

## CHAPTER 5

### STRUCTURAL, PRACTICAL, AND CULTURAL CONSTRAINTS

*Since the creation of the United Nations Organization, it has always been asserted that women's rights are fundamental rights, that women must be able to participate fully in every aspect of society be it political, civil, economic, social or cultural and that discrimination toward them must be eliminated. Nonetheless and despite the efforts made throughout the years, inequality between men and women remains a characteristic of social relationships in areas such as the law and the institutions. (Bauer 1996: p.101)*

#### 5.1 Introduction

The preceding chapter described the substantive component of the legal systems in the four countries; namely, the contents of the various laws that affect women. This chapter discusses some of the broader factors that impact on women's sociolegal status—the legal structure in the four countries; cultural mores and practical barriers that affect the implementation of justice; and finally, the need for more effective statistical collection and evaluation of women's sociolegal status.

As noted in Chapter 1, legal barriers and lacunae relating to women's status arise out of a number of factors. Important here are laws that clearly discriminate against women, and the *absence* of gender-sensitive laws on important issues such as domestic violence. Other law-related issues to be considered are conflicting rules and regulations, and conflicts between laws derived from varying sources, such as conflicts between civil codes that espouse women's equality and religious and customary laws that reflect patriarchal norms.

The situation is further compounded by structural, cultural, and practical factors that determine the level of responsiveness and accessibility of the legal system, its laws and institutions. It is therefore critical to examine the broader context in which the law and legal

institutions work, remembering that such laws and institutions reflect the values and beliefs of dominant groups within a society. Issues to be considered here include

- the widespread lack of gender sensitivity among implementing and enforcement agencies, including the judiciary;
- women's lack of legal awareness and legal literacy;
- women's low utilization of the legal system;
- prevailing sociocultural attitudes towards women's legal problems;
- women's lack of financial capacity to have recourse to the law; and
- women's lack of access to legal services.

A further practical barrier to the improvement of women's sociolegal status is the lack of gender statistics. In order to effectively monitor and evaluate the sociolegal status of woman, good data collection and evaluation are important.

The need for women in the Southeast Asian region to pursue legal and judicial reform is even more pressing following the Asian economic crisis of the late 1990s. Stabilization policies and structural adjustment programs have high social costs. Women, particularly poor women, tend to bear a large share of the costs when there are drastic cutbacks in basic government services such as education, health care, and family planning. In terms of sociolegal status, poverty acts as a further inhibitor to women and men seeking court action or taking legal action to protect their rights. Lack of education, particularly as children are withdrawn from school early, makes this barrier even more pronounced, and has implications for women's ability to seek court action in the future.

Women activists in Southeast Asia have promoted legal reform to improve women's access to resources, economic opportunities, political participation, and general well-being. During times of economic crisis, such efforts become even more urgent. The danger here is that unless governments and their development partners vigorously pursue these issues now, women will become further marginalized, as economic crises and dislocations caused by economic globalization divert the attention of policymakers to pressing, short-term concerns.

## 5.2 Structural Aspects of the Legal System

Although the national economic and social policies of the four countries may provide a relatively favorable environment for women's development and protection of their rights, laws do not always translate into justice. Many structural factors affect women's access to justice. Major structural and institutional constraints that confront women in the four countries include

- low representation of women in administrative agencies (including law enforcement), the judiciary and the legal profession, and lack of awareness in such agencies of women's concerns;
- lack of equitable, gender-sensitive implementation and enforcement of laws pertaining to women;
- women's limited access to justice and inability to afford legal services; and
- lack of political and bureaucratic will to pursue gender-sensitive reform of policies and laws, and to improve their implementation and enforcement.

### 5.2.1 Administrative Agencies, the Judiciary, and the Legal Profession

There is much to be done in terms of restructuring the present legal institutions in the four countries. To begin with, there are no special family courts to handle women-related cases. The percentage of women in the judiciary is also relatively small (between 10 and 15 percent). While the prohibition against women becoming judges and State attorneys in Thailand has been lifted, as yet the number of women in these positions has not greatly increased. The situation is worse in religious courts. In Malaysia, for example, all syariah court judges are men, and all *hakim* (arbitrators) have to be men. All members of the state religious councils are men, although this is not a requirement. It is not surprising that their decisions tend to reflect primarily the interests of men.

Increasing the number of women judges is not a sufficient condition to make courts more women-friendly. For example, there are

women judges, such as in the Philippines, who are active in women's issues, but many are also unaware of these issues. Knowledge of and sensitivity to women's issues are important factors that will influence their handling of cases involving women. At present, judges and other court personnel do not have the requisite knowledge and training, or often the sensitivity, to handle such cases.

In addition, much systemic discrimination and inequality flow directly from the attitudes of lawyers (usually male, but sometimes female), courts, law schools, firms, societies, and government legal departments. In order to bring about change in major sectors of the legal system, it will also be necessary to bring about attitudinal and behavioral change within the legal profession and judiciary. There are many barriers to entry for women in the legal profession, and in most countries it is still a "men's club". Women are underrepresented in law faculties and at the senior levels of the profession. Circumstances and the corporate culture in most law practices are such that it is difficult for women to succeed, particularly women who have primary responsibility for child care and home management.

### 5.2.2 Implementation, Monitoring, and Enforcement

The implementation and enforcement of laws have been characterized by all four country teams as extremely problematic. In particular, there is widespread criticism of law enforcement agencies. Police forces in all countries have inadequate resources. Many police also overlook or ignore criminal events. The lack of regular monitoring and evaluation procedures makes it difficult to assess the institutional capacity or effectiveness of the enforcement agencies. The public generally is of the opinion that law enforcement needs an overhaul.

The number of women in the police forces of the four countries in the study is small. In **Thailand**, women police have only recently been introduced. This makes it difficult to implement the recommendation made by the NCWA and other women's organizations in Thailand that a policewoman be placed in every police station to handle cases of rape, divorce, domestic violence, and sexual harassment.

Government institutions with women's programs are inadequately staffed. In **Malaysia**, one problem identified in domestic violence cases is

that only a social welfare officer can apply for an IPO. A shortage of welfare officers impedes this process. For example, there was only one welfare officer in charge of domestic violence cases in an office serving a large metropolitan area. If she was on leave, there was no one to replace her, so victims of domestic violence had to wait for her return.

### 5.2.3 Accessible and Affordable Legal Services

Finally, limited legal aid in the four countries is a major barrier to justice for women, as women rarely have the money to pay for lawyers and to contend with lengthy legal or court proceedings.

In **Malaysia**, for example, if a woman wants to take a case to the labor court or industrial court, a lawyer or a union official must represent her. Rural women in particular are ill-served by the law, due to the overall lack of services in rural areas provided by either the Government or NGOs. Cheaper, more localized alternative dispute resolution services are also not common in the four countries, although there are some customary, alternative, or informal processes used by women. In the **Philippines**, a Barangay Justice Law is in place, with the authority to settle village disputes. However, the system does not work in cases of violence against women, because its objective is to settle cases amicably and not to protect the victim and punish the offender.

An effective and low-cost legal system is particularly relevant in areas where women are most affected: criminal law courts, family and domestic law courts, and religious or customary law venues. Legal reforms and strengthened judicial institutions are needed to facilitate economic development, social development and better environmental management. Effective judges and courts, legal processes, and legal institutions are crucial for the settlement of disputes. As pointed out at the Meeting of the Chief Justices and Ministers of Justice at ADB in August 1997, the availability of effective and low cost civil and commercial dispute settlement is an important condition for economic development.

### 5.2.4 Broader Political and Institutional Environment

There are few women in high-level positions in the governments of the four countries, and of these, not all are cognizant of or sensitive to

gender issues. This lack of women in positions of power in government agencies, the judiciary, and legislatures makes it far more difficult to implement law reforms and programs to redress gender bias in government.

Legal reform is hampered by the scarcity of female legislators. Pro-women legislation is often passed as a result of strong lobbying from women's groups, but there is no comprehensive agenda to address existing gender bias in any of the four countries.

Cultural norms in the four countries condition women to think their primary responsibilities are to the family and their husband. This partly explains why there are so few women in decision-making positions in government, as well as in other areas of public life. The same constraints face women who run for public office. Although many women are visible on the campaign trail and in fund-raising activities, traditional political parties seldom consider them as candidates. Voters also often have reservations about women candidates. Records show that very few women make it to high elected positions. In Thailand, women civil servants are still not allowed to hold positions related to national security.

### 5.3 Cultural and Practical Aspects of the Legal System

In general, women in the four countries suffer from discrimination as a result of entrenched attitudes and practices. Cultural values, attitudes, and habits of thought become part of the institutional framework of the society. Of relevance here is the way in which these attitudes and practices inform the laws and legal institutions within a country.

In addition to the influence of patriarchal attitudes and conservative religious norms, major cultural and practical constraints facing women in the four countries include

- women's lack of awareness of their rights and of how to access the legal system;
- bias and insensitivity of administrative and judicial personnel toward women's legal problems; and
- women's reluctance to access the legal system, based on fear, shame, or other factors.

### 5.3.1 Women's Legal Awareness and Legal Literacy

Women must be aware of the law and how it affects them if they are to benefit from legal reform. Women's lack of legal awareness is one of the greatest barriers to their utilization of the legal system to protect their interests. Unfortunately, few rural or urban poor women know their rights, or know how to access the legal and court systems. Few know about NGOs or legal aid centers that can assist them with their legal problems or court cases. In general, only educated elite women, and those women active in NGOs and women's organizations, are aware of their rights and familiar with court processes.

In **Indonesia**, for example, the majority of women are unaware that a marriage has to be registered to be valid. This disadvantages women in cases of separation, as only women whose marriages are registered can claim maintenance and other benefits.

In **Thailand**, women are gradually becoming more aware of their rights. The 1974 Constitution, which first provided for equality between men and women, and its successors, including the 1997 Constitution now in force, have helped generate a great deal of awareness about women's rights.

**Malaysian** women are generally unaware of their legal rights, protection, and sources of assistance. They also lack information about the health hazards of their jobs and of many industrial processes that use toxic or poisonous substances.

The lack of media attention to women's legal needs, including legal literacy, and the complexities of the law further disadvantage women who lack legal aid and advice from knowledgeable sources. More emphasis will need to be given to educating women about the law and their legal rights, and the legal services available to them. For this to be successful, other parallel programs will also need to be run, such as campaigns that emphasize the *unacceptability* of sex discrimination and violent acts against women (including incest) and how women can protect themselves both in public and within the home. It will also necessitate the retraining of myriad layers of law implementation and enforcement personnel to sensitize them not only to women's lack of legal literacy but also to the barriers that prevent women from seeking legal redress.

It is also important to consider the extent to which the legal and judicial systems intimidate women. Statutes, regulations, and court

decisions are generally dense and difficult to read even for well-educated women. Moreover, they are often not readily available to the general public. The preparation of easily understood and accessible information sheets on the most common laws pertaining to women, in an array of local languages, would be of benefit here.

Finally, community involvement needs to be considered if women are to feel empowered to seek legal redress, particularly in the prevention of violence against women. Community involvement removes the issue of violence from the private realm of the family to the public realm, and organizes community support to redress acts of violence through social sanctions such as “shaming”. Also important is information dissemination, basic legal literacy campaigns, counseling, and lobbying for legislation.

### **5.3.2 Gender Awareness and Attitudes toward Women’s Legal Problems**

General attitudes within the administrative, legal, and judicial systems of the four countries leave much to be desired. The treatment of women complainants is often degrading and demeaning. Reporting procedures are limited at best, and often nonexistent. Moreover, women’s complaints are often not treated seriously enough to activate the necessary mechanisms to protect them. As noted above, there is a particular need for change in the attitudes of front-line police officials. However, the treatment of women will not improve without major attitudinal changes at the top of the legal, judicial, and enforcement institutions, and without direction from the political level. Some change is occurring, but it is not fast enough to cope with the escalating violence and demands to protect women and their children from that violence.

In order to change or modify attitudes and values, education and training are needed for the judiciary, legal, and enforcement systems. Furthermore, if gender bias in society is to be eliminated, there must be an increased understanding of the roots of women’s subordination, and of how the law has been and can be used to reinforce this inferior status. The rhetoric of protection of the individual and the family or, similarly, the interest of a well-ordered society, are often guises under which the inequality of women is perpetuated.

In addition, the ways in which sexist language structures and institutionalizes female subordination in the law as well as in society as a whole must be considered. Language has a direct impact on attitudes and perceptions. Use of gender-neutral terminology can help remove double standards, confusion, and ambiguity in the laws, as well as making legislators and those who draft laws more sensitive to women's position and needs. Language reform should thus be an integral part of legal, regulatory, and contractual reform. Some progress has been achieved in making the language of laws, regulations, and contracts more gender-neutral and inclusive. However, there is still a tendency in the four countries to use gender-exclusive terminology, for example, Ministry of *Manpower* instead of *Human Resources*.

The need for gender-neutral language was raised by the Philippine team in the context of the Civil Code, and specifically relating to property and inheritance. They urged that, wherever possible, in the language of laws, regulations, and contracts, "men" or "women" be replaced with "persons," "husband" or "wife" be replaced with "spouse," "son" or "daughter" be replaced with "child" or "children".

### 5.3.3 Women's Reluctance to Use the Legal System

It is also well documented that women in the four countries are often reluctant to use the available legal systems. This is frequently related to their lack of financial resources (see 5.2.3), or their lack of legal awareness and sense of intimidation by the legal system (see 5.3.1). It is also important to note, however, that women's sense of fear or shame can also be barriers to their utilization of the legal system, particularly in the case of domestic violence and rape.

Many women tolerate abuse and violence, and fail to report incidents to the police, medical practitioners, social workers, and women's organizations and shelters. In part this is due to shame, embarrassment and the belief that these are personal matters to be tolerated or worked out in a family context. As Bauer (1996) notes, there is a growing body of evidence that fear also causes women not to express themselves or seek legal redress. This fear is most often articulated during discussions of violence against women in general and of rape in particular. The fear not only reflects concern over the possibility of physical

retaliation, but is also linked to customs and attitudes that exclude, marginalize, and stigmatize women. It is hoped that with increasing publicity in the media about the unacceptability of violence against women and children in any form, many more women will come forward to report abuse and violence (Box 6). As more women come forward, more resources will be needed to ensure that women are provided with full legal support and recourse.

**Box 6: On Our Own**

**W**e salute... the girl who, having been almost raped, and her attacker having fled in a taxi, nevertheless persuaded another taxi driver to help her apprehend those who had tried to violate her... The girl didn't allow her having been victimized to dampen her courage; the taxi driver who helped her showed an admirable concern for a fellow human being... Their stories show that ordinary citizens will not take crime and injustice sitting down. In the face of their resolve to see justice done, their almost superhuman efforts to ensure law and order, we can only ask: Where were the police?

But it is clear the police were, to put it charitably, the extras in these scenes of derring-do. This is a timely reminder to our law-enforcement officials. As the police top brass and the military exchange recriminations and expose corruption in each other's ranks, the citizenry finds itself having to attend to law and order by itself. We, the citizens, have been left to our own resources. If you are raped, then you yourself must give chase to the rapists if you ever want to see them behind bars; if you are held up and stabbed, far better for you to lunge at your assailants and bring them to justice, rather than expect succor from the police...

**Source:** Editorial, *Today*, 6 August 1997 (Philippines).

## 5.4 Gender Statistics: Measuring and Monitoring Women's Legal Status

In order to effectively monitor and evaluate the sociolegal status of women, collection and analysis of gender-disaggregated data are essential. Ideally, the data collection and analysis will be based on agreed indicators of women's status, and will involve all relevant government agencies.

### 5.4.1 Status of Data Collection and Analysis

Following are some highlights of the country studies in this area.

**Indonesia.** Indonesia's Central Bureau of Statistics collects and disaggregates most data it collects. The surveys and censuses typically cover population, employment, health, religion, housing, the environment, agriculture, mining, manufacturing, foreign trade, finance, consumption, and income. They also collect and publish data from other ministries and some of these data are relevant to the status of women.

The Department of Religious Affairs collects data on marriage, divorce, and reconciliation from the religious offices (KUA) and the religious courts where marriages and divorces are registered. The statistics are limited to Islamic marriages; marriages and divorces based on the other religions are not tabulated. The number of Islamic marriages and divorces are underreported due to registration costs, travel costs to the registry, the remoteness of many registries from rural areas, and the lack of readily accessible KUAs: most KUAs are in cities, while 64 percent of the population live in 67,000 rural villages.

The main problems in data collection and statistical analysis are poor management and administration of information; poor records and poor filing systems; incomplete registration of marriages; and underqualified staff. However, there is a real appreciation of the importance of sound data collection systems, and of the need for adequate budgets to hire technically expert staff at all levels.

**Malaysia.** Malaysia has recognized that there is a lack of gender-disaggregated data on the sociolegal status of women. The Statistics Department has expressed "strong interest and commitment" to help in gathering gender-disaggregated data from existing sources, provided the necessary budget and human resource allocations are made available. In 1999, ADB financed a technical assistance (TA) program for HAWA to develop a management information system and to strengthen its monitoring and evaluation. It is recommended that such TA incorporate into the program indicators on the sociolegal status of women.

It may be important for Malaysia, when gathering indicators on the sociolegal status of women, to look at the process of law reform, the uniformity of laws at the subnational level, and the institutional support

available for enforcement of laws. These concerns are important, given the reforms to Islamic family law that are being carried out by the Technical Committee to Coordinate the Syariah and Civil Laws under the Department of Islamic Development. The ability of Malaysian states to amend the original law may be open to exploitation, depending on how easy or difficult a specific legal process is when compared across states. The concern for institutional support for implementation and enforcement of laws is not limited to the participation of women. It is also a basic concern about staffing and workload that results in backlog of cases for women seeking legal redress.

**Philippines.** The Philippines has put much effort into establishing indicators that would capture changes in the overall situation of women. From as early as 1991, the National Commission on the Role of Filipino Women (NCRFW), jointly with the Statistical Research and Training Center, undertook the Development of Gender-Based Indicators System, Data Assessment and Data Improvement Plan project. The set of gender indicators developed under this project fell under four broad categories: agriculture sector, industry and economic sector, social sector, and special concerns. The last category consists mainly of migration, politics, violence against women, and women in media. In 1993, under a TA Agreement between ADB and NCRFW, the initial set of indicators was refined and grouped into eight categories: general indicators that provide information on the sex and age distribution of the population and rural-urban characteristics of the sexes; marriages/families and households; economic participation; political/community participation and leadership; education; health care; special concerns; and enjoyment of development services.

Both these projects focused on social and economic indicators. Some legal-related indicators were included but these were only incidental to the sector.

**Thailand.** In Thailand, the Committee on the Development of the Women's Information System prepared a report on gender indicators using 1990 as the base year. Using UN guidelines, the indicators cover nine areas<sup>5</sup> including legal rights.

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<sup>5</sup> Population (5 indicators); households and families, marital status and fertility (12 indicators); learning and educational services (10 indicators); health, health services, and nutrition (22 indicators); economic activity and population not economically active (11 indicators); public affairs and political participation (10 indicators); legal rights issues (2 indicators); public order and safety (11 indicators); and leisure and cultural activities (2 indicators).

The Committee decided to use two innovative measures to capture the legal situation of Thai women. The first tracks progress in lifting the Government's reservations on CEDAW. The second set of indicators tracks gender equality with respect to selected rights under Thai law.

#### 5.4.2 Suggested Sociolegal Indicators

All of the country reports recognize the pressing need to maximize the use of data collected by relevant government institutions, including the national statistics office or agency, the national ministry or committee for women's affairs, the ministry of justice and law enforcement agencies, the judiciary, the legislature, and other government offices participating in the implementation or enforcement of laws affecting women. In addition, it is also suggested that concerned agencies make better use of data generated by NGOs active in promoting women's rights.

The Philippine study also suggests three generic sets of indicators to monitor the legal status of women in the Philippines, which could be considered for possible application by other countries.

The first refers to laws and policies providing equal access and opportunities for women in various areas or fields like education and training, labor and employment, politics and decision making, health care, and nutrition. This category could include brief descriptions of the relevant laws or policies, the provisions particularly relevant to women, and any enforcement mechanisms (such as fines or injunctions) that ensure compliance.

The second category consists of indicators related to the implementation, enforcement, and monitoring of laws and policies relevant to women. Indicators identified under this category could include measures of women's ownership of land and access to credit; male/female differences regarding wages, benefits, and hiring/firing; data on marriages, separations and divorces, including the disposition of property and custody of children; statistics on reports and prosecutions of rape, domestic violence, and sexual harassment cases, including the penalties imposed for convictions; complaints about police treatment of women; and data on trafficking in women and children, child abuse and prostitution. This second category could also include indicators on legal

education and other support programs, and on the resources allocated for monitoring and enforcement of laws pertaining to women.

The third category relates to the participation of women in the formulation and implementation of laws affecting them. This category measures the extent of women's participation in activities aimed at achieving gender equality. Specific indicators under this category could include women's representation in different levels of government administration (including law enforcement), the judiciary, the legislature, the legal profession, and law schools.