

LEGAL AND GENDER ISSUES OF MARRIAGE AND DIVORCE IN CAMBODIA

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Although the provisions governing marriage and divorce in the Cambodian Civil Code of 2007 are in general formally sufficient, there are serious practical barriers limiting women’s access to the benefits of the statutory regime, resulting in substandard protection of their rights. As a consequence, women’s circumstances in both marriage and divorce situations are frequently precarious, necessitating regulatory improvements.

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I. INTRODUCTION

In Cambodia, marriage is a highly valued institution, and the norm in society. Statistics from 2004 show that 81% of women between 25-29 were married and only about 5% of the population remained unmarried throughout their lives.² Divorce is socially unaccepted and its incidence remains low.

Although marriage is common, the rights and obligations of spouses during and after marriage are not well known to the Cambodian public. The Cambodian Civil Code of 2007 adequately regulates most aspects of marriage, including the age of marriageability, registration, marital property, and household expenses. Cambodian law additionally protects married women from domestic violence, bigamy and desertion.³ Nevertheless, in practice the implementation of these provisions can have gender implications reducing the effectiveness of their protection for women. The law also adequately regulates the consequences of a judicial termination of a registered marriage; however, it does not regulate the rights and the obligations of a couple who fails to legally register their marriage at the civil registry, or the rights of a separated couple who fails to obtain a legal

2 National Institute of Statistics — Ministry of Planning, 2004 Inter-Censal Population Survey, available at <http://nada.nis.gov.kh/index.php/catalog/6> & <http://marriage-statistics.findthebest.com/1/1084/Cambodia-2004-Women-Single>.

3 See Civil Code of Cambodia (2007), available at <http://cambodianbusinesscorner.wordpress.com/2013/01/05/civil-code-2007/>, art. 978(1)(a).

divorce through the court. The consequences of the failure to register a marriage or obtain a divorce from the courts can be far reaching, in particular for women. These gendered aspects of marriage and divorce in Cambodia are discussed below.⁴

2. MARRIAGE

Cambodian law regulates the institution of marriage properly and in line with international standards; however, its implementation—or lack thereof—can have a disproportionate impact on women due to societal traditions.

2.1. Limitations on Who Can Marry

In Cambodian law, the rules regulating those who can marry fail to protect both women and men as intended. Cambodian law forbids child marriages, setting the minimum age for marriage at 18.⁵ Exceptionally, a person can marry at the age of 16.⁶ However, in conformity with cultural and indigenous traditions, Cambodian girls marry young. According to 2014 UNICEF statistics, 2% of girls are married by the age of 15, and 18% by the age of 18.⁷ It therefore seems clear that the law is not properly enforced.

The law also prohibits women from remarrying until 120 days after the day of divorce or annulment of their previous marriage.⁸ This Code article has the aim of protecting the paternity rights of the first husband. The Committee monitoring the Convention on the Elimination of Discrimination against Women (CEDAW) has expressed concern that this provision is discriminatory and unduly restrictive on the right of women to remarry because today paternity can easily be established by a simple medical test.⁹ However, this is not entirely applicable in the context of Cambodia. First, DNA tests are not widely accessible in Cambodia and are still too expensive for 99% of the population. Second, when a mother-to-be remarries, her new husband is by law presumed to be the father of the child.¹⁰ If the former husband is in fact the father, he cannot claim his right to paternity.

Nevertheless, this provision does seem to unnecessarily invade the private life and civil rights of women. First, the period of 120 days seems arbitrary, as it does

4 This article does not address the inheritance implications of the legal regime for marriage and divorce.

5 Civil Code, art. 948.

6 *Id.* art. 948 (allowing this only with the consent of the parental power holder or guardian of the minor).

7 See Child Marriage Around the World: Cambodia, at www.girlsnotbrides.org/country/cambodia/.

8 Civil Code, art. 950.

9 See Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Cambodia, CEDAW Comm., 56th Session, U.N. Doc. CEDAW/C/KHM/CO/4-5 at 9 (2013).

10 See Civil Code, art. 988.

not eliminate the possibility that a new husband will become the legal father of a child conceived by the former husband at some point following the 120 days. The 120-day period is apparently based on the term to conclusively establish a pregnancy in Cambodia, but pregnancy lasts on average 280 days. Second, it could be argued that the mother is in the best position to determine whether or not her new husband should be granted paternity rights through marriage, as she is in the best position to assess who is the actual father. Perhaps—a more emancipatory idea—she may even be in the best position to choose between her two sexual partners and decide who deserves to be the legal father, taking into consideration the best interest of her child. If the new husband rejects paternity of the child, he can file a request to deny his paternity rights.¹¹

2.2. Marriage Registration

In Cambodia, marriage can only be legally recognized if it is registered by the commune council with the civil registry.¹² A couple who intends to marry must apply for a marriage authorization with the commune council at the woman's place of residence. The civil registration officer of the commune council will inspect the application and, if approved, post a copy at the commune council's office at the place of residence of both the bride and groom for a minimum ten-day public objection period. After the objection period has passed, the couple must agree to marry in front of the civil registrar at the woman's place of residence. This agreement will be recorded in the marriage registry. In most provinces, the duty of marriage registration costs 400 Riels.¹³

2.3. Marital Property

2.3.1. Joint Property Defined.

The Cambodian Civil Code provides a fair statutory system for marital property. Unless the married couple concludes a (pre)nuptial agreement, their assets will be categorized in accordance with the statutory system. The system provides that joint property includes all property earned by one or both spouses during the marriage, but excludes the property of either spouses obtained before the marriage, as well as property obtained by one spouse during the marriage

11 See *id.* art. 989.

12 This interpretation is based on the wording of Civil Code art. 955 in conjunction with Ministry of Interior Sub-Degree 103 on Civil Status (Civil Registration) (2002), available at www.skpcambodia.com/Laws%20&%20Regulations%20of%20the%20Kingdom%20of%20Cambodia/Nationality_Immigration_Civil%20Registration/Sub-dree%20No103%20on%20Civil%20Registration-Eng.pdf.

13 Sub-Decree No 62 on the Fee of Civil Registration Paper and Stamp (2002).

through gift or succession—including proceeds from the disposal of these private properties.¹⁴

Although the law provides a fair initial basis, it leaves some room for ambiguity. For example, the law does not say whether the fruits of excluded private property fall within the marital property.

For example, a wife inherits USD 10,000 and places it in the ACLEDA bank for a yearly interest of 2%.

Does the interest fall within the marital property? Based on the law it must be concluded that it does. However, due to inflation, the principal sum of USD 10,000 will lose its value over the years. Thus the result does not seem entirely fair.

For example, if land inherited by the wife is leased, will the rent proceeds be marital property or considered her private property?

In the current legal system it must be concluded that the rental income is joint property since all property acquired during marriage is considered marital, with the exception of gifts or assets obtained through succession. However, any increase in the value of the land during the marriage would benefit the wife. When the land is sold, the full proceeds of the sale are her private property.

It can be difficult to make an artificial distinction between income produced by property and increased property value. For example, if a wife inherits the majority shares in a private limited company, what part of the yearly profits can be considered joint marital income, bearing in mind that the majority shareholder can decide the amount of the dividends?

In the next example, one of the spouses contributes to the increased value of the private property, but appears to have no claim to it as marital property.

For example, a wife works her whole life in a private limited company whose shares are owned by the husband. Is she entitled to the value increase of the shares?

The salary of the wife would be considered joint marital property, but the increase in the value of the company's shares is the husband's private

14 See Civil Code, arts. 972-973.

property.

This could potentially lead to unfair situations if for example the wife worked hard at the company, received little or no salary, and helped to increase the company's value. Such unfairness could be mitigated through an appeal from the wife to apply Civil Code art. 980, allowing a court to deviate from the general rule of dividing marital property strictly in half. This possibility is discussed in section 3.3., *infra*.

2.3.2. *Protection from Unilateral Disposal*

Importantly, marital property is protected against unilateral legal acts of one spouse. The law states that joint property may not be sold or otherwise disposed of without the consent of both spouses.¹⁵ However, this is expressed as a very broad prohibition that if strictly interpreted could complicate everyday life unnecessarily.

For example a wife sells her Scoopy scooter via the Internet for USD 325.

The scooter was joint marital property. The husband who heard about the sale only the next day disagrees and goes to the court to nullify the agreement with the buyer.

Should the husband's consent have been required for the sale of ordinary moveable property? Based on common sense the answer should be no. It seems that in these circumstances the buyer could not be expected to ask the seller if she is married and if so, if her husband agrees with the sale. Otherwise, everyday life transactions might become too cumbersome with too much legal uncertainty.

The same example: a wife sells her Scoopy scooter via the internet for USD 325.

The scooter was joint marital property. The wife regrets the sale the next day and asks her husband to go to the court to nullify the agreement with the buyer.

Courts providing reasonable interpretations of this article could prevent legal uncertainty and abuse from complicating everyday transactions.

15 See *id.* art. 976(1).

On the other hand, sometimes it is appropriate to grant protection to the non-consenting spouse, in particular for sales of immovable property.

For example, the husband gambles away land that is part of the marital property.

The wife has joint ownership of the land through the statutory marital system, even if the land is only registered in the husband's name. Civil Code art. 976(I) grants protection to the wife.

In this case the law should protect the wife by giving her the right to nullify the disposal. The spouse must request nullification through the courts within two years of the date he or she became aware of the disposal of immovable property, and within one year of notice in the case of movable property.¹⁶

The law is not explicit if grants of mortgages, leases, concessions and other rights burdening the marital property fall within the definition of prohibited unilateral sales and other disposals.

For example, the husband agrees to let an apartment to a lessee for two years for USD 400 per month. The apartment is part of the marital property.

This transaction should be considered a type of unilateral “disposal” that requires consent of both spouses.

Civil Code art. 976 should be interpreted to protect both spouses from any alienation of (part of) valuable or unmovable marital property.

2.3.3. Protection for Use of the Matrimonial Residence.

The law provides extra spousal protection for the right to use the matrimonial residence. Even if the matrimonial residence is separate property, the non-owning spouse must be asked for permission to sell or dispose of the property. If the non-owning spouse does not grant permission, he or she may continue to live in the house.¹⁷

For this reason a third party to a sale, lease, or mortgage has the obligation to check whether the seller, lessor, mortgagor is married and, if so, obtain permission from both spouses for the transaction.

¹⁶ *Id.* art. 976(3).

¹⁷ *Id.* art. 977.

When a (pre)nuptial agreement between the spouses varies their property rights from this statutory system, the contract cannot be held against third parties unless it is registered.¹⁸

For example, the husband obtained the ownership of land in the village before his marriage and the land is registered in his name. A third party buys the land from the husband without permission of the wife. Later the wife objects on the ground that their prenuptial agreement defined this piece of property as joint marital property. The agreement was not registered.

The wife cannot nullify the agreement on the basis that she did not consent to the agreement, even though she was owner of the joint marital property. However, she can claim half of the proceeds of the sale as joint marital property.

2.4. Household Expenses

The Civil Code also regulates how household expenses should be borne: expenses are to be shared by the spouses, “taking into account their property, income and all other circumstances.”¹⁹ However, this article is not precise. It may be assumed that household expenses should be paid from joint income first. However, what if this income is exhausted? Should expenses then be paid from joint marital property, and if this is insufficient, proportionally from private property income?²⁰

2.5. Domestic Violence and Marital Rape

The issues related to and scope of domestic violence in Cambodia is too vast to be discussed in depth in this article, and is the topic of numerous other research projects and publications. However, two relevant issues should be mentioned. First, research shows that women stay in abusive marriages for economic reasons, including “[m]en’s predominant income-earning. . . especially in rural sites.”²¹ This suggests that with a growing middle class, including a rise in women’s financial independence, the Cambodian divorce rate can be expected to rise.

Second, there is existing legal protection against marital rape, which occurs

18 *Id.* art. 970(2).

19 *Id.* art. 971.

20 As discussed previously, there can be no private income from private property.

21 See Katherine Brickell, Baureaksmeay Prak & Bunnak Poch, *Domestic Violence Law: The Gap Between Legislation and Practice in Cambodia and What Can Be Done About It* (2014), at 18, available at www.katherinebrickell.com/katherinebrickell/wp-content/uploads/2014/01/DV-Law-Prelim-Report-2014.pdf.

frequently in Cambodia. A survey from 2005 indicates that 14% of respondents know a woman whose husband has forced her to have sex against her will.²² There is a misconception in Cambodia that rape within a marriage is not a crime. According to the 2005 survey, 45% of Cambodians²³ believe it is the right of the husband to force his wife to have sex with him. Although the Law on the Prevention of Domestic Violence and the Protection of Victims only speaks in general of sexual aggression and does not explicitly mention (marital) rape, it should be considered applicable to marital rape.²⁴ Read in conjunction with the Criminal Code, Cambodian law makes marital rape punishable by imprisonment from five to ten years.²⁵ Nevertheless, many officials in the Cambodian justice sector lack this understanding and fail to properly prosecute marital rape. A recent regional study conducted by the United Nations found that the vast majority of men who had perpetrated rape (72%-97%) did not suffer any legal consequences, with the highest impunity for intimate partner rape.²⁶

2.6. Bigamy & Desertion

Bigamy and desertion by men is common in Cambodia, in part due to the imbalanced gender ratio caused by the higher mortality rate of men during the Khmer Rouge,²⁷ and in part due to gender power imbalances. In a case of bigamy, the husband marries another woman without having previously divorced his first wife. In the case of desertion, the husband starts a new life, possibly with another woman without marrying her, while still married to his first wife. Bigamy is a prohibited criminal act²⁸; however, it must be assumed that the prohibition applies only to legally registered marriages, whereas as discussed *infra* there are many unreg-

22 Catherine Cecil et al., *Violence Against Women — A Baseline Survey (2005)*, at 57, available at www.unwomen-eseasia.org/projects/Cedaw/docs/2006/Baseline%20VAW-2005Engl.pdf.

23 *Id.*

24 See The Cambodian Committee of Women (Cambow), *Violence Against Women: How Cambodian Laws Discriminate Against Women* (Nov. 2007), at 9, available at www.licadho-cambodia.org/reports/files/112CAMBOWViolenceWomenReport2007_ENG.pdf.

25 See Law on the Prevention of Domestic Violence and the Protection of Victims (2005), art. 7, available at www.wcwoonline.org/pdf/lawcompilation/Cambodia_dv_victims2005.pdf; Cambodian Criminal Code (2009), art. 239, available at www.unodc.org/res/cld/document/khm/criminal_code_of_the_kingdom_of_cambodia_html/Cambodia_Criminal-Code-of-the-Kingdom-of-Cambodia-30-Nov-2009-Eng.pdf.

26 Emma Fulu et al., *Why Do Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-country Study on Men and Violence in Asia and the Pacific* (2013), available at http://unwomen-asiapacific.org/docs/WhyDoSomeMenUseViolenceAgainstWomen_P4P_Report.pdf.

27 See generally Patrick Heuveline & Bunnak Poch, *Do Marriages Forget Their Past? Marital Stability in Post-Khmer Rouge Cambodia*, 43:1 DEMOGRAPHY 99 (Feb. 2006), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3930764/.

28 Prohibited in Civil Code art. 949, and punishable with a fine up to 2,000,000 Riels in the Cambodian Criminal Code, art. 353.

istered marriages. Desertion is not a criminal act. Bigamy and desertion are both grounds for a wife to pursue a divorce and claim her matrimonial rights.²⁹

3. DIVORCE

3.1. Introduction

There are no reliable and up-to-date statistics in Cambodia on the rate of divorce. Based on the General Population Census of 2008, the incidence of separation (0.1%) and divorce (2%) is very low.³⁰ As pointed out by Brickell, the emphasis in Cambodian culture is on harmony and reconciliation.³¹ This is also demonstrated by the stated purpose of the Law on the Prevention of Domestic Violence and the Protection of Victims being: "... to establish a legal mechanism to prevent domestic violence, protect the victims and preserve the harmony within the households in line with the Nation's good custom and tradition[.]"³² In this way the cultural tendency is to mediate and reconcile marital differences.

Nevertheless, the low divorce rate measured in the 2008 census does not reflect reality, and it must be assumed that the separation and divorce rate is much higher. The statistical distortion is probably due to the limits of self-reported surveys, the lack of proper databases and updated civil registries, and the lack of formal divorces discussed *infra*. In 2003, Hirschman and Teerawichitchainan estimated the divorce rate at 7%.³³ This number seems more in line with reality given the fact that commune councils report that divorce and domestic violence is the most common type of conflict they handle.³⁴ Nevertheless, divorce rates will certainly remain much lower than in the West due to the cultural stigma on women who are divorced and their economic dependence on men. As emphasized even by the Ministry of Women's Affairs, divorce is only a last resort.³⁵

Reasons for divorce are numerous and similar to any other culture and country, but unique to Cambodia is marital unhappiness caused by mental health issues that are the result of first and second generation Khmer Rouge survivors, alongside a high incidence of domestic violence; gambling, alcohol and drugs abuse; and

29 Civil Code art. 978(I)(a). Bigamy can be assumed to be an act of infidelity.

30 NIS, General Population Census of Cambodia (2008), at www.nis.gov.kh/nis/census2008/Census.pdf.

31 See Katherine Brickell, 'Plates in a Basket Will Rattle': Marital Dissolution and Home 'Unmaking' in *Contemporary Cambodia*, 51 GEOFORUM 262, 265 (2013).

32 Law on the Prevention of Domestic Violence and the Protection of Victims, art. I.

33 See generally Charles Hirschman & Bussarawan Teerawichitchainan, *Cultural and Socioeconomic Influences on Divorce During Modernization: Southeast Asia, 1940s to 1960s*, 29:2 POPULATION & DEV. REV. 215 (June 2003).

34 UNDP, *Pathways to Justice* (2005), at 115.

35 Remarks at Legal Aid of Cambodia Workshop, *Access to Divorce for Women in Cambodia* (Mar. 17, 2010) (on file with author).

desertion and bigamy.³⁶

Although the legal grounds for divorce are limited, they are quite broadly formulated, giving ample possibilities for filing for divorce if one spouse wishes to do so. Grounds include infidelity, desertion, separation (i.e. living apart) for more than one year, and breakdown of the relationship.³⁷ The law does include room for judicial discretion to reject the grounds of separation and breakdown if he or she feels the petitioner has seriously neglected to cooperate and assist the other spouse. This limitation on the right to divorce shows the value that Cambodian culture attaches to the institution of marriage and is somewhat in contradiction to the right of self-determination. The law is surprisingly modern by allowing for a joint petition without the need to specify the grounds for divorce.³⁸ This shows that the state respects the private right of a couple to decide to divorce without having to explain their reasons to the state.

3.2. Procedure

A legal marriage, i.e. one that is duly registered at the civil registry, can only be terminated by a legal divorce order issued by a court. A request for divorce can either be submitted directly to the court or submitted to the commune council. If the request is submitted to the commune council, the council has 15 days to attempt reconciliation. If the commune council's attempts have been unsuccessful, it should forward the divorce application to the court.³⁹

After receiving a request for divorce, the court will ask both parties to come to the court. Most judges will lobby with the complainant to withdraw the divorce request. If the complainant persists, the court can make provisional arrangements as described in section 3.6. *infra*. At this stage, the court will usually attempt three mediation rounds to see if the couple can be reconciled. If the plaintiff(s) persist, the court will then make a decision on the requested divorce, division of marital property, partner alimony, child custody, child visitation rights, and child support, as described in the following sections.

In Cambodia there are only courts at the provincial level, often necessitating the rural population to travel far to reach its provincial capital. As discussed below, divorce proceedings usually require three to five visits to the court. This in itself is almost an impossible burden for poor families. Lack of access to divorce is discussed further in section 4.2, *infra*.

36 See, e.g., UNDP, *supra* note 34, at 79.

37 See Civil Code, art. 978(1).

38 *Id.* art. 979.

39 *Id.* art. 982(2).

3.3. Division of Marital Property

The Civil Code regulates the division of marital property in the case of a divorce. Art. 980 states that the marital property shall be divided in accordance with the agreement of the spouses. Although not specifically mentioned, it must be assumed that this includes any prior (pre)nuptial agreement between the parties. If the parties cannot agree, the judge must follow the statutory system of marital property. According to articles 972-973, the property should be divided in half. The right of divorced spouses to half the marital property seems to be well known in Cambodia, and further public awareness was raised in 2008 when an estranged husband decided to saw the marital residence in half and take it away with him.⁴⁰

In dividing the marital property, judges have explicit discretion — on request of one of the parties — to deviate from the statutory system:

[W]here there are special circumstances and also an application is filed by one of the parties, the court may divide the common property [otherwise] taking into account all the circumstances, including, without limitation, the contribution of each spouse to the acquisition, maintenance and increase of property, the period of the marriage, the living standard during the marriage, the age, mental and physical condition of each spouse, their occupations, income and earning capacity, the welfare of any children, etc.⁴¹

The same article further notes—in support of women—that housework is as valuable as work outside the house. This is also recorded in the Constitution.⁴² This is a fair, progressive and gender sensitive clause given the fact that most Cambodian women are not in the position to earn as much as their husbands due to the burden of housework that traditionally befalls them and a lack of education and opportunity.

Specific issues that commonly arise in the division of property are land and pension rights.

3.3.1. Land

Land is a critical resource for Cambodians, especially poorer and rural

40 See *Cambodian Couple Saw House in Half in Divorce*, HUFFINGTON POST, Oct. 10, 2008, at www.huffingtonpost.com/2008/10/13/cambodian-couple-saw-hous_n_134098.html.

41 Civil Code, art. 980.

42 CAMBODIAN CONSTITUTION (1993), art. 36.

families. An estimated 80% of the population lives in rural areas.⁴³ and around 36% of the economy consists of agriculture.⁴⁴ Land titling is done through the cadastre. Under the Khmer Rouge, all cadastre records were destroyed and during the past ten years the government has made efforts to register land ownership in a newly set up cadastral system.

Several NGOs and international organizations have placed emphasis on the importance of joint land titling for married couples to protect women's rights.⁴⁵ Although likely protective of women's rights in practice, joint titling of land is irrelevant from a strictly legal point of view: as discussed above, marital property includes any land obtained during the marriage, except land obtained through gift or succession or bought with private property.⁴⁶ There seems to be a misconception that if land is registered in the name of one spouse only, the other spouse has no ownership. This is untrue if the land can be defined as marital property. The other spouse is legally a joint owner through the statutory system of marital property.

For example a couple titles land obtained with joint savings during the marriage in only the husband's name.

The wife is nevertheless the joint owner of the land through the statutory system of marital property.

However, what about the reverse situation? For example, a couple has land obtained by the wife through succession, but titled in the name of both the husband and wife. The land should have been registered in the name of the wife only, in line with the statutory system of marital property. However, now both parties have deviated from the statutory system. Should the husband be considered joint owner of the property? And if so, does the wife have a claim to unjust enrichment of her husband?⁴⁷ Or could the husband state that the joint registration in the cadastre is an agreement to deviate from the statutory system of marital property?⁴⁸ There is no clear answer.

43 General Population Census, *supra* note 30.

44 World Bank 2012 figures, as published by Trading Economics at www.tradingeconomics.com/cambodia/agriculture-value-added-percent-of-gdp-wb-data.html.

45 For example, this practice is emphasized in the Land Management and Registration (LMAP) of the World Bank at web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIA/PACIFICEXT/CAMBODIAEXTN/O,,contentMDK:21434075~menuPK:293874~pagePK:2865066~piPK:2865079~theSitePK:293856,00.html.

46 Civil Code, arts. 972, 973.

47 *See id.* art. 736.

48 *See id.* art. 969.

The principle rule is that land titles obtained during the marriage will be owned jointly by the spouses unless they are obtained through gift or succession or bought with private property of one spouse. After a legal divorce, the couple can either agree on who will become the owner of the land or—if they cannot agree—ask the court to divide the land. The court can order the couple to sell the land and split proceeds or award the land to one spouse under the obligation to pay half of the value to the other spouse. Or perhaps the land could be literally split into two land titles. The court judgment could then be used to change the registration of the land at the cadastre.

3.3.2. *Pension Rights.*

The law is not clear if pension rights are part of the marital property. Pension rights can consist of rights built by civil servants or other employees, e.g. claims on a provident fund with the employer. It can be argued that pension rights built up during marriage should be considered marital property and equally divided. How this division would take place is not clear. It is only the employee who can—in compliance with the pension regulations—demand payment of the pension funds. The spouse can likely only claim his or her rights once the employee-spouse has become entitled to receive the payments. This issue is most important for the female spouse, as it is more likely that the husband has pension rights, and wives should not be entitled to less property upon divorce as a consequence of their generally lower salaries and cultural expectations that women perform housework.

3.4. *Alimony*

The Civil Code 2007 does not have a legal basis for the provision of partner alimony after divorce. There is only a legal obligation to provide support for cohabiting relatives, blood-related lineal relatives and siblings.⁴⁹ The reasoning behind this omission is unclear. The Law on the Implementation of the Civil Code addressed this omission, stating that articles 76 and 77 of the Law on Marriage and Family governing alimony remain valid.⁵⁰ Art. 76 reads in part: “[W]here a party is not at fault and is in need, he may request the other party to provide alimony.”

In light of the gender inequities in Cambodia it seems unfortunate that the right to partner alimony only exists where the party is not at fault. The danger is

49 *Id.* art. 1140.

50 Law on the Implementation of the Civil Code (2011), art. 78, available at www.cambodiainvestment.gov.kh/content/uploads/2012/03/Law-on-Implementation-of-CC_Eng-FINAL_110531.pdf.

that women escaping an abusive marriage will be considered at fault, as for example 75% of Cambodians think that wives should remain silent about domestic violence to keep the family together.⁵¹

Even if the court grants the right to alimony, in practice it is difficult to enforce such decisions in Cambodia's poor rule-of-law climate. If there is marital property such as land, it might thus be advisable to request the judge for more than half of the marital property in lieu of alimony. As discussed previously, Civil Code art. 980(2) creates the explicit possibility for the spouse to request the court to receive more than half of the marital property based on the income and earning capacity of the spouses. On the basis of this article, the wife could for example claim the land owned as joint marital property so that she can become self-sufficient without the need to depend on partner alimony.

3.5. Child Custody & Visiting Rights & Child Support

The law states that in case of divorce the spouses can agree on who will have custody over the child(ren). If the spouses cannot agree, the court will decide.⁵² There is no option for joint custody after divorce in Cambodia, unlike in other civil law countries. This is particularly important for the father who in most cases is not the care-taker. In this rare instance, Cambodian lawmakers seem to have chosen the side of women. To soften the blow to an extent, the law gives the parent who loses custody the right to regular reports as well as the right to be consulted on matters of the child(ren)'s education, changes of residency, occupation or business, medical treatment affecting their life, disposition of property, and other important matters.⁵³

The law also grants visiting rights and child support rights. In principle the court will follow the agreement of the parents on these issues; however, it does have discretion to deviate from an agreement.⁵⁴ This discretion can only be used if the judge deems it necessary for the best interest of the child(ren).

3.6. Provisional Arrangements

Divorce proceedings can take a long time, on average between six months to a year to complete.⁵⁵ In order to safeguard the rights of the spouses during this period, the court can make provisional arrangements on the request of the parties or at its own discretion. The arrangements can include provisional measures regarding the separation (i.e. who lives where?), custody of the children, maintenance or

51 *The Gap Between Legislation and Practice in Cambodia*, *supra* note 21, at 40.

52 Civil Code, art. 1037.

53 *Id.* art. 1042.

54 *See id.* art. 1040.

55 The divorce procedure will generally take longer if there is property to divide.

management of property, partner alimony, household expenses, expenses of child education, etc.⁵⁶ The article is explicitly non-exhaustive and the judge can also make decisions on the right to use the marital house by one party only, visiting rights of the spouse to meet his/her children on a regular basis, and monthly child support owed by one spouse to the other. Although the law does not state this explicitly, these provisional arrangements can only be deemed valid when the judge makes a final decision on the issues, most likely in the divorce judgment.

4. PSEUDO-MARRIAGE AND PSEUDO-DIVORCE

4.I. Pseudo-Marriage

In Cambodia many couples do not register their marriage at the civil registry because they find the registration procedure too cumbersome. Couples usually only go through the first stages of the registration procedure — the application for permission and the public announcement — but do not bother to actually register the marriage at their commune council.⁵⁷ Many Cambodians, especially in the countryside, do not understand the value of registration, and attach more value to the traditional Buddhist marriage ceremony. For most Cambodians the religious ceremony, and not legal registration, constitutes the act of joining in marriage. In addition to a lack of legal awareness of the importance of registration, there is reluctance to register due to the costs involved. Although the official fee to register a marriage at the commune council is only 400 Riels (less than USD 0.10) maximum, instances are reported of couples being charged up to 40,000 Riels (approximately 10 USD).⁵⁸

The omission of marriage registration results in many couples not being legally married. There are no statistics on the number of these “*pseudo-marriages*.” Although it is believed that a majority of couples register their marriage,⁵⁹ there is a large group of unregistered couples. Some lawyers say that only 20% of their clients in the countryside have registered their marriages.

This omission primarily endangers the rights of women, especially those who later seek a divorce. Women’s rights to marital property and partner alimony are not assured since they are not considered legally married and therefore are not legally entitled to property in the name of their *pseudo-husband*. They may also have no right to child support, because their husband is not legally the father of their

56 Civil Code, art. 983.

57 See UNDP, *supra* note 34, at 80.

58 Notes from Legal Aid of Cambodia Workshop, *Access to Divorce for Women in Cambodia* (Mar. 17, 2010) (on file with author).

59 Remarks by Mr. Chan Sovanna of the Ministry of Interior at the Legal Aid of Cambodia Workshop, *Access to Divorce for Women in Cambodia* (Mar. 17, 2010) (on file with author).

children. Some examples demonstrate the seriousness of this problem.

For example a couple does not register their marriage at the commune council and the husband buys land during their marriage from income saved during the marriage. The husband registers the land in his name only.

The *pseudo-wife* is not entitled to the land, unlike if the couple had registered their marriage.

For example a couple does not register their marriage at the commune council and they have two children.

The children are not the legal children of the husband. He will have responsibility for them only if he acknowledges the children as his own⁶⁰ or the children file a suit of acknowledgment.⁶¹

As demonstrated by these examples, the legal consequences of non-registration is causing serious problems for couples who likely did intend to have a legally recognized marriage, but failed to go to the commune council for the registration.

As these difficulties arise daily in the courts, the Cambodian justice sector and other government officials have tried to address these legal issues in practical ways. Some judges are willing to accept *pseudo-marriages* as legal marriages and render a legal divorce judgment in accordance with the statutory system⁶² if it is substantiated that a Buddhist marriage ceremony took place. Their reasoning may perhaps be based on Civil Code art. 958, which states that a slight procedural defect, shall not preclude the validity of a marriage. Although it is doubtful that a lack of registration can be seen as a “*slight procedural defect*,” it does seem a practical and humane solution to a difficult legal vacuum. Other judges have taken the formal standpoint that there is no legal marriage and thus a legal divorce decision cannot be rendered.

The CEDAW Committee identified and addressed this issue in 2013:

The Committee also recommends that the State party [Cambodia] take measures to facilitate the formalisation of marriages contracted under customary law by ensuring that registration is affordable and not cumbersome.⁶³

60 Civil Code, art. 993.

61 *Id.* art. 1001.

62 See UNDP, *supra* note 34, at 121 n.181.

63 CEDAW Comm. Concluding Observations on Cambodia, *supra* note 9.

4.2. Pseudo-Divorce

The converse of “*pseudo-marriages*” are “*pseudo-divorces*.” *Pseudo-divorces* are also common, and also lead to a legal vacuum. They occur when legally married couples do not obtain a legal divorce through the courts. In general, litigation in the courts of Cambodia is cumbersome and often avoided. In 2014, Cambodia was ranked a poor 97 out of 99 countries on access to civil justice.⁶⁴ This by itself is a grave obstacle for access to divorce.

In addition to this immense hurdle, divorce law reflects the Cambodian social culture and the stigma on divorce by including additional obstacles to obtain a divorce judgment. First, the procedure is unnecessary long and complicated.⁶⁵ In practice, couples have to visit the courts three to five times before a divorce order is rendered.

Second, the procedure includes multiple mediation rounds by both the commune council and the court.⁶⁶ The law even allows the court to insist on mediation, including when one of the spouses is “*strongly demanding divorce*.”⁶⁷ This practice is opposed to international mediation principles, which provide that both parties must be willing to commit to the mediation procedure. It is usually the wife who initiates divorce proceedings, and it is difficult for a Cambodian woman to ignore the pressures of court mediation conducted at a court, usually by a male judge who is likely generally opposed to divorce.⁶⁸

Third, the need for legal representation by a lawyer seems unavoidable due to the complicated procedure, further hampering economic access to divorce. Although the law states that parties can represent themselves, it would be nearly impossible for someone lacking legal expertise to submit a divorce request. Currently there are approximately 720 practicing lawyers in Cambodia, thus a ratio of one lawyer for 19,000 people, as compared to one for 1,000 people in The Netherlands⁶⁹ or one for 265 people in the US.⁷⁰ Not only are lawyers rare in Cambodia, they are also expensive, with only 119 lawyers working with NGOs to provide *pro*

64 World Justice Project Rule of Law Index (2014), at 80, available at <http://worldjusticeproject.org/rule-of-law-index>.

65 See generally the Code of Civil Procedure of Cambodia, Book Two: Proceedings at the Court of First Instance (2006), available at <http://cambodianbusinesscorner.wordpress.com/2013/01/05/civil-code-2007/>.

66 See Civil Code, arts. 982(2), 984.

67 *Id.* art. 984.

68 See Cambow, *supra* note 24, at 15.

69 S.L. Peters, et al., Raad voor Rechtsbijstand: Monitor Gesubsidieerde Rechtsbijstand (2011), available at <http://rvr.turnpages.nl/DS/public/slot00008/pdf/compleet.pdf>.

70 See http://wiki.answers.com/Q/What_country_in_the_world_has_most_lawyers_per_capita.

bono services as of 2010.⁷¹ Further, most lawyers work in Phnom Penh or the bigger cities, not in the more remote provincial towns. If a woman seeking a divorce cannot find a pro bono lawyer, she will have to retain a lawyer and pay for his or her expenses including 55,000 Riels (approximately USD 13.75) for the court fee, 5,000 Riels (approximately USD 1.25) for the stamp tax and a further 5,000 Riels for any additional court motions. Additionally there are travel costs to appear before the court as requested — on average 3-5 times for a divorce case.

Another hurdle for women seeking divorce is the fact that most commune council members are male (82%),⁷² as are the majority of judges (91.5%).⁷³ Cambodian culture does not encourage women to speak out, let alone in public or a court setting. There are few role models for Cambodian women who publicly dare to stand up for their rights because it goes directly against the Cambodian cultural model of “appropriate” female behavior. It is thus not surprising to see that many women seeking a divorce do not pursue a legal (official) divorce through the courts. The commune council is usually the first and last stop for a spouse seeking divorce.

Consequences of these *pseudo-divorces* can be far reaching.

For example, a couple is legally married (registered marriage) for two years when the husband abandons the wife. They do not seek a divorce order through the court. Twenty years later, the husband comes back after he found out that his wife has become a successful business woman. He then seeks a divorce and claims half of her property.

Assuming the couple did not deviate from the statutory marital property system with an (pre)nuptial agreement, the man has a good chance of winning in court. However, the wife could ask the court to reduce her husband’s share to less than half, taking into account all the circumstances.⁷⁴

71 Christoph Sperfeldt et al., *Legal Aid Services in Cambodia: Report of a Survey Among Legal Aid Providers* Cambodian Human Rights Action Committee (CHRAC) (Nov. 2010), at 8, available at http://cambodia.ohchr.org/WebDOCs/DocProgrammes/CHRAC_Legal_aid_survey_Nov_2010_Eng.pdf.

72 Cambodian Center for Human Rights, Joint Press Release on Results of the Commune/Sangkat Council Elections 2012: Further Efforts Required to Achieve Quantitative and Qualitative Female Representation in Politics in Cambodia (July 11, 2012), available at <http://iknowpolitics.org/en/2012/07/joint-press-release-result-commune-council-election-2012-further-effortss-required-achieve> (visited May 14, 2014).

73 Gender and Development for Cambodia (GAD/C), et al., CSO Report on Cambodian Gender Issues (Apr. 8, 2009), at 3, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/KH/JS4_KHM_UPR_S06_2009_JointSubmission4.pdf (visited May 14, 2014).

74 See Civil Code, art. 980(2).

For example, a couple is legally married (registered marriage) for two years when the husband abandons the wife. The wife seeks a pseudo-divorce through the commune council and later remarries her old school friend. They register their marriage at the commune council.

The first husband can accuse his wife of bigamy and file a complaint with the prosecutor on the grounds that they were never legally divorced as there was no divorce court order.

For example, a couple is legally married (registered marriage) for two years when the husband abandons the wife. The wife seeks a pseudo-divorce through the commune council and later remarries her old school friend. They do not register their marriage and they have four children.

The first husband will be considered the legal father of the four children.⁷⁵

As they have with *pseudo-marriages*, justice sector and government officials have sought to find ways on how to deal with the legal consequences of *pseudo-divorces*. Commune councils have come up with a practical solution through the issuance of a “*separation certificate*.”⁷⁶ These certificates have no legal meaning, as they are not based on the law. Nevertheless, in practice commune councils will allow people to remarry after they obtain a separation certificate.

Land titling officials have also agreed in part to this practical approach. According to the 2004 Land Adjudication Guideline, a *pseudo-divorce* is recognized in a systematic land registration process when the commune council’s separation certificate specifies a division of property. Thus the cadastre is willing to register land in the name of only one spouse if he or she has a separation certificate. Importantly however, it recognizes this *pseudo-divorce* only for couples who were not legally married. For such couples who were legally married, a legal divorce by the court is still required by the cadastre.⁷⁷

4.3. Disparity Between Law and Reality

The root cause of the problem of *pseudo-marriages* and *pseudo-divorces* are laws that are not congruent to capacity on the ground. Due to poverty, lack of good governance, and lack of access to justice, there are too many obstacles for couples

75 See *id.* art. 988.

76 See UNDP, *supra* note 34, at 80.

77 See Mehrak Mehrvar et al., *Women’s Perspectives: A Case Study of Systematic Land Registration in Cambodia* (July 2008), at 12, available at www.kh.boell.org/downloads/CambodianWomensPerspectives_EN.pdf.

to register their marriages at the commune councils and to seek divorces through the courts. It might be possible with proper legal awareness raising campaigns to have all marriages registered, as has been done by UNICEF in Cambodia for the registration of births. But even if all marriages were registered in Cambodia, Cambodia's legal court system is not ready to handle an influx of thousands of divorce requests. The functioning of the Cambodian court system is hampered by an overload of cases, a lack of capacity, and corruption issues, and this situation is likely to continue for the next few decades.

5. CONCLUSIONS AND RECOMMENDATIONS

Specific gender issues arising from the statutory regime for marriage in Cambodia includes the continuing marriage of minors, which despite regulation is occurring on a broad scale, especially in the more rural areas. It is recommended that the Ministry of Women's Affairs actively discourage the marriage of girls younger than 18 years old through outreach programs. Another gender issue is the legal prohibition on women remarrying within 120 days of their divorce, which seems to unnecessarily invade the private life of the mother with little or no legal benefit to the father, whether he is the first or second husband. This Civil Code article mandate should therefore be reviewed.

Cambodian law has a clear system in place for marriage registration and a sound statutory system for marital property. There are some ambiguities in the law regarding the consent of a spouse to dispose joint marital property and who bears the burden of household expenses. The courts should clarify these ambiguities through developing case law and making it publically accessible. Moreover, it is advisable that Ministry of Women's Affairs and the Ministry of Justice take action to increase public awareness and understanding of the statutory system for marital property, as there seems to be a lack of knowledge, especially regarding rules governing the ownership of land.

It is recommended that the Ministry of Women's Affairs further raise the awareness of the public about marital rape and its legal consequences and provide women with logistical support in seeking help. Legal aid should be accessible to women who require access to the justice system, and police, prosecutors and judges should be specifically trained about this issue to combat the current impunity.

Cambodian law grants sufficient rights to women (and men) in the case of legal divorce, including division of marital property, child custody, child visitation rights and child support. However, to further protect women's rights it should be made clear that wives who escape abusive marriages by filing for divorce cannot be held at fault, and have the right to partner alimony if they need it and their hus-

band has the means to provide it. Although the law is not explicit, it seems that pension rights should be considered part of the marital property. How and when pension rights should be divided should be worked out through jurisprudence and published.

The areas of greatest concern are associated with the marriage registration and court divorce procedures. Both procedures are seriously flawed, inaccessible and too costly. It would be advisable for the Ministry of Interior to raise public awareness of the official cost of marriage registration to prevent further corruption. The Ministry of Justice should also review the divorce procedure in order to simplify divorce procedures or create a simpler alternative for a legally valid divorce order. Other avenues could be explored by organizing a conference on this topic at which the diverse practices of other (Asian) countries are reviewed. Alternative procedures could altogether avoid the courts, which are not currently able to provide sufficient access to justice for the poor and women. In order to improve access to justice through the courts for women, more women should be appointed judges. This should help lessen the burden on women who request divorce by improving their treatment by the courts. It is further recommended that judges receive guidelines about when they should and when they should not attempt mediation. For example, mediation is not appropriate if the wife claims that there has been domestic violence.

These recommendations would increase access to legal marriage and to legal divorce in Cambodia. The Ministry of Women's Affairs should raise the awareness of the Cambodian Government and lawmakers that these innovations would not lead to more *de facto* divorces, but would lead to a higher level of protection of the rights of women during divorce.