protection or remedies from the justice sector when as women they face private sphere discrimination or human rights abuses in the family or community.

Meanwhile, where members of a particular community perceive themselves to be the target of significant abuse from state authorities, a dynamic may arise whereby women are loath to seek assistance from the same authorities in relation to human rights abuses they face within the community or family, for fears of betraying the community. In addition, mistrust of state authorities, the perception of justice system bias against particular communities, or widespread failures of effective responsive, can sometimes lead communities to develop informal justice systems and methods of self-regulation which in turn can sometimes give rise to significant consequences for women's access to justice and freedom from discrimination.

5.2 Gender Discrimination, Stereotypes & Norms

A great many of those we consulted and interviewed during this process highlighted that in order to improve women's access to justice it is now vital to address the way in which nuanced and tacit forms of gender discrimination and stereotypes may manifest in the behaviour of key justice sector officials when dealing with women seeking legal remedies and protection. In the

view of those we spoke to, these appear to reveal themselves predominantly in relation to instances of gender-based violence. From their accounts it appears that sometimes the discrimination is overt and explicit, while often it manifests in a lack of gender sensitivity or awareness and in reliance on assumptions and gender norms. In the experience of those we spoke to it often results in a failure to effectively prevent, investigate and prosecute instances of gender-based violence. They also considered that it leads to re-victimisation of women survivors of violence and undermines women's faith and confidence in the justice system, meaning for example that many women who face violence simply do not turn to the system for assistance.

Domestic Violence

"When a woman gets beaten up by her husband, the matter is treated as a family issue."¹⁹²

Throughout this process, those we spoke to across Thailand expressed the view that many individual justice sector officials continue to treat domestic violence as though it is a private matter which should be resolved exclusively within the family. Indeed, it appears that this is an experience which is shared across ethnic, nationality and community lines, for we heard similar accounts from wealthy and poor women, from those working with women in urban and rural areas, from Muslim women in the Southern Border Provinces, from migrant women and from asylum seekers.

In their experience, although a wide range of factors come together to impact the ability of women to access justice in instances of domestic violence, the response of individual officials they encounter may play a significant role.

For example, many told us that when women seek to report the matter to the police they are often told they should go home and resolve the problem with their partner. The words of one woman in the Southern Border Provinces spoke to the accounts of many, "if we go to the police station, the police will say that it is a family matter and we should go home."¹⁹³ Another woman indicated that this is often the approach, even in cases of repeated abuse: "even if they have been subject to such abuses many times still the police insist that they talk it over with their husband. I mean the police only want them to talk it over. This is unbearable. There has got to be some intervention."¹⁹⁴ In the opinion of many of those we spoke to, in such situations it is virtually impossible for women to persevere in their request for police intervention or follow-up.

¹⁹² Participant, ICJ & JPF Workshop, Songkhla, September 2011.

¹⁹³ Participant, ICJ & JPF Workshop, Songkhla, September 2011.

¹⁹⁴ Participant, ICJ & JPF Workshop, Songkhla, September 2011.

Meanwhile, even where the authorities do intervene, those we spoke to said that in their experience it is not to carry out an effective investigation into the matter or assist women in obtaining legal protection orders or pursuing legal proceedings, but rather to encourage reconciliation. For example, one woman specified that “the inquiry officers tend to take lenient approaches, for example, if a husband beating his wife, the police would ask both of them to talk and try to restore their relationships. The police would not opt for warning him or pursuing any prosecution against him, or even to fine him, ... the police might summon the beating husband to the police station and simply warn him against beating his own wife otherwise he could face some legal wrangle. Then the guy is let go. It makes the woman feel she shall not receive justice through the law.”¹⁹⁵

The Director of an organization providing assistance to survivors of violence noted that there is often a predisposition to treat cases of domestic violence within the framework of conflict resolution. As a result, rather than treating cases as criminal matters, judges, prosecutors, police will often seek to mediate and reconcile the cases. For example, she indicated that in many instances the propensity is to appoint a mediator, such as an elder brother, and try to resolve the case through compromise.¹⁹⁶ Meanwhile another organization’s representative said that often officials will often not take the practical preventative steps available to them under the law to protect victims, even while mediation or legal proceedings are ongoing, for example through imposing provisional remedial measures envisaged by the Domestic Violence Victim Protection Act.¹⁹⁷

Others told us that when a woman does persevere and pursue a legal remedy, the ensuing official investigation is not always effective and the authorities may not follow-up of their own initiative. For example one woman explained that in her experience she had to produce evidence of the violence to the police, instead of the police taking full initiative to investigate the offence. She said that she had to repeat the details several times such that it often felt like the burden of proof for domestic violence was higher than in other crimes.¹⁹⁸ In addition we were told of women being placed under pressure by the authorities to reach a compromise and negotiate a settlement.

Indeed this may not be surprising, for as noted in Section 3, many of those with whom we discussed the legal framework dealing with domestic violence indicated that its emphasis on settlement, mediation and family reunification, rather than remedies and accountability, may tacitly foster

195 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

196 ICJ & JPF Interview with Usa Lertsrisuntad, Foundation for Women, Bangkok, 15 December 2011. See discussion of the legal regime applicable to domestic violence in *Section 4.2* above.

197 ICJ & JPF Interview with Bundit Panwiset, Friends of Women Foundation, Bangkok, 12 January 2012. See Domestic-Violence Victim Protection Act B.E. 2550 (2007), Section 10, for available provisional measures.

198 ICJ & JPF Interview with Areewan Jatutong, Bangkok, 21 December 2011.

such approaches by officials rather than challenge them and put in place the foundations for change.

Sexual Violence

"It starts with the police shouting loudly at the complainant, 'why are you here?'"¹⁹⁹

Those we spoke to also expressed the view that survivors of sexual violence often face similar hurdles to justice as a result of the approach of key justice sector officials, including police officers, prosecutors and members of the judiciary. They said that in their experience constitutional provisions indicating that women should be afforded proper treatment in cases related to sexual violence²⁰⁰ are often not implemented in practice. From the accounts we received it appears that often obstacles arise due to a lack of gender sensitivity or reliance on stereotyped assumptions and norms.

For example, some of those we spoke to highlighted the difficulties that may arise because of failures to understand the particular nature of sexual violence and the specific needs of victims, thereby treating the matter as they would any other and not ensuring appropriate privacy in the taking of the complaint. One representative of an organisation providing direct assistance to women survivors of violence told us that in her experience women are often confronted by a lack of gender sensitivity from the moment they enter a police station, for example often being loudly asked in public why they are there, and not being interviewed about the matter in a private room.

Others indicated that at times problems arise due to derogatory treatment of women who seek to report sexual violence. They noted that police officers sometimes imply that a woman is at fault for an assault, passing comment on her dress or behavior and not effectively investigating the matter. They highlighted that women who breach gender norms or social mores may often encounter such responses. For example, one of those we spoke to indicated that lesbian women reporting "corrective" rape may often face discriminatory treatment: "when she informed to the police they just laughed and did nothing."²⁰¹ Meanwhile, although those we interviewed specified that sex workers who have faced sexual violence will rarely seek justice, they noted that in the rare cases that they do try to file a report, they are met with negative police attitudes and incidents are rarely investigated.

Additionally, we heard from a number of participants that officials will sometimes not treat sexual assault cases seriously, and may pressure women

199 ICJ & JPF Interview Participant, Interview, Bangkok, 15 December 2011.

200 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Section 40(6)

201 Participant, ICJ & JPF Workshop, Bangkok, September 2011.

to settle the case, wishing to resolve the matter speedily rather than spend time investigating or prosecuting.

Even where cases are investigated and/or prosecuted, as outlined in Section 3, many of those we spoke to indicated that difficulties often arise as a result of stereotyped assumptions on the part of officials and members of the judiciary as to what kind of contexts rape occurs in and what kind of behavior it necessarily involves on the part of victims and perpetrators. For example, they noted that unless there is proof of injury or signs of a struggle, complaints of sexual assault may not be pursued by investigators or prosecutors or may be acquitted in court. Additionally, they explained that a woman's background and sexual history, as well as the relationship between the victim and alleged perpetrator will be significant factors in determining how a case is treated.

International Obligations

As outlined previously, compliance with international law necessitates that Thailand take steps to ensure appropriate conduct, attitudes and approaches among justice sector officials in relation to women seeking justice. These requirements flow from Thailand's international obligations to ensure that no public authority engage in any act or practice of discrimination against women,²⁰² to guarantee equal protection of the law,²⁰³ and to eliminate prejudices based on stereotypes.²⁰⁴ In respect of acts of violence against women, the due diligence obligation to prevent, investigate and punish such violence,²⁰⁵ necessitates that a gender sensitive judicial process be ensured in cases of such violence.²⁰⁶ Indeed, where for whatever reason officials fail to conduct an effective investigation into incidents of gender-based violence that are brought to their attention, with a view to pursuing the accountability of the perpetrator, this will give rise to a breach of obligations enshrined in the ICCPR, CAT and CEDAW.²⁰⁷ An effective investigation entails a number of components, but always requires that officials investigate allegations of

202 Article 2(d), CEDAW.

203 Article 26, ICCPR; Article 2(c), CEDAW.

204 Article 5, CEDAW.

205 CEDAW, *General Recommendation 19*, Para. 9; CEDAW, *General Recommendation 28*, Para.19; CAT, *General Comment 2*, Para. 18; Article 4(c), *UN Declaration on the Elimination of Violence Against Women*, 20 December 1993, General Assembly, Resolution A/RES/48/104; CEDAW, *Vertido v. The Philippines*, Communication No. 18/2008, 16 July 2010, Para. 8.4; *Şahide Goekce v. Austria*, Communication No. 5/2005, 6 August 2007, Para. 12.1.4; *Fatma Yildirim v. Austria*, Communication No. 6/2005, 6 August 2007, Paras. 12.1.2. and 12.1.5. See also, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, *Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61, 20 January 2006, Para. 29. See also, HRC, *General Comment 31*, Para.8 (regarding private actors generally).

206 CEDAW, *VK v. Bulgaria*, Communication No. 20/2008, 25 July 2011, Para. 9.9 and 9.11-9.16; CEDAW, *Vertido v. Philippines*, Communication No. 18/2008, 16 July 2010, Paras. 8.5-8.9.

207 Articles 2(3) & 7 ICCPR; Article 2 CEDAW; Articles 12,13 & 16 CAT. See also: CEDAW, *General Recommendation 19*, Para. 9; CEDAW, *General Recommendation 28*, Para.19; CAT, *General Comment 2*, Para. 18; HRC, *General Comment 31*, Para.8.

such violence, "promptly, thoroughly, impartially and seriously"²⁰⁸ and of their own volition. Other required steps include training and awareness raising exercises for officials at all levels, the establishment of effective oversight and monitoring mechanisms, the elaboration of clear codes of conduct, guidelines and directives and the accountability of officials who do not adhere to them.

208 CEDAW, *AT v. Hungary*, Communication No. 2/2003, 26 January 2005, Paras. 9.6. See also, CEDAW, *Şahide Goekce v. Austria*, Communication No. 5/2005, 5 August 2007; CEDAW, *Fatma Yildirim v. Austria*, Communication No. 6/2005, 1 October 2007.

6. Practical Obstacles – Information, Money & Language

In our conversations with those across the country a range of practical realities were persistently identified as constituting significant barriers to justice. Unavailability of legal information, including in accessible languages, and lack of financial means were identified by all those we spoke to as key factors effecting abilities to access justice across communities and provinces, across urban and rural divides. It was clear from the accounts we received that although these problems are not specific to women and will equally affect men, they will sometimes have distinctive impacts on women.

Information

“If the women have no knowledge, how can they fight using the law?”²⁰⁹

Almost all those we spoke to expressed the view that where women lack basic information about the law and their rights it constitutes a significant barrier to justice. From the accounts we received such an absence of critical information appears to be commonplace and pervasive.

Sometimes this lack of information means that women may simply not know that they possess certain rights under the law or that there are legal avenues to protection and redress that are available to them in relation to particular types of human rights abuses. For example, representatives of organizations working directly with women victims of violence in Bangkok explained that many women are unaware of the laws and legal procedures in place to protect them from gender-based violence. As a result, even where financial resources are not a problem, they do not seek legal protection or justice. Even where women do know about the general existence of a right or protective law often, in the experience of those we spoke to, their information will be general rather than specific, and consequently they will not be aware of their rights during a legal process. For example, one representative of an organization working with survivors of trafficking explained that often women are not informed of their rights to financial assistance during the course of legal proceedings, including support for travel and accommodation costs. Others explained that survivors of sexual violence are often not aware of procedural rules stating that they do not have to confront the alleged perpetrator in Court or that they are entitled to be interviewed by female police investigators. They explained that this lack of information may make women hesitant to pursue complaints or prosecution because they are afraid of having to face the perpetrator in Court or because they feel uncomfortable at the thought of talking to male officials about what happened.

²⁰⁹ Participant, ICJ & JPF Workshop, Songkhla, September 2011.

A number of survivors of domestic violence that we spoke to in the Southern Border Provinces also told us they were either not aware of the existence of the Domestic Violence Victim Protection Act or believed that it was not applicable to them because of the application of Islamic law in family matters. In general in our conversations with women in the Southern Border Provinces they indicated that they did not consider themselves equipped with adequate information regarding the law. This was the case even for women human rights defenders. In the words of one woman: "Frankly speaking although we graduated from university we do not know much about the laws. Imagine how it is for female villagers. How can they access justice?"²¹⁰ Some of the women explained that in the past some organizations and religious leaders had provided training courses for women. However they said such training had to cease due to lack of funding. Meanwhile others said that sometimes women may be reluctant to participate in discussions on Islamic law in particular: "When we organize training and announce that we are going to touch on Islamic Law the participants would be reluctant to share. They do not speak much."²¹¹ Some said that, "the training might give people an impression that we are encouraging the women to uprise."²¹² However all those we spoke to, including those working with religious or community organizations in the provinces, highlighted the importance of ensuring women are able to access information regarding their rights and the relevant law. "Women should be instilled with the relevant knowledge ... training could be about laws useful for women, like family laws. After the training is given to women, it should be given to their husbands too, to raise their awareness that if they violate rights, they will face consequences."²¹³ Others suggested that in addition communicating information to women should be done through mechanisms familiar to women: "Women listen to the radio. What we need today is radio programs about women, the law and other matters."²¹⁴

A representative of hill tribe communities also explained that women, "often do not have legal knowledge and therefore do not know about their rights either. They cannot find solutions on their own as a result."²¹⁵ Meanwhile many of those working with migrant communities explained that there is a prevailing lack of information available to migrant workers about their rights under the law and they often mistakenly believe Thai laws do not apply to them because they are not Thai or have irregular legal status. Again, even where they do have information regarding the general applicability of the law, they will not be informed about specific rights and protections. Meanwhile one organization providing legal advice and support to migrant workers

210 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

211 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

212 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

213 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

214 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

215 Participant, ICJ & JPF Workshop, Bangkok, September 2011.

in different locations throughout Thailand explained that when they hold community information meetings on legal rights for migrant workers the majority of those who attend are men. In some provinces over 80 percent of the participants are men, while in their experience often the women who do attend do not speak. As a result, in order to identify ways in which to increase women's information on their rights and legal protection, they have started to organize meetings for women on women's health issues. They explained that this often encourages women to attend meetings. After a few occasions the women become sufficiently comfortable for legal information sessions to be introduced.²¹⁶

From the accounts we received it also appears that a lack of adequate knowledge of certain laws and legal rights on the part of lawyers and officials can often compound the situation. For example, many of those we spoke to indicated that even where women do wish to seek justice, it may be hard for them to access effective legal advice, as many lawyers in Thailand do not have in depth knowledge of general laws protecting human rights, or those dealing specifically with issues facing women, including gender-based violence. In the words of those we spoke to, "even those who use the laws do not have sufficient understanding,"²¹⁷ and, "even those who help to solve the problems or provide assistance lack knowledge and understanding to access the correct channels."²¹⁸ In addition some of those we spoke to explained that in their experience lawyers often treat certain groups of women in a discriminatory or derogatory manner. For example, they said that legal professionals often treat survivors of sex trafficking badly because of failure to understand the nature of trafficking or because of perceptions and stigma surrounding issues of extensive sexual contact. Meanwhile, it can be very difficult for sex workers to identify lawyers who are willing to represent them at all. These issues lead to particular difficulties for women who do not have the financial means to choose their own lawyer and as a result are reliant on lawyers working with State legal aid services who are often not specialized in human rights or gender issues.

Similarly, many expressed the view that officials often lack accurate legal knowledge and do not have the correct information about the extent of Thai law. For example, those working with migrant communities said that often law enforcement officials do not have up-to-date information on migration laws or regulations. In addition, they may not understand that Thai Constitutional rights guarantees and other protective laws apply to both documented and undocumented migrants in Thailand.

216 ICJ & JPF Interviews with Preeyaporn Khankumnerd & Sukanta Sukpaitha, Human Rights and Development Foundation (HRDF), Samutsakorn Province, 22 July 2011

217 Participant, ICJ & JPF Workshop, Bangkok, September 2011.

218 Participant, ICJ & JPF Workshop, Bangkok, September 2011.

Representatives of some organizations providing legal advice and support to migrants throughout Thailand explained that there is often a positive result when they take steps to ensure an individual official is provided with accurate information regarding migrants' rights under Thai law. Meanwhile those working with survivors of gender-based violence explained that often law enforcement officers, prosecutors and members of judiciary are not aware of procedural guarantees intended to protect the rights of victims during judicial processes. For example, often members of the judiciary and prosecutors will not be aware of provisions outlining that woman victims of sexual violence should not be required to confront the alleged perpetrator while giving testimony and that this requires special Court room and logistical arrangements. Similarly, they indicated that often police investigators do not know of provisions guaranteeing women a right to interrogation by a female officer and in the presence of a support person. As a result these safeguards are often not respected.

Costs & Financial Means

"It is very difficult for ordinary persons to access justice processes. It is only possible if we have a lot of money."²¹⁹

Almost all those to whom we spoke across communities identified costs and financial issues as significant factors which regularly impact women's ability to seek justice and legal protection. They told us that it is often extremely difficult for poor women, or those without access to independent financial means, to obtain legal advice and legal representation. Although provisions for free legal aid for those who cannot afford to hire a lawyer themselves are in place for both criminal and civil cases,²²⁰ they explained that in reality it can often be very difficult for individuals who have suffered human rights abuses to avail of relevant entitlements.

Again, lack of access to information is an important factor and in particular those who are the victims of crimes or those whose complaints would take the form of civil or constitutional claims regarding human rights abuses, may simply not have information regarding their right to obtain legal assistance and representation. Even if they know of this right in principle, those we spoke to explained that in practice, without the assistance of a support organisation, it is difficult for them to successfully access relevant services. In addition, we were told that even where representation is obtained, there are insufficient numbers of lawyers working for legal aid services and as a result the services are overstretched. Also, lawyers often do not have sufficient

219 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

220 Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Sections 40(5), 242; Criminal Procedure Code, Sections 134(1), 173; Ministerial Regulations on Justice Fund (Ministry of Justice) B.E. 2553 (2010); Attorney General Rules on Legal Aid B.E. 2547 (2004), No.3, Section 11.

time to give to each case or may be lacking specialised capacity to deal appropriately with certain issues, including gender-based violence or other forms of discrimination against women. Meanwhile, for certain communities legal aid services may not be present in practice or off limits. For example accounts we received from representatives of Hill Tribe communities and other rural communities indicated legal aid services are simply not available within an accessible or viable distance. Meanwhile, women in the Southern Border Provinces indicated that for many in their communities mistrust of State authorities is so pervasive that there is hesitancy to seek legal advice or assistance from State lawyers.

Beyond the question of legal fees, all those we spoke to alluded to the ways in which peripheral or indirect costs can impact access to legal protection and remedies by women without ample independent financial means. For example, many of those we spoke to specified that in order to pursue legal proceedings women workers will regularly have to take days off work. Where they are paid a daily or hourly wage they may simply not be able to afford to do so. In addition, they explained that for women living outside urban areas and/or those who do not live near to relevant departments, offices and Courts substantial travel and accommodation costs will arise. In their experience due to the long length of time which legal proceedings in Thailand can take these costs may be significant and are often prohibitive. Although legal provisions specify that individuals may be entitled to payment of these expenses, those we spoke to said that the relevant amounts allowed by the State are extremely low. They also pointed to other related issues that are often present for women as a result of their roles as family caregivers. In the words of one woman we spoke to, “women have to take care of children. They cannot leave home for days.”²²¹ Indeed where women are single parents or the sole breadwinners in their families, these practical realities are exacerbated, and those we spoke to expressed the view that often women will simply not consider themselves able to devote time, money and efforts to pursuing legal remedies and justice.

Language Barriers

A related obstacle which we were told is commonly experienced by migrant women from neighboring countries, Hill Tribe women, and Malay Muslim women in the Southern Border Provinces relates to the provision of legal information in a language they can understand. Many members of these communities do not speak Thai as a first language, and their ability to understand and operate in Thai may at times be very limited. We were told that there has been very limited provision by State authorities of generally available information on rights and the law in the main languages of these communities.

221 Participant, ICJ & JPF Workshop, Songkhla, September 2011.

Meanwhile, when individuals from these communities with limited financial means seek to make complaints or pursue legal remedies, although Thai law indicates that where necessary authorities must arrange for the presence of interpreters for interviews or relevant court processes, we were told that in practice it can be difficult to secure the presence of an interpreter or access to translations of relevant documents and evidence. Some of those we spoke to indicated that these problems can sometimes arise because of a general lack of readiness on the part of officials and difficulties in identifying or locating an interpreter despite reoccurring demand. For example one lawyer working with women migrants from Burma, Cambodia and Laos explained that whenever he accompanies women to a police station to make a report, "there is a panic to find the interpreter every time."²²² Meanwhile many of those we spoke to from the Southern Border Provinces said that officials will often refuse to provide an interpreter or will charge for the translation of official documents.

222 Participant, ICJ & JPF Workshop, Bangkok, September 2011.

7. Recommendations & Action Points

In the preceding sections we have outlined the accounts we received of cross-cutting obstacles to justice which women in Thailand continue to face. In the following paragraphs we seek to present a range of responsive recommendations and action points which we call on relevant actors to implement.

These recommendations were developed jointly with over 30 women, lawyers and advocates who participated in a workshop in March 2011 to discuss the ICJ & JPF research findings and identify follow up steps.

These recommendations are largely addressed to a range of Government Officials, Ministries and Offices and many of the suggested action steps require action from more than one Ministry or Office or require coordination and collaboration between them. In particular we address these recommendations to the Office of the Prime Minister, the Ministry of Justice, the Ministry of Human Development and Human Security, the Minister of Interior and the Royal Thai Police, the Ministry of Labour, the Office of the Council of State, the Ministry of Foreign Affairs, the Office of the Ombudsman.

I. Gender Equality & Non-Discrimination Legislation

Ensure the timely production and publication of a revised draft of the Promotion of Opportunity and Gender Equality Bill that responds to the concerns raised by civil society. At a minimum the following elements should be reflected:

- No exceptions to the prohibition on discrimination should be provided for.
- Intersectional discrimination should be expressly encompassed within the prohibition on discrimination so as to enable the legislation to respond to the forms of intersectional discrimination that certain women face .
- Judicial remedies, including right of appeal to superior courts, must be made available to those seeking to enforce their rights.
- The rights of victims of discrimination to reparation, including but not limited to compensation, should be reflected.
- Budgetary needs for the effective implementation of the legislation should be outlined and provided for.

Hold meaningful consultations on the revised draft Bill with civil society and other relevant stakeholders and revise the Bill accordingly.

Take steps and coordinated action to prepare State officials and members of the broader public for the entry into force of gender equality legislation, including through:

- Ensuring that civil servants, police officers and other State officials are fully informed of the draft Bill and its particular contents and subsequently the entry into force of the Act.
- Providing ongoing and regular gender equality and non-discrimination advice including, where appropriate, training, to a cross-section of judges and judicial officers, prosecutors, civil servants, police officers, military officers and other key officials at all levels. Such initiatives should be conducted in close cooperation with civil society and other independent experts, including those working closely with marginalized groups of women in Thailand. Initiatives should involve recourse to best-practice models and experience sharing with stakeholders from other countries.
- Implementing effective and targeted informational campaigns to raise awareness of the new legislation and key concepts among key stakeholders, including public institutions, service providers, private enterprises and the general public.

II. Gender-Based Violence

Domestic Violence

Initiate a process towards the revision and amendment of relevant provisions of the Domestic Violence Victim Protection Act. This process should involve close consultation with civil society organizations, independent experts and representatives of marginalized groups. It should involve recourse to best-practice models, drawing on examples from other countries, and experience sharing with experts from relevant countries.

In the short-term, develop and issue appropriate directives, regulations and guidelines directed at police officers, prosecutors and members of the judiciary. These should:

- Unambiguously clarify that domestic violence involves serious criminal conduct and clearly underline that officials must not treat domestic violence as a problem to be resolved exclusively or primarily within families and must not encourage those who have suffered such violence to withdraw complaints or settle cases.

- Reinforce the duty of responsible officials to effectively investigate instances of domestic violence of their own volition and assist affected women to access justice, including by providing information on the legal avenues available to them and advice they need in order to pursue complaints.
- Emphasize the importance of treating those suffering domestic violence with respect and appropriate sensitivity. Develop detailed procedural guidelines to assist officials dealing with instances of domestic violence.
- Emphasize the importance of recourse by officials to the range of protective and provisional remedial measures provided for in Section 10 of the Domestic Violence Victim Protection Act.
- Clarify, pending law reform, that the wellbeing and safety of a woman who has suffered violence should always be prioritized over the other guiding principles listed in Section 15 of the Domestic Violence Victim Protection Act.
- Clarify, pending law reform, that if appointing mediators, Courts and officials should ensure their competence, independence and impartiality, and should generally not appoint family members of the parties.

Provide ongoing and regular advice and continuing education to a cross-section of judges, prosecutors, civil servants, police officers and other officials at all levels regarding their responsibilities in respect of domestic violence. Such initiatives should be conducted in close cooperation with civil society experts, including those working with survivors of domestic violence in Thailand. Initiatives should involve recourse to best-practice models.

Sexual Assault

Initiate a process towards the medium-term revision and amendment of provisions of the Penal Code and Criminal Procedure Code dealing with various forms of sexual assault. The process should involve close consultation with civil society organizations, independent experts and representatives of marginalized groups. It should involve recourse to best-practice models, drawing on examples from other countries, and experience sharing with experts from relevant countries.

Develop and issue appropriate directives, regulations and guidelines aimed at law enforcement officers, prosecutors and members of the judiciary regarding the investigation and prosecution of sexual violence, with the purpose of:

- Underlining that sexual violence involves serious criminal conduct and that officials must treat incidents seriously and must not encourage survivors to withdraw complaints or settle cases.
- Clarifying and emphasizing relevant officials' responsibilities to effectively investigate instances of sexual assault that are brought to their attention, with a view to enabling subsequent accountability, including prosecution. Underline the importance of ensuring incidents of sexual violence involving lesbian women, transgender women and sex workers are equally subject to effective investigation and prosecution.
- Emphasizing that those subject to sexual violence must be treated with respect and appropriate sensitivity, including through ensuring that procedures applied during investigation and trial do not cause further harm to the person who has suffered the violence.
- Providing detailed procedural guidelines, developed with the assistance and advice of competent experts on violence against women, to assist officials dealing with instances of sexual violence.
- Clarifying for prosecutors and members of the judiciary both the applicable rules of evidence in cases of sexual violence and what the requirement of "consent" entails.

Provide ongoing and regular advice and continuing education to a cross-section of judges, prosecutors, civil servants, police officers and other officials at all levels regarding their responsibilities in respect of sexual violence. Such initiatives should be conducted in close cooperation with civil society experts, including those working closely with survivors of sexual violence in Thailand. Initiatives should involve recourse to best-practice models.

Sexual Harassment

Ensure the timely production and publication of draft legislative provisions on sexual harassment.

Hold meaningful consultations on the draft provisions with civil society organizations, independent experts and representatives of marginalized groups of women.

Take steps and coordinated action to prepare State officials and broader Thai society for the entry into force of new legislative provisions, including through effective and targeted campaigns to raise awareness of the new legislation and the prohibition of sexual harassment among key stakeholders, including institutions, service providers, private enterprises and the general public.

III. Immigration Laws & Regulations And Migrant Women's Access to Justice

Initiate a process to identify and thereafter implement effective legal measures to ensure that migrants' immigration status in Thailand does not continue to impede access to legal protection and remedies when they face human rights abuses in Thailand. This process should involve significant consultation with civil society organizations and representatives of migrant communities as well as recourse to best practice models and experience sharing with experts from relevant countries. It should specifically address the legal protections and remedies, among others, available under the Domestic Violence Victim Protection Act, the Penal Code, the Labour Protection Act and any new gender equality legislation which is adopted.

Effective measures may include:

- The short-term establishment of legal 'firewalls' between immigration law enforcement and rights protection mechanisms. This involves ensuring through relevant safeguards, including law reform, Ministerial Regulations and other Government orders and directives, that where a woman reports or seeks protection in relation to instances of gender-based violence her immigration status will not come under scrutiny by officials and authorities and she will not be subject to arrest or deportation. Section 17 of the Immigration Act clearly enables the establishment of such exceptions.
- The introduction of provisions into legal frameworks dealing with gender-based violence and immigration which provide undocumented women migrants pursuing legal protection and remedies in respect of gender-based violence with the right to receive residence and work permits and pursue longer-term regularization of status.
- Changes to migration registration so as to separate a migrant's legal status from their employment with a specific employer.
- The significant extension of the seven day time period for migrants to find a new employer in cases where they wish to complain about employee abuses.
- The revocation of provincial orders restricting the movement of migrant workers in certain provinces.

IV. Addressing the Ways in Which Plural Legal Systems Affect Women Asylum Seekers or Displaced Persons from Myanmar/Burma

Establish an effective process by which to ensure meaningful and ongoing consultation with women and representative organizations regarding access to justice in the camps.

Establish an oversight body comprising relevant representatives, including of women's organizations and international organizations, to monitor case referrals to the Thai justice system.

Expedite the preparation of a cohesive set of rules to govern internal camp justice processes and in this context ensure meaningful consultation with women's representatives on draft rules. Develop interim guidelines and rules to be applied in the meantime. Ensure transparency and awareness raising initiatives regarding the development of new rules.

Provide training and ongoing education on women's rights and justice requirements to relevant actors in the camps, including Camp Committees, security officers and section leaders.

Increase the financial and human resources available to support victim's engagement with the Thai justice system. Improve the facilities available in camps to enforce decisions and detain perpetrators.

V. Addressing the Ways in Which Plural Legal Systems Affect Muslim Women in the Southern Border Provinces

Defer the adoption of new legislation to update the Act on the Implementation of Islamic laws in Pattani, Naarathiwat, Yala and Satun Provinces until:

- A comprehensive human rights analysis, including in respect of gender equality principles, can be carried out in relation to the way in which the law is interpreted and applied and the system operates.
- Meaningful consultations are undertaken with diverse groups of Muslim women from the relevant provinces.
- The draft legislation is revised in order to allow it respond to difficulties identified in relation to its human rights compliance.

Ensure that the draft legislation proposed for adoption incorporates human rights-protection safeguards and oversight mechanisms, including:

- Specification that the legislation is subject to the Thai Constitution and its international legal obligations and must be applied and interpreted in a manner that complies with Constitutional rights protections, including those relating to gender equality and non-discrimination.

- Clarification that the legislation will only be applied when both parties to a case agree and specification that the Civil and Commercial Code shall apply when one party wishes.
- Clarification of processes for review and appeal of first instance decisions.
- Clarification of the jurisdiction of the legislation and specification of those matters in relation to which it is not applicable.
- Specification that before entry into force of the legislation an official codification will be developed outlining the applicable tenets and rules of Islamic law and the relevant interpretation that will be given to them.
- Explicit direction in relevant provisions that such a codification must comply with the human rights and gender equality principles under international law and standards and enshrined in the Thai Constitution and must be reviewed by the Supreme Court.

Work with human rights and gender equality experts and the Islamic Council of Thailand, to provide ongoing and regular training on legal requirements regarding human rights, gender equality and non-discrimination to Dato Justices, Court of First Instance Judges, and other court officials in the Southern Border Provinces.

Engage with provincial governors, local administration officials, the Islamic Council of Thailand and provincial Islamic councils, to address and eradicate extra-legal practices in Yala province that involve abuses of women's human rights, including freedom from torture and other ill-treatment. In this context Thai authorities must:

- Clearly and unambiguously recall that Thai authorities are obliged to prevent, investigate and prosecute such conduct as serious crimes.
- Specify that tacit acceptance by provincial governors, local authorities or other State officials, of such practices is unacceptable and direct these actors to inform village leaders and other stakeholders accordingly.

VI. Addressing Fear and Mistrust of Officials

Rigorously pursue the accountability of State officials alleged to have committed crimes, including sexual assault and other ill-treatment and extortion, involving individuals from marginalized groups, including migrants, Muslims in the Southern Border Provinces, members of Hill Tribes, and sex workers. Steps must include:

- Unequivocal public statements of zero-tolerance for crimes against members of these groups involving law enforcement officials, prosecution officials, military personnel and civil servants.

- Issuance of appropriate directives, orders, regulations and guidelines directed at law enforcement officials, prosecution officials, military personnel and civil servants, unambiguously underlining intentions to pursue the accountability of those officials who perpetrate criminal acts.
- Rigorous measures to prevent, investigate and prosecute allegations of criminal activity by law enforcement officials, prosecution officials, military personnel and civil servants.
- Ensuring that victims of such human rights violations enjoy the full right to remedy and reparation for the violations suffered.
- Establishment of independent and impartial investigative mechanisms that would issue public findings and recommendations, where there have been allegations of systematic human rights violations by State officials against members of certain communities.

Similarly address violations of rights to liberty, fair trial by a competent, independent and impartial tribunal established by law and equality and equal protection of the law faced by members of marginalized communities which result from the conduct or attitudes of relevant officials. Steps should include:

- Issuance of appropriate directives, orders, regulations and guidelines directed at members of the judiciary, law enforcement officials, prosecution officials, military personnel and civil servants.
- Establishment and recourse to effective independent oversight, investigatory and accountability mechanisms in respect of allegations of violations.
- Provision of ongoing and regular training to relevant officials at all levels on human rights and non-discrimination principles and obligations.

Ensure that all crimes involving private actors, including sexual assault and other forms of gender-based violence, perpetrated against members of marginalized communities are subject to an effective and timely investigation with a view to prosecution.

VII. Sex Workers

Initiate a process of meaningful consultation and dialogue with sex workers and civil society experts in order to identify and implement effective legal measures to ensure the protection of the human rights of sex workers in Thailand. Among other things such measures will necessitate law reform, including of the criminal law.

The process should explicitly acknowledge that sex workers are rights-bearers, entitled to the full realization of the human rights they enjoy as human beings and that effective legal measures are those which will enhance their ability to enjoy and claim those rights.

The measures identified should specifically address the need to enable sex workers to access and claim the legal protections and remedies provided for in Thai law, including for example under the Criminal Code, the Labour Protection Act and any new gender equality legislation which is adopted.

In the short term effective measures may include the establishment of legal 'firewalls' between criminal laws prohibiting aspects of sex work and rights protection mechanisms. This involves ensuring through relevant safeguards, including Government regulations, guidelines, orders and directives, that where a sex worker reports or seeks protection in relation to instances of gender-based violence or labour rights abuses she will not face fines or prosecution under the Prevention and Suppression of Prostitution Act or Criminal Code.

VIII. Labour Law & Domestic Workers

Ensure the forthcoming Ministerial Regulation on the protection of domestic workers extends the full range of rights protection to domestic workers.

Take steps and coordinated action to ensure the effective implementation of the new Regulation in practice once adopted including through:

- Ensuring that Ministry of Labour officials, Labour Court Judges and other authorities are informed of the draft Bill and subsequently the entry into force of the Act.
- Implementing effective and targeted campaigns to raise awareness of the new Regulation among employers and the general public.

Undertake a comprehensive and up-to-date gender equality and human rights review of current labour law and labour rights protection with a view to initiating relevant law reform processes. Such a process should involve close consultation with civil society organizations and representatives of marginalized groups of women workers, including migrant workers, and in particular women workers in the informal sector.

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Areewan Jatuthong, Lawyer
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Naiyana Supaphueng, Teerarat Kanjanauksorn Foundation
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Patchanee Tempiem, Women Lawyers Association of Thailand
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Sureeporn Yupa, Disabled Peoples' International Asia-Pacific
Nussir Archvarin, Sub-Committee, Lawyers Council of Thailand
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Jaded Chouwilai, Women and Men Progressive Movement Foundation

Northern and Northeastern Thailand

16 Women from Burma including Representatives of BWU, KW, KWO, PWO,
 SWAN, WRWAB, WLB
 6 Sex Workers
 5 Representatives of Hill Tribe Communities
Manee Boonrawd, Natural Resources Conservation Network
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Suntree Sengking, Northeastern Women Network
Thitichai Sornpakdi, TRAFCORD
Watcharawalee Tonsoongnoen, International Rescue Committee
Surachai Wachanasat, International Rescue Committee
Sompong Wiangchan, Assembly of The Poor Network

Southern Thailand

10 Women Survivors of Domestic Violence from Yala Province.
13 Women from Naratiwat Province.
Kalaya Aewsakul, Womens Health Center and Organization
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Abdulloh Wangni

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Siriorn Aromdee, Dept. of the Protection of Rights and Liberties
Krisada Boonrach, Provincial Governor of Songkla
Dol Bunnag, Chief Judge, Office of the Presidency of the Supreme Court
Apapan Cholsuek, Royal Thai Police
Kosin Hintao, Royal Thai Police
NanThima Jaroensuk, Pattani Social Welfare Office
Pithaya Jinawat, Dept. of the Protection of Rights and Liberties MOJ
Samphan Jinawat, Lawyer, Yala Provincial Office
Janchom Jintayanon, Dept. of the Protection of Rights and Liberties MOJ
Tawee Kaewkleeb, Internal Security Operation Command
Jonggonnee Mekrattanaworakul, Thonburi Criminal Court
Surat Poomkong, Internal Security Operation Command
Aimon Siangyai, Dept. of the Protection of Rights and Liberties MOJ
Amorn Silpwiwat, Office of Southern Border Administrative Court
Kavinadee Suppapongtevasakul, Office of Justice Affairs
Worapong Tongpaiboon, Royal Thai Police
Somboon Wattanapornmongkol, Chief Judge, Region 9

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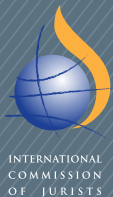
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Ensuring access to justice in respect of human rights violations and abuses is at once both a fundamental component of the rule of law and an indispensable element of human rights protection. Yet, in a wide range of contexts and places across the world, women's access to justice often remains illusive. Identifying and addressing the range of structural, legal, and practical obstacles which continue to impede women's access to justice is a vital step in enabling women to claim rights as legal entitlements, seek the accountability of those who transgress them and turn to the law for viable protection and meaningful redress.

In 2011 the International Commission of Jurists and the Justice for Peace Foundation initiated a process of consultation, research and discussion to explore the obstacles to justice that women in Thailand continue to face and identify ways in which to address them. This report outlines the main findings that emerged from that process, encapsulating what we heard from women human rights defenders, legal experts, representatives of non- governmental organizations and other stakeholders about women's access to justice in Thailand and presenting a series of recommended action steps.



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