

Protection of Women in Domestic Violence in Myanmar: differences between Civil and Criminal Proceedings

Abstract

Domestic violence is one of the most prevalent forms of violence in the world. Definitely, Myanmar women also are without avoidance from this kind of violence. There is no legislation that specifically addresses the offences and penalties concerning domestic violence. However, there are related laws for the protection of women from domestic violence. For example, like Myanmar Customary Law which provides the way of getting remedy to the victim who was suffered by domestic violence. Myanmar has ratified CEDAW in 1997 and has signed ICESCR in 2015 to protect women rights specially and to promote Human Rights in general. This research paper examines on different procedures, remedies and punishments concerning between civil and criminal proceeding related to the domestic violence of women especially in Myanmar. This analysis may produce how to make the effective procedure or mechanism in the litigation and how to implement preventive measures when suffering with the domestic violence both family level and in the community level. In addition, this analysis evaluates whether the actual protection of women for domestic violence in Myanmar is in line with international level or not, and then the next is what should be sound prevention to eliminate this kind of human torture

Introduction

Domestic violence can affect anyone regardless of ethnicity, religion, class, age, sexuality, disability or lifestyle. However, the vast majority of the victims of domestic violence are women and children, and women are also considerably more likely to experience repeated and severe forms of violence, and sexual abuse. Domestic violence does not discriminate and includes all diversity groups within community. Domestic violence is unacceptable behavior in civilized society .Some Myanmar women have faced with the domestic violence since ancient time but it has exited as hidden problem for several years. Nowadays, most of Myanmar women do not want to allow the domestic violence but some accept that it is a normal problems of daily life. Therefore, it needs to educate the awareness of those who did not understand the human rights.

The purpose of research is three fold. First, it may contribute a better understanding of domestic violence and its impact in Myanmar. Second, it explore how future effective procedure or mechanism out to be implement to get justice for victims. Finally, how to protect effectively the domestic violence in line with international and ASEAN standard of women rights.

The organization of the research paper is as follows: Firstly, part I explains the nature of domestic violence , kinds of divorce under Myanmar Customary Law ,and also presents the remedies of women who are victims of domestic violence under Myanmar Customary Law. Secondly, Part II discusses the protection of women for domestic violence under Criminal Law and Special Laws and obstacles to suit for the violent women. This part also analyses the decided

cases in 2015 about domestic violence in Kyauktan Township Court for accessing the actual nature of domestic violence on Myanmar and the posture (attitude) of the courts upon it. Lastly, part III comparative analyses with International and ASEAN standard relating to women for domestic violence. It is also hoped that the paper may contribute to the field in Myanmar by analyzing the domestic violence from a different angle.

1. Domestic Violence under Myanmar Customary Law

Myanmar Customary Law is the social and secular law based upon the custom and usages that are historically accepted by the ancient Myanmar. Moreover, Myanmar Customary Law is the law that is mainly based on rulings. The rulings are compiled by the State's Highest Courts such as High Court, Supreme Court and Chief Court in accordance with customs and ethics accepted by Myanmar Buddhist people. Myanmar women had enjoyed the remedies guaranteed by Myanmar Customary Law regarding the marriage, divorce, partition of property, custody of children, succession and inheritance. Sources of Myanmar Customary Law are the Dhammathats or treaties of rules which are in accordance with custom and usage and which are referred to in the settlement of disputes relating to person and property, Custom, Judicial precedents and legislative enactments. The terms "domestic violence" is not definitely found in Myanmar Customary Law. However, it can be found closely in the meaning of "cruelty" prescribed therein. According to Myanmar Customary law, cruelty means not only physical cruelty but for mental pain. In addition, in order to constitute cruelty ill-treatment in the shape of physical violence or infliction of mental pain must be done with indifference or delight in pain caused to suffer.¹

A Remedies for the women who are victims of domestic violence

In Myanmar Customary Law, there are mainly three kinds of divorce, they are; (1) divorce by mutual consent

- (2) divorce when the husband enter into priesthood or Rahan and
- (3) divorce by matrimonial fault.

There is no need to discuss the first two kinds of divorce in this research paper. In case of divorce by matrimonial fault, there are two kinds; ordinary matrimonial faults and grievous matrimonial faults. In former case, there are five kinds of faults;

- Misrepresentation
- Adultery on the part of the husband
- Taking another wife by the husband
- Desertion
- Ordinary Cruelty.

In addition, in later case, there are also two kinds; adultery on the part of the wife and grievous cruelty.

¹DawPu vs Mg Tun Kha,1946,BLR,P 125

In case of misrepresentation to marry, a girl had been induced by misrepresentation to marry a man, the deceived person may claim a dissolution of the marriage and a decree for divorce had been granted to a wife on the ground of misrepresentation.² Adultery by husband is not, in itself, a sufficient ground for divorce by the wife though the wife may be entitled to resist a claim by the husband for restitution of conjugal rights.³ If however, the wife commits adultery, the husband may divorce her or condone the offence.⁴ Generally, the mere adultery of a husband is not sufficient ground for divorce. But if a husband treats his wife with cruelty, the wife is entitled to a divorce. It can be seen that in case of *Mrs. R. Joubent Bwa vs Joubent Bwa*⁵ held that having the infectious disease from the husband to the wife is an apparent fact that the husband committed adultery with a prostitute. Infecting the wife by means of that way is another kind of cruelty and entitled the wife to claim a divorce.

As the Myanmar Customary Law recognized polygamy on the part of the husband, taking another wife or lesser wife would not itself constitute a ground for divorce but it would be a fault which might form a good ground if the circumstances of desertion, cruelty, ill-treatment or like coexisted.⁶ But Monogamy Law was enacted by Pyidaungsu Hluttaw (Parliament) in 2015. This law concerns with all those who are living in Myanmar, Myanmar citizens who live outside of Myanmar, and foreigners who marry Myanmar citizens while living in Myanmar.⁷ After this law came into effect, any marriage between a man and a woman in accordance with any law or any religion or any custom shall be legitimate only if monogamous.⁸ This law prohibits any man or woman who married with more than one spouse.⁹ If any husband or wife, while the original union is still legally recognized according to a law or a religion or a custom, marries with another person, that person is deemed to commit matrimonial faults and his or her spouse has the right to seek divorce.¹⁰

The Dhammathats recognize the husband's power of moderate chastisement with a light cane or split bamboo. Even in the early days of the British period it was thought that striking a wife only once or pulling the wife by her hair and abusing her was not sufficient ground for a divorce. But the Courts in Myanmar no longer recognize the husband's power of chastisement. Physical assault by the husband on his wife is considered to be a matrimonial fault.¹¹ Cruelty might be in any means. An isolated instance of ill-treatment or violence is not sufficient; there must be physical violence or infliction of mental pain with indifference to delight in the pain caused to the sufferer.¹² It includes any act of likely to cause endangerment of body, life or health.¹³

² May Oung, U, A selection of Leading Cases on Buddhist Law, British Burma Press, Rangoon, 1914, P 94, *Ma Khin vs Mg Gale* P.J 130

³ *Ma Thein Nwe V Mg Kha* (7 Ran 415), *Ma Ein V Te Naung* (5 LBR 87)

⁴ Maung Maung Dr., Law and Custom in Burma and the Burmese Family, The Hague, Martinus Nijhoff, 1963, P 77

⁵ *Mrs. R. Joubent Bwa vs Joubent Bwa*, 1948 BLR .P132

⁶ Chan-Toon, U, The principles of Buddhist Law, 1894, Myles Standish & Co, Rangoon, Myanmar, P 36

⁷ Section 2, Monogamy Law, 2015

⁸ Section 6, Ibid

⁹ Section 10, Ibid

¹⁰ Section 14, Ibid

¹¹ Lahiri, S.C. Principles of Modern Burmese Buddhist Law, 6th Edition, 1957, p.97.

¹² *Daw Pu(a) Daw Pu Gyiv Mg Tun Kha*, 1946, BLR.P 125

Some mental pains are rather worse than the physical cruelty. Cruelty by one spouse is a matrimonial fault for which the other party entitled to divorce.¹⁴ In case of aggravated cruelty, such as the infliction of grievous hurt, the guilty spouse share of the joint property may be forfeited in the partition of property goes by the cause of the divorce and the guilt of the offending party.

With regard to this fact the Supreme Court had decided in the case of Daw Mee Mee Tun vs U Mg Mg Lwin¹⁵ that: - "In this case U Mg Mg Lwin frequently committed sexual intercourse with other women. Moreover, he married with a second wife during the period of the first legally marriage. It was held that it is contrary to Myanmar custom and social life and constitutes the grievous cruelty to Daw Mee Mee Tun. Therefore, the wife has the right to divorce and the husband who commits a grievous matrimonial fault shall waive all his property rights.

Although the terms domestic violence is not found in the provisions and rulings of Myanmar Customary Law, the grievous cruelty is found and recognized as grievous matrimonial fault. Moreover, it should be noted that according to Myanmar Customary Law cruelty takes an aggravated form and the victims of this grievous cruelty may have the right to divorce to escape from this situation. Furthermore, the guilty party is liable to forfeit his or her share of the joint property on divorce. Therefore, protection of women for domestic violence seemed to be applied under Myanmar Customary Law in Myanmar. Moreover, it is found out the word cruelty is used instead of describing the word violence in Myanmar Customary Law.

B. Jurisdiction of the Courts and Procedure for Suit

The Supreme Court of the Union is the highest Court of the Union without affecting the jurisdiction of the Courts-Martial and the Constitutional Tribunal of the Union in Myanmar¹⁶. The Supreme Court of the Union, the High Court of the Region and the High Court of the State are formed in accord with the provisions of the Constitution in the Republic of the Union of Myanmar.¹⁷ Court of Self-Administered Division, Court of Self-Administered Zone, District Courts, Township Courts and other Courts established by law are formed in the Region or State, in accord with the provisions of the Constitution.¹⁸ Therefore, the lowest court is the Township Court. The jurisdiction of various levels of Courts are provided in Union Judiciary Law, 2010.¹⁹

In Myanmar, when the courts have to decide any question regarding marriage, succession, inheritance, Myanmar Customary Law shall operate in cases where the parties are Buddhists, the Mohammedan Law shall operate where the parties are Mohammedans and Hindu Law shall operate in case where the parties are Hindus.²⁰ In a case where no specific personal law can be

¹³Mrs Pearl Kyaw vs. U Kyaw 1967 ,B.L.R, P 249

¹⁴MrsProtimaGhoshvsBimalandu Ghoah,1963,BLR,526

¹⁵DawMeeMeeTunvs U Mg MgLwin 2012 MLR.P 48

¹⁶ Section 8, Union Judiciary Law,2010

¹⁷ Sections 7,39 ,Ibid

¹⁸Section 52, Ibid

¹⁹ Sections 11,12,13,14,15,16,17,18,19,20,21,22,38,39,40,41,53,54,55,56 and 57, Ibid.

²⁰ Section 13 (1) Burma Laws Act ,1898,Tan Ma Sher Zin vs Tan Ma Ngwe Zin,1932,10 Ran followed in Ma Sein Byu vs Khoo Soon Thye ,1933,11 Ran.310

applied the Court shall decide in accordance with justice, equity and good conscience. This principle is still applicable in civil adjudication. Every case must be decided on legally admissible evidence taken at the trial in the presence of accused. The trial must be fair and impartial. Before 1954, there is no provisions and rulings that which Law shall operate for the Buddhist women who marry non Buddhist men. All these cases are mostly decided by the non Buddhist husband's Law .Therefore, Myanmar women lost their legal status relating to marriage, divorce and inheritance. In 1954, the Buddhist Women's Special Marriage and Succession Act, was promulgated and Myanmar Customary Law shall operate for the Buddhist women who marry non Buddhist men relating to marriage and divorce according to the Buddhist Women's Special Marriage and Succession Act. In 2015, Pyidaungsu Hluttaw enacted Myanmar Buddhist Women's Special Marriage Law, in order to enable the enjoyment of equal rights by Myanmar Buddhist Women and non-Buddhist men with regard to marriage, divorce, partition and guardianship of children and to give effective protection. It abolished the Buddhist Women's Special Marriage and Succession Act,1954. But there is no provision included relating to domestic violence for Myanmar women.

If a woman wants to claim divorce under Myanmar Customary Law, she will apply to the Court according to Civil Procedure Code. All Civil Courts have to try the cases strictly according to the provisions laid down in the Civil Procedure Code, 1908 and the Evidence Act,1872 relating to civil cases. All Civil Judge are supposed to be well – versed in these laws. Principles underlying the adjudication of the civil cases and the criminal cases are the same in so far admission of evidence, examination of witness, examination of complainant or plaintiff and examination of accused or respondent concerned.

In Myanmar, every civil suit shall be instituted by presenting a plaint to the court or such officer as it appoints in behalf.²¹Every plaint shall comply with the rules contained in orders VI and VII, so far as they are applicable.²²The defendant may and if so required by the Court, shall at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.²³ At the first hearing of the suit, the Court shall, after the reading the plaint and written statements, if any and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of Law the parties are variance and shall there upon proceed to frame and record the issue on which the right decision of the case appears to depend. The Court have the power to amend and strike out any issues that appear to it be wrongly framed or introduced at any time before passing a decree.²⁴ After the case has been heard, the Court shall pronounce judgment in open Court.²⁵

2. Protection of Women for domestic Violence under Criminal Law and Special Laws

²¹ Order V Rule 1(a),The Code of Civil Procedure,1908

²² Order V Rule 1(b), Ibid

²³ Order VIII,Ibid

²⁴ Order XIV Rule 5 ,The Code of Civil Procedure,1908

²⁵ Order XX ,The Code of Civil Procedure,1908

Myanmar women and girls have been protected from violence under Criminal Laws and Special Criminal Laws. In Myanmar, there are some enacted laws relating to the offences affecting not only physically but also mentally on human beings.

A. Protection of Women for Domestic Violence under Criminal Law

Myanmar women were protected by the Penal Code. The Penal Code was enacted on 1st May 1861. It has various sections referring to the offences against women such as causing miscarriage, criminal force and assault upon women, kidnapping, abduction, slavery and forced labour to women, rape and offences relating to marriage. Some of the provisions of the Penal Code are protecting and safeguarding the rights and modesty of women by passing deterrent and preventive punishments.

The offences relating to the causing of miscarriage are enumerated in Sections 312 to 314 of the Penal Code. The offences relating to hurt was enumerated in Sections 319 to 338 of the Penal Code. The offences relating to criminal force and assault was enumerated in Sections 349 to 358 of the Penal Code. Actually, most provisions which provided in Criminal Law concern to all people and very few provisions concern with women. Similarly, there is no specific provisions included relating to domestic violence for Myanmar women. Generally, term domestic violence include physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse at the hand of the husband or male live in partner or his relatives to the women living in household such as sisters, widows or mothers.²⁶Therefore, the nature of domestic violence which is more widely recognized as violation of human rights, may not be enough with practice of Criminal Law in Myanmar. Protection rights of women under the Criminal Procedure Code provided in Section 52, 198, 199, 382, 488, 489 (1) & (2), 490, 552 and 562(1).

B. Protection of Women for Domestic Violence under Special Laws

To form a permanent organization in order to carry out effectively welfare work and assistance relating to the health and social affairs of mothers and children throughout Myanmar; The Myanmar Maternal and Child Welfare Association Law was enacted in 1990. The Myanmar Maternal and Child Welfare Association (Central Council) shall carry out the followings; prescribing from time to time works relating to health and social affairs to be carried out by the Township Associations and Branch Associations, carrying out other matters relating to maternal and Child Welfare.²⁷

Myanmar Buddhist Women's Special Marriage Law, 2015 was enacted on 26th August, 2015. Myanmar Buddhist Women's Special Marriage Law shall be applicable to Myanmar Buddhist Women and non-Buddhist men .The disputes concerning marriage, divorce, partition,

²⁶ Protection of Women from Domestic Violence Act, 2005 , India

²⁷ Section 27(c), The Myanmar Maternal and Child Welfare Association Law

succession and guardianship of children of Myanmar Buddhist women and non-Buddhist men shall be decided in accordance with this Law.²⁸

Due to any religion, custom or any law that has effect on such religion or custom, and that does not allow the marriage between a non-Buddhist man and a Buddhist woman, if the man divorces the woman, or forsakes, or behaves cruelly and causes mental harm, whether or not it amounts physical violence, notwithstanding the provision of the said custom or law –

(a) the man shall waive the portion entitled to him from property owned by both parties,² and pay compensation to the Buddhist woman;

(b) the guardianship of all children shall be with the Buddhist woman;

(c) the man shall pay maintenance for children who are minors.²⁹

. **Monogamy Law, 2015** is concerned with all those who are living in Myanmar, Myanmar citizens who live outside of Myanmar, and foreigners who marry with Myanmar citizens while living in Myanmar.³⁰ The purpose of this is to help legally married couples set up peaceful and pleasant families on the basis of loyalty by practicing monogamy, to protect women from being co-wives and to prevent matrimonial crimes arising from polygamous acts of spouse.³¹ After this law comes into effect, any marriage between a man and a woman in accordance with any law or any religion or any custom shall be legitimate only if monogamous.³² The prohibitions of this Law are as follows;

Any man or woman who is already married with one spouse or more than one spouse in accordance with a law or a religion or a custom, shall not enter, while the original union is still legally recognized, into another marriage with another person or conduct an illegal extramarital affair.³³

Any man or woman, if he or she was previously married, can enter into another marriage with another person, only after declaring the previous marriage and showing evidence of legal divorce with his or her previous spouse.³⁴

Any man or woman who is already married in accordance with a law or a religion or a custom, shall not enter, while the original union is still legally recognized, into another marriage with another person or conduct an illegal extramarital affair.³⁵

Whoever commits section 10 or section 11 of this Law shall be punished with imprisonment which may extend to 7 years, and shall also be liable to fine.³⁶ Despite whatever contradictories with an existing law or religion or custom, if any husband or wife, while an original union is still legally recognized, marries another person, he or she is deemed to commit

²⁸ Section 2, Myanmar Buddhist Women's Special Marriage Law, 2015

²⁹ Section 27, Myanmar Buddhist Women's Special Marriage Law, 2015

³⁰ Section 2, Monogamy Law, 2015

³¹ Section 4, Ibid

³² Section 4, Ibid

³³ Section 10, Ibid

³⁴ Section 11, Ibid

³⁵ Section 12, Ibid

³⁶ Section 13, Monogamy Law, 2015

a matrimonial crime, and his or her spouse has the right to seek divorce.³⁷In a divorce according to section 14, the person who commits a matrimonial crime shall forfeit all his property rights.³⁸

According to section 362 of the Constitution of the Republic of the Union of Myanmar, 2008 the Union also recognizes Christianity, Islam, Hinduism and Animism as the religious existing in the Union at the day of the coming into operation of this law. Therefore, Christians, Hindu and Muslims who live in Myanmar can marry under their respective law and custom. Christianity Law, 1872, Hinduism Law, 1955 and Islamic Law 1953 are also applied in Myanmar as family laws. On the other hand, Monogamy law is said to be concerned with all the citizens of Myanmar. So there could be legal conflicts between Buddhist and non-Buddhist customary law.

C. Procedure for Prosecution

There are three ways of taking cognizance of an offence in the Criminal Court in Myanmar. Any magistrate, empowered in this behalf, take cognizance of any offence:

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a report in of such facts made by any police-officer;
- (c) upon information received from any person other than a or upon his own knowledge or suspicion, that such offence has been committed³⁹.

When any case files with direct complaint under Section 190(a) of the Criminal Procedure Code, a Magistrate taking cognizance on complaint shall at once examine the complaint upon oath and the substance of examination shall be reduced to writing and shall be signed by the complainant and the Magistrate.⁴⁰ And then, if the Magistrate thinks that there is sufficient ground for proceeding, he may issue summons or warrant, as the case may be, for the attendance of the accused. If he thinks there is no sufficient ground for proceeding, he may postpone the case, and directs to make an inquiry or investigation to ascertain the truth of the complaint. After the inquiry or investigation, he may the order of the case or dismissed.⁴¹

When a case is informed to the police-station as cognizable offences, the first information report is taken.⁴² After investigation, the case was filed to the court through the Law Officer. Magistrate is not allowed to dismiss the case at once. He may discharge or acquit the accused when there is no evidence for taking cognizance.⁴³ If the accused is found the Court may make sentence of punishment of fine, or imprisonment or both as the case may be.⁴⁴

When a case which the Court by itself makes a complaint at any other Court when he found out that an offence has been committed before him or when he received information from any person other than a police officer that such offence has been committed.⁴⁵

³⁷ Section 14, Ibid

³⁸ Section 15, Ibid

³⁹ Section 190, The Code of Criminal Procedure, 1898

⁴⁰ Section 200, Ibid

⁴¹ Section 203, Ibid

⁴² Section 154, Ibid

⁴³ Section 203, Ibid

⁴⁴ Section 366, Ibid

⁴⁵ Section 195, Ibid

Any women or a victim of domestic violence wants to complain her case, she may inform the Police station if the case was cognizable or she may make a complaint to the Magistrate directly to take action to the offender if the offence is non-cognizable one. In trying and making decisions in criminal cases, Judges or Magistrates at different levels have to apply with the Code of Criminal Procedure and the Law of Evidence. All criminal Courts in Myanmar have to adhere strictly to the established procedure and practice of admitting documentary and material evidence, examining witness, and accused.

3. Obstacles to Suit of Women for Domestic Violence at Court

In Myanmar, the Union shall guarantee any person to enjoy equal rights before the Law and shall equally provide legal protection. But in Myanmar family, man is always the leader and woman is dependent. Man thinks to be a brave and dominant person while woman thinks to be gentle and polite, to perform the household duties and to be strictly faithful to her husband. Because of these grounds, most of Myanmar women do not dispute with their husbands. Normally, women do not to express their feelings even if they faced with physical or mental violence. In practice, as it has been accepted that a good wife should keep secret about domestic violence as a personal matter, she always hesitate to discuss with others. Therefore, inequalities in power and assumption between husband and wife has been rooted for several years in our society. Moreover, most of domestic violence cases of Myanmar women are regarded as ordinary family affairs and any other person are not willing to admit of these cases before the court to settle it with justice. In order to know actual condition of cases relating to domestic violence of women, Kyaukton Township Court, which is established in Northern District of Yangon Region, was chosen for collecting data and analyzing the cases. The population of that township is about 164949, in which the male is about 80872 and the female is about 84077. There are 36687 families in Kyaukton Township. The case data was collected from the cases filing to the court in 2015. In 2015, there were 5 cases relating to domestic violence in 1331 total criminal cases filed in Kyaukton Township Court. In these criminal cases, it includes both the cases sent by the police to the court and the complaint made directly to the court by the injured person. All complaints were brought before the court under section 323 of Penal Code for accusation of voluntarily causing hurt which may be sentenced to imprisonment up to one year or fine. Among these cases, 2 cases were dismissed, 2 cases were compounded and 1 case was withdrawn. All the complaints based on the facts of accusation of her husband's drunkenness and physical torture. As for civil suit, there were 2 suits for divorce in 24 total civil suits. All complaints relate to husband's drunkenness and physical torture. But, all these civil suit for divorce, the wife submitted her withdrawal of the case to the court. The court also allowed her withdrawal.

Most of the cases relating to domestic violence are proceeded under section 323 of the Penal Code (voluntarily causing hurt). The Penal Code is very old which was enacted since British Colony and thus the penalty and fine provided in which was not consistent with the

present period. According to section 323 of the Penal Code, the offender shall be punished with imprisonment of either description for a term which may extend to one year or with fine which may extend to one hundred kyats or with both. Thus it is considered that it is no effective punishment when the court made a decision to impose the offender only with fine. Therefore, to be more effective deterrent punishment, the amendment of Penal Code relating to the provisions of penalty and fine was made in 2016. According to section 22 of the Law amending to Penal Code the fine for section 323 is replaced with one hundred thousand kyats. The reason for divorce under Myanmar Customary Law is that the wife who is the victim of the domestic violence wants to claim the rights and remedies for her. As a court, there is no applicable specific law to solve effectively for domestic violence. So, the court cannot give the effective remedy and penalty for the action for domestic violence.⁴⁶

Most of the cases relating to domestic violence in criminal proceeding before the court are proceeded under section 323 of Penal Code (voluntarily causing hurt). This offence is non-cognizable case and thus the plaintiff or her lawyer needs to appear before the court when the judge examines the case. Actually, it is very difficult to appear regularly before the court because every wife has many duties of household works and other matters such as health and care of the children. Especially, wives from poor families do not want to go the court. Because they afraid of the court proceeding laws and expenses. If a wife wants to divorce with her husband, they can divorce before the heads of community with mutual consent. The wives from rich families want to claim divorce and sue criminal proceeding in order to get her rights in the partition of property on divorce.⁴⁷ Every Myanmar wife thinks that the voluntarily causing hurt done by husband does not amount to commit the domestic violence. Therefore, they do not usually proceed this kind of hurt. If husband treats his wife adultery with cruelty, the wife wants to claim divorce only according to Myanmar Customary Law.⁴⁸

It is very rare to file a complaint to the police or the court for domestic violence of women. In addition, most cases relating to this issue are withdrawn and compounded. When a wife needs to get conclusive evidence for claiming divorce as a grievous matrimonial fault, she sues her husband in criminal proceeding.⁴⁹

Most of Myanmar people do not want to go the court. Because some people traditionally accepted the places such as the court, hospital, police station are unlucky places. Thus, Myanmar women especially do not want to go the court even though they are victims of domestic violence.⁵⁰

The victim of domestic violence can proceed under not only criminal proceeding but also civil proceeding. Actually, Myanmar has no specific law relating to domestic violence against women. Now, violence against women law is in drafting stage and also includes domestic

⁴⁶ Interview with U Zaw Zaw Tun, Township Judge, Kyautton Township, Yangon, 9 June, 2016

⁴⁷ Interview with U Thant Zaw Win Oo, Advocate, Yangon, 15 July, 2016

⁴⁸ Interview with U Tun Hlaing, Higher Grade Pleader, Yangon, 17 June, 2016

⁴⁹ Interview with Daw Khin Ni Ni Aye, Township Judge, Thargayta Township, Yangon, 7 July, 2016

⁵⁰ Interview with U Thet Zin Aun, Deputy Township Judge, Okkataya Township Court, Naypyitaw, 27 June, 2016

violence of women as one chapter.⁵¹

According to Myanmar tradition, women always hesitate to go the court for many reasons. Some of that reasons are that Myanmar women are very kind, patient, polite and love their family. In addition, Myanmar women do not want to live as a divorcee and to become their children as a fatherless child.⁵²

Therefore, in practice, it is very rare to file a complaint to the police or the courts for the domestic violence of women. The main obstacles to suit related to domestic violence before the court is most of Myanmar women hesitate to go to the police or the courts for some reasons. They think that domestic violence should consider as a private matter and kept as a shameful secret. Another thing is many women are afraid of to go to the police or the courts because of having lack of knowledge about the procedure of the courts and police. On the other hand, before reaching the court or police, the elders or the head of the community tried to settle it by their own ways such as by persuading her not to sue or by taking bond from not to commit it again for men. Sometime, if a wife sent her husband before the court, her family may face difficulties to settle daily expenses as the husband is the main earner of the family. Thus, it has to educate the public awareness to those who suffer the bitterness of this violence and the perpetrators who commit it. Moreover, the main obstacle to suit of women for domestic violence at Court is no specific Law relating to settle this issue.

4. Comparison to International and ASEAN Standards

International Human Rights Law prohibits discrimination against women in their enjoyment of all human rights and fundamental freedom. Moreover, International Law and Policy on domestic violence has developed through the work of UDHR, UN Conventions, Covenant and Conferences. Many treaties and conventions do not specifically mention domestic violence but they have still been interpreted as relevant to domestic violence. The UDHR, the International Covenant on Civil and Political Covenant and the International Covenant on Social, Economic and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Against Torture are mainly concerned with domestic violence of women.

According to Article 3 of the UDHR, everyone has right to life, liberty and security of person. This right was reaffirmed in by the ICCPR, 1966 which protects the right to life⁵³ and the right to liberty and security of person.⁵⁴ These rights as well as other in UDHR, ICCPR and ICESCR ⁵⁵, such as the right to equal protection under the law⁵⁶ and the right to the highest

⁵¹ Interview with Daw Aye Win, Director, Attorney- General Office, Naypyitaw, Myanmar, 30 July, 2016

⁵² Interview with U Kyi Myaing, District Law Officer, Dawei District Court, Myanmar, 20 July, 2016

⁵³ Article 6 of ICCPR

⁵⁴ Article 9 of ICCPR

⁵⁵ ICESCR, G.A.res,2200A(xx1),21 UN .GAOR SuPP.(no.16) at 49, U.N.Doc.A/6326(1966),993.U.N.T.S 3, entered into forec Jan 3.1976

⁵⁶ Article 14 of ICCPR

standard of physical and mental health⁵⁷ are implicated in domestic violence cases. Therefore, states that are parties to these instruments have an implicit obligation to protect women from domestic violence as part of their obligation.

CEDAW did not explicitly include language on violence against women or domestic violence. However, CEDAW's primary focus in which state parties agree to condemn discrimination against women in all its forms⁵⁸ was interpreted as covering violence against women is not the root problem, but that violence occurs allowed to flourish.⁵⁹ As described by Rashida Manjoo, the UN special Rapporteur on Violence against women, "states must know that violence against women is not the root problem, but that violence against women as the most extreme manifestation on the continuum of discrimination led the Committee on the Elimination of All Forms of Discrimination against Women, the monitoring body of CEDAW, to adopt General Recommendation Number 19."⁶⁰

Recommendation 19 also specifically addressed domestic violence as a form of discrimination against women, stating: Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

CEDAW Recommendation 19 also states that violence against women is a violation of the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment, as protected by UDHR Article 5 and ICCPR Article 7. In recent years, the view has been affirmed by the Committee Against Torture, which is the monitoring body of the Convention Against Torture (CAT).

Myanmar acceded to CEDAW in 1997 and signed ICESCR in 2015. Therefore, Myanmar is obligated to take all appropriate measures to eliminate discrimination against women. CEDAW Articles specifically call for the states "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices,"⁶¹ to accord "women equality with men before the law,"⁶² and "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of

⁵⁷ Article 12 of ICESCR

⁵⁸ Article 2 of CEDAW

⁵⁹ Rashida Manjoo, Statement of GA 3 (Oct 10 2011) ,

<http://www.un.org/womenwatch/daw/documents/gabc/RAPPORT> on Vaw. Pdf

⁶⁰ Committee on Elimination of Discrimination against Women, General Recommendation 19, Violence against women (Eleventh Session 1992) UN. Doc A/47/ 38 at 1 (1993), [http:// www. 1. un. edu/humanrts/general Session 19.htm](http://www.1.unm.edu/humanrts/generalSession19.htm).gen.com

⁶¹ Article 5 , CEDAW

⁶² Article 15(1), Ibid.

discrimination.”⁶⁴Moreover, ICESCR Articles call for the states “to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant⁶⁵and to give special measures of protection and assistance to family, especially for mothers and children.⁶⁶ASEAN Human Rights Declaration affirms the equal dignity and rights,⁶⁸personal liberty and security ⁶⁹and against torture or cruel, inhumane or degrading treatment or punishment of person⁷⁰.

In order to promote and protect the of women and girls, the Myanmar Government has established Myanmar National Committee for Women's Affairs in 1996 as a national machinery to carry out the Beijing Declaration and platform of Action. In addition, the Myanmar Women's Affairs Federation (MWAF) as established in 20 December 2003 to take effective measures of women's affairs in implementing the principles and guidelines laid down the MNCWA. The Women's Affairs organizations were formed in 126 all States and Divisions down to the grass-roots level to carry out the activities in order to promote its functions comprehensively and for the advancement of women. The National Committee enhances the between the Government and Non-governmental in implementing the National Plan of Action. An NGOs namely, Myanmar Maternal and Child Welfare Association (MMCWA) which has branches and associations all over the country up to the grass-root level is dedicated to health and the well-being of mothers and children. Similarly, Myanmar Women Entrepreneurs Association, Myanmar Women Federation (MWSF) and others NGOs implemented activities with the advancement of women as its objective and has achieved tremendous progress for the last decade. Moreover, the Myanmar National Human Rights Commission (MNHRC) was established under Union Government's Notification No.34/2011.

The Myanmar National Human Rights Commission Law was enacted by Pyidaungsu Hluttaw (Parliament) no 21/2014 in order to comply with the Paris Principles and to effectively promote and protect the rights of citizens enshrined in the Constitution of the Republic of the Union of Myanmar, human rights contains in UDHR and international human rights instruments applicable to Myanmar. Any citizens may send complaint to MNHRC when his or her fundamental human rights are violated. Its mandate includes receiving, verifying and investigating complaints of human rights violations and submitting reports to the President (Chapter V).⁷¹ While the law provides that proposed members should have expertise or knowledge in human rights issues, it does not guarantee total independence from the Executive, which suggests the Commission is not fully compliant with the Paris Principles.⁷²According to UPR (Myanmar), it was found that there was no specific recommendation relating to domestic

⁶⁴ Article 2(c), Ibid.

⁶⁵ Article 3 , ICESCR

⁶⁶ Article 10, Ibid.

⁶⁸ Article2, ASEAN Human Rights Declaration

⁶⁹ Article 14, Ibid.

⁷⁰ Article 14, Ibid.

⁷¹ The Myanmar National Human Rights Commission,<http://www.mnhrc.org.mm/en/about/mnhrc-laws/>.

⁷² Universal Periodic Review Session23:Myanmar, March 2015, Submission to the United Nations Human Rights Council ,www.ihrb.org>2015-UPR-Myanmar

violence in Myanmar. Yet it was found that there is no specific organization to settle domestic violence issues like law relating to the protection for domestic violence of women.

In November, 2015, the Alternative ASEAN Network on Burma (ALTSEAN-Burma) and the International Federation for Human Rights (FIDH) submitted to Human Rights Council relating to Myanmar, 23rd Session of the Working Group on the Universal Periodic Review. It focused on: Myanmar's adherence to international human rights instruments; its domestic legislation and the rule of law; the intimidation and targeting of human rights defenders (HRDs); armed conflict and displacement; the rights of ethnic and religious minorities, rape and gender-based violence; human rights abuses in prisons and in conflict areas; and the National Human Rights Commission.⁷³ It recognized the Myanmar pledged to adopt effective measures to fight violence against women and girls. This included a commitment to ensure that violence against women, including domestic violence and all forms of sexual abuse, is treated as a criminal offence and that perpetrators are prosecuted and punished.

Myanmar agreed to adopt and enforce strict legislation which criminalizes rape in every context, and which ensures legal punishment of all perpetrators, including those from the police, military, and other authorities. They also committed to conduct investigations, bring perpetrators to justice, and provide reparation to the victims of sexual violence involving members of the armed forces. However, no specific legislation has yet been enacted to address domestic violence or sexual violence. The Criminal Code provides punishment for rape and harassment, but does not recognize marital rape. This UPR also analyzed the important accepted recommendations to implement adequately or at all. Recommendations to the government relating to violence against women are as follows;

- Implement all recommendations made by the Committee on CEDAW at its 42nd Session to the government of Myanmar.
- Sign and ratify the Optional Protocol to CEDAW.
- Ensure rule of law and effective access to justice for all victims of rape and gender-based violence, as well as sufficient means of protection, such as counseling services and shelters.
- Independently and credibly investigate instances of rape, sexual violence, and enforced disappearance
- Immediately cease violations of international humanitarian and human rights law against ethnic minority civilians in conflict and ceasefire areas, including violence against women.⁷⁴

Despite its commitment to ratify and implement CRC, CEDAW, CRPD and ICESCR Myanmar has needed to take concrete steps to effectively implement all the instruments to which it is a party, including the UN Convention on the Elimination of All Forms of Discrimination

⁷³ Myanmar, 23rd Session of the Working Group on the Universal Periodic Review Human Rights Council submitted by the Alternative ASEAN Network on Burma (ALTSEAN-Burma) and the International Federation for Human Rights (FIDH), <http://www.fidh.org> > IMG > PDF 2015

⁷⁴ Myanmar, 23rd Session of the Working Group on the Universal Periodic Review Human Rights Council submitted by the Alternative ASEAN Network on Burma (ALTSEAN-Burma) and the International Federation for Human Rights (FIDH), <http://www.fidh.org> > IMG > PDF 2015

against Women (CEDAW). Moreover, Myanmar has not signed the Optional Protocol to CEDAW, which provides a communication procedure for individuals or groups to submit complaints to the Committee. Myanmar has not yet fully incorporated its CEDAW obligations into domestic legislation, thereby allowing existing laws to remain incompatible with CEDAW's provisions.

Conclusion

Myanmar has experience the inevitable effects of domestic violence but it has existed as a hidden problem for several years, like other countries. Although Myanmar endeavors to protect women by implementing the guideline of CEDAW, the government faces many challenges to fully success. At present, most of Myanmar women are not willing to admit the existence of domestic violence as many still it as a normal aspect of daily life that is legitimized traditional customs. Thus, it needs to educate the public awareness to those not only victims of domestic violence but also the perpetrators who commit it. According to the data collection of Kyaukton Township Court, it can be found that there were very few domestic violence cases before the court. In the international sphere, the Optional Protocol to CEDAW, which created two procedure to monitor compliance with CEDAW. First, it established a communications procedure for individual women, or groups of women, to submit claims of violations of CEDAW after exhausting domestic remedies. Second, the Optional Protocol created an inquiry procedure which enable the committee to investigate situations of grave or systematic violations of women's rights. Both procedures can only be used in cases where the state is a party to the convention and the optional protocol. Thus, a state cannot be successful to implement the CEDAW obligations without applying communication procedure and inquiring procedure which provide in Optional Protocol to CEDAW. As the essential needs, Myanmar need to sign and ratify this. At present, as a signatory state of CEDAW, Myanmar has coordinated with international, regional and intergovernmental organizations for the protection of rights of women and the abused women in violence to implement effectively. Nevertheless, to give more effective measure it at national level, Law for the Protection of Violence against Women is urgently needed to enact not only to protect the domestic violence of women but also to be in line with CEDAW.

References

Myanmar National Laws

1. Constitution of the Republic of the Union of Myanmar, 2008
2. Monogamy Law, 2015
3. Union Judiciary Law, 2010
4. Burma Laws Act, 1898
5. The Penal Code of Myanmar, 1861
6. The Code of Civil Procedure, 1908

7. The Code of Criminal Procedure, 1898
8. The Myanmar Maternal and Child Welfare Association Law, 1990
9. Myanmar Buddhist Women's Special Marriage Law, 2015

International Frameworks

1. Universal Declaration of Human Rights, 1948
2. International Covenant on Civil and Political Right, 1966
3. International Covenant on Economic, Social and Cultural Rights, 1966
4. Convention on the Elimination of All Forms of Discrimination against Women, 1979
5. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999
6. ASEAN Human Rights Declaration, 2012

Books

1. Mya Sein, U, Myanmar Customary Law, 12th Edition, 2014, Myanmar
2. May Aung, U, A Selection of Leading Case on Buddhist Law, 1914, British Burma Press, Rangoon
3. E Maung, Burmese Buddhist Law, 1969, Myanmar
4. Lahiri, Sisir Chandra, Principles of Modern Burmese Buddhist Law, 6th Edition, 1957, Calcutta
5. Maung Maung, Law and Custom in Burma and the Burmese Family, 1963, The Hague, Netherlands

Interviews

1. Interview with U Zaw Zaw Tun, Township Judge, Kyautton Township, Yangon, 9 June, 2016
2. Interview with U Thant Zaw Win Oo, Advocate, Yangon, 15 July, 2016
3. Interview with U Tun Hlaing, Higher Grade Pleader, Yangon, 17 June, 2016
4. Interview with Daw Khin Ni Ni Aye, Township Judge, Thargayta Township, Yangon, 7 July, 2016
5. Interview with U Thet Zin Aun, Deputy Township Judge, Okkataya Township Court, Naypyitaw, 27 June, 2016
6. Interview with Daw Aye Win, Director, Attorney- General Office, Naypyitaw, Myanmar, 30 July, 2016
7. Interview with U Kyi Myaing, District Law Officer, Dawei District Court, Myanmar, 20 July, 2016