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Women's Rights, International Norms, and Domestic Violence: Asian Perspectives

*Kumaralingam Amirthalingam**

ABSTRACT

This article examines domestic violence laws in two Asian jurisdictions and highlights the importance of using a gender analysis to create an alternative narrative of, and different solutions to, the problem. The paper reviews some of the theoretical analyses of domestic violence and draws on international human rights discourse to supplement domestic developments. The tension between cultural norms and international norms is considered and it is suggested that certain universal norms need to be championed—in this case the right of women to be free from domestic violence.

I. INTRODUCTION

Domestic violence has been on the global agenda for several decades, and in the last two, has been the subject of considerable reform activity in Asia, particularly in Singapore and Malaysia, which have enacted legislation to

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deal with the problem.¹ While domestic violence affects various parties (including partners,² parents, children and extended family), this article is limited to partner violence and argues for an enhanced gender analysis of the problem in this region. The evidence suggests that domestic violence disproportionately affects women as victims. The World Health Organization, in its first World Report on Violence and Health in 2002, revealed that between 40 percent and 70 percent of women who die due to homicide are killed by current or former partners.³ The UN Special Rapporteur on Violence Against Women has defined domestic violence in gender terms as "violence perpetrated in the domestic sphere which targets women because of their role within that sphere or as violence which is intended to impact, directly and negatively, on women within the domestic sphere."⁴

The significance of using gender as a basis of analysis is that it forces a paradigmatic shift away from domestic violence analysis best captured by the following observation: "Instead of asking why he batterers, there is a tendency to ask why she stays."⁵ A gendered analysis compels us instead to question why men resort to violence and why violence against women occurs and is tolerated in many societies. Restructuring the debate in this way is vital for meaningful legal reform, especially from the perspectives of criminal justice and human rights.⁶ The key to understanding domestic violence from a gender perspective is to appreciate that the root cause of violence lies in an unequal power relationship between men and women that is compounded in male dominated societies. As noted recently, "Violence is . . . a sign of the struggle for the maintenance of certain fantasies of identity and power. Violence emerges, in this analysis, as deeply gendered and sexualised."⁷

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1. Domestic Violence Act, No. 521 (1994) (Malay.); Women's Charter Act, No. 353, § 64 (1961) (Sing.), *amended* 1996 to insert Part VII dealing with the protection of the family.
 2. "Partners" includes a relationship between two people that has some degree of continuity, but is not exclusive to the husband-wife relationship.
 3. WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 93 (2002), *available at* www.who.int/violence_injury_prevention/violence/world_report/en/.
 4. *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, a Framework for Model Legislation on Domestic Violence, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 9(a), addendum, ¶ 28, U.N. Doc. E/CN.4/1996/53/Add. 2 (1996).
 5. *Societal Change and Change in Family Violence from 1975 to 1985: As Revealed by Two National Surveys*, in WOMAN BATTERING IN THE UNITED STATES: TILL DEATH DO US PART 131 (Helen M. Eigenberg ed., 2001).
 6. An important caveat must be introduced here. It is acknowledged that a multidimensional approach is crucial and while this paper focuses on criminal justice and women's rights, it is not suggested that there are no other dimensions to domestic violence. All that is contended is that this particular aspect needs serious attention.
 7. Sally E. Merry, *Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence*, 25 HUM. RTS. Q. 343, 350 (2003).

In many jurisdictions, and particularly in Asia, domestic violence is seen as a private matter and considerations of family, culture, or religion tend to prevail over women's interests. This article seeks to promote legal reform in this area (both in terms of subject matter and the region) by addressing international norms, gender analysis, and transcultural values. Section II of this article analyzes the recently enacted domestic violence laws in Malaysia and Singapore. While the legal reforms in both jurisdictions have been progressive, they have also been hindered by perceived cultural constraints and an inadequate appreciation of the gendered nature of domestic violence. Section III draws on feminist theories of family violence and international human rights discourse to create an alternative narrative that can better advance legal reform in the region. By defining family violence both as a gender issue and a human rights issue, the locus of domestic violence is shifted away from the private domain to the public, a critical step in the Asian context. The theoretical and philosophical arguments are designed to provide the tools with which to challenge certain Asian assumptions about domestic violence, family and cultural values, as well as the public/private divide that defines the boundaries of State regulation. This article finally suggests that Asian values are not incompatible with human rights discourse in general or women's rights in particular.

II. DOMESTIC VIOLENCE LAWS IN SINGAPORE AND MALAYSIA⁸

In both Malaysia and Singapore, concerted efforts to deal with domestic violence—or family violence⁹—began in the 1980s with grassroots campaigns by women activists.¹⁰ While the respective enactments did not meet all the targets of the reformers, the publicity and awareness created has at least forced the community and the government to confront the issue of

8. The criminal laws of Singapore and Malaysia are virtually identical. Both have their origins in the Penal Code of the Straits Settlements of 1871. When Singapore became a crown colony in 1935 and the Federation of Malaysia was formed in 1948, each jurisdiction simply adopted the Straits Settlement Penal Code, which incidentally was copied from the Indian Penal Code of 1860. The current version of the Penal Codes are Penal Code, Cap. 224, Revised Edition 1985 (Singapore) and Penal Code Revised 1997 (Malaysia). The general discussion of Penal Code offenses applies equally to both jurisdictions unless otherwise specified.

9. The term domestic violence is used in Malaysia and family violence in Singapore and they are treated interchangeably in this article.

10. For a history of activities and milestones in Singapore, see Constance Singam, *Working for Gender Equality: An AWARE Experience*, in *BUILDING SOCIAL SPACE IN SINGAPORE: THE WORKING COMMITTEE'S INITIATIVE IN CIVIL SOCIETY ACTIVISM* 45–52 (Constance Singam et al. eds., 2002). For information on Malaysia, see the Women's Aid Organisation, Domestic Violence, available at www.wao.org.my/research.htm#domestic.

domestic violence. Both countries ratified the Convention on the Elimination of All Forms of Discrimination Against Women¹¹ (Women's Convention) in 1995 and have committed greater resources to combat domestic violence. The Singapore Government has established a Family Court,¹² as well as developed a sophisticated infrastructure to facilitate an integrated and multidisciplinary approach to domestic violence.¹³ Statistics show that the vast majority of victims of family violence are women, thus reinforcing the importance of a gendered approach in this region.¹⁴

Despite some positive outcomes,¹⁵ legal reform continues to be hampered because domestic violence is treated primarily as a family matter with policies and laws geared toward the preservation of the family unit.¹⁶ An official policy of treating domestic violence as a family matter in cultures that to some degree tolerate violence against women is problematic.¹⁷ Advocates for reform have argued that domestic violence should be viewed as a women's rights issue and not a family issue, that domestic violence should be criminalized, and that it should not be precluded from public debate and scrutiny.¹⁸

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11. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GOAR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980) (*entered into force* 3 Sept. 1981), 1249 U.N.T.S. 13, *reprinted in* 19 I.L.M. 33 (1980).
 12. The establishment of a family court to provide a holistic approach to family matters is highly commendable. Malaysia does not have a specialist family court, despite the value of having one. See Abu Bakar Munir & Nor Aini Abdullah, *Domestic Violence and the Need for a Family Court*, 4 CURRENT L.J. lxxv, lxxx–lxxxiii (1995).
 13. See Ministry of Community Development and Sports, *National Family Violence Networking System*, in FAMILIES IN CONFLICT: THEORIES AND APPROACHES IN MEDIATION AND COUNSELLING 271 (Richard Magnus et al. eds., 2000).
 14. In 1995, there were 3,639 reported cases of family violence, of which 90 percent or 3,245 involved women as the victims. See Singapore Parliamentary Debates, Official Reports, Vol. 66, col. 121 (2 May 1996), Dr. Kanwaljit Soin, Nominated Member of Parliament.
 15. The legislation has had an impact on the number of reported cases of domestic violence, which showed a dramatic increase after the enactments. See *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Second Periodic Reports of States Parties, Singapore*, U.N. ESCOR, Comm. for Elim. of Discrim. Against Women, U.N. Doc. CEDAW/C/SPG/2 (2001).
 16. See text accompanying notes 67–69 for disadvantages of this type of approach.
 17. A 1995 survey by the Women's Aid Organisation showed that 15 percent of adults did not view physical abuse of women as wrong. Rashidah Abdullah et al., Women's Aid Organisation, *Battered Women in Malaysia: Prevalence, Problems and Public Attitudes* (1995) (report available from WAO office, Kuala Lumpur), available at www.wao.org.my/research.htm#domestic.
 18. See generally, Second Reading of the Family Violence Bill, Singapore Parliamentary Debates, Official Reports, Vol. 65, at cols. 94–110 (1 Nov. 1995), Dr. Kanwaljit Soin, Nominated Member of Parliament (hereinafter Statement of Dr. Kanwaljit Soin); Website of the Women's Aid Organisation, especially the research and advocacy page, available at www.wao.org.my/research.htm.

Progressive reforms were rejected by the legislatures of both countries primarily because of concerns of unwarranted intrusion into the private family sphere. Making family violence, including forced or nonconsensual sex and related conduct,¹⁹ a specific crime²⁰ and increasing the role of the police in investigating family violence were seen to be antagonistic to the private concept of family,²¹ despite the overwhelming view of women's groups and victims that greater police powers and intervention were necessary.²² A survey of ordinary Singaporeans also showed support for greater police involvement.²³ A small scale experiment in the US city of Minneapolis, Minnesota has suggested that greater use of police arrests is an effective deterrent.²⁴ Later experiments and research have raised questions about the validity of the Minneapolis experiment.²⁵ Nevertheless, recent data shows that while the deterrent effect may not be spectacular, it is still present.²⁶ The possibility of deterrence, however, does not mean that arrests should be made indiscriminately every time there is a complaint.²⁷ The argument is simply that domestic violence is a serious crime and from a gender perspective there is a greater need for a proactive role by the police in order to redress the power imbalance between aggressor and victim.

In contrast to the conception of the family as private, the Ministry of

19. Statement of Dr. Kanwaljit Soin, *supra* note 18, col. 114.

20. See, e.g., *id.* col. 169.

21. *Id.* col. 170.

22. *Id.* cols. 98, 105.

23. Alfred Choi, *Formal Protection of Women from Wife Assaults in Singapore*, 3 MALAYAN L.J. xli (1994).

24. *The Minneapolis Domestic Violence Experiment*, POLICE FOUNDATION REPORTS (Apr. 1984), available at www.policefoundation.org/pdf/minneapolisdve.pdf.

25. See Lisa G. Lerman, *The Decontextualisation of Domestic Violence*, in WOMAN BATTERING IN THE UNITED STATES, *supra* note 5, at 226.

26. See Joel H. Garner & Christopher D. Maxwell, *What are the Lessons of the Police Arrest Studies?*, 4 J. AGGRESSION, MALTREATMENT & TRAUMA 83 (2000), cited in Robyn Holder, *Domestic and Family Violence: Criminal Justice Interventions*, 3 AUSTRALIAN DOMESTIC AND FAMILY VIOLENCE CLEARING HOUSE: ISSUES PAPER 11 (2001).

27. Dr. Soin made this point explicitly during the second reading of the Domestic Violence Bill 1994:

By empowering the Police to carry out investigations of a case, we are not suggesting that in each and every case of family violence the Police have to take a pro-active approach and intrude into every home . . . the Police can use their discretion not to proceed further. Like any other offence reported to the Police, it is up to Police judgment to assess the situation.

Statement of Dr. Kanwaljit Soin, *supra* note 18, col. 102. Compare the view expressed by Kenneth Chen Koon Lap, a member of Parliament, during debate of the Domestic Violence Bill 1994: "I, therefore, consider the proposed Family Violence Bill redundant and, if passed, would serve no additional purpose but may even have a negative effect on creating more broken families and bring more pain and suffering to THE FAMILY MEMBERS." Singapore Parliamentary Debates, Official Reports, Vol. 65, col. 172 (2 Nov. 1995), Kenneth Chen Koon Lap.

Community Development and Society in Singapore advocates a very public concept of family:

Some may perceive that marriage and family are private matters, and that choices should be left to the individual. However, these can have collective impact on our nation. When families breakdown and fail to provide support for their members, the effects reverberate across society. Therefore, *it is important for the entire community to support the formation and strengthening of families.*²⁸

The conflicting classifications of the family as private and public depending on whether a particular policy should be restricted or expanded is troubling, especially when viewed in light of the fact that while policy makers are acting in good faith they may not be sufficiently attuned to the gender dynamics of domestic violence. While the Singapore government has been progressive on women's rights, in some respects, it remains wedded to certain traditions that have an inherent bias against women. For example, the UN Committee on the Elimination of Discrimination Against Women (CEDAW) commended Singapore on its efforts in dealing with family violence,²⁹ but was critical of some of the country's reservations to the Women's Convention, which were made on the basis of alleged incompatibility between "Asian values" and certain provisions of the treaty. CEDAW expressed concern that such views "might be interpreted so as to perpetuate stereotyped gender roles in the family and reinforce discrimination against women."³⁰

Turning to an analysis of the new laws, some of the key defects of the legal reforms in Singapore and Malaysia include:

- failing to recognize domestic violence as a specific crime;
- defining domestic violence too narrowly;
- including unnecessary constraints on obtaining protection orders;
- discriminating against the victim with respect to residential rights;
- failing to extend protection beyond marital relationships; and,
- failing to recognize marital rape as an offence.³¹

28. MINISTRY OF COMMUNITY DEVELOPMENT AND SPORTS, FAMILY MATTERS: REPORT OF THE PUBLIC EDUCATION COMMITTEE ON FAMILY 2 (2002), available at app.mcys.gov.sg/web/serv_reports_faml.asp?szMod=toppublication&szSubMod=rfaml.

29. *Report of the Committee on the Elimination of Discrimination Against Women (25th Sess. 2001)*, U.N. GAOR, 56th Sess., Supp. No. 38, at 53, U.N. Doc A/56/38 (2001).

30. *Id.* at 54.

31. Faridah Hamid, *Domestic Violence Act Passed But for Whom?*, MALAYSIAN LAW NEWS, June 1994, at 27.

The failure to recognize domestic violence as a specific crime is illustrative of the lack of appreciation of the nature and context of domestic violence. The legislators in Singapore and Malaysia viewed domestic violence as another species of interpersonal violence that could adequately be covered by the existing provisions in the Penal Code of each country.³² This ignores the nature of domestic violence that distinguishes it from other types of violent offenses. Some key characteristics of domestic violence described by Malaysian reformers include the following:

- it is perpetrated by someone close to the victim, usually her partner or ex-partner;
- it happens in intimate settings which are presumed by society to be sites of support and care;
- it is a recurring form of abuse generally characterized by a “cycle of violence”;
- the abuser uses domestic violence to control and coerce the victim; and,
- the abuse has profound emotional and psychological effects on the victim, who often believes (and is often told by the abuser) that she is to blame for the violence.³³

None of the offenses in the Penal Codes, individually or collectively, adequately capture the concept of domestic violence. The Penal Code offenses in both Singapore and Malaysia are pertinent to violent incidents occurring usually between strangers rather than continued violence by a close family member in the confined space of the home.³⁴ Domestic violence manifests as violence but, as will be argued later, it is inextricably tied to control and subjugation. The definition of domestic violence in the

32. Some of the provisions in both Penal Codes include sections 323 (voluntarily causing hurt); 324 (voluntarily causing hurt by dangerous weapons or means); 325 (voluntarily causing grievous hurt); 326 (voluntarily causing grievous hurt by dangerous weapons or means); 341 (wrongful restraint); 342 (wrongful confinement); 352 (using criminal force otherwise than on grave provocation); 354 assault or use of criminal force to a person with intent to outrage modesty); 355 (assault or criminal force with intent to dishonor a person; otherwise than on grave provocation) 357 assault or criminal force in attempt to wrongfully confine a person; 376 (rape); 426 (committing mischief); and 506 (criminal intimidation). This list was compiled by Fawziah Begum, Implementing the Domestic Violence Act 1994 (7 Oct. 1996) (unpublished paper presented at HAWA Workshop on Gender Perspectives in Family Violence).

33. Women's Crisis Centre, Review and Proposals for Amendments to the Domestic Violence Act 1994, at 3 (Mar. 1999) (report available from the WAO office, Kuala Lumpur).

34. See *supra* note 32.

Malaysian Domestic Violence Act 1994 (Malaysian DVA) ignores this central feature and is limited to physical violence.³⁵ Inflicting psychological and emotional harm are key elements of domestic violence; examples include, but are not limited to, constant ridicule, denying access to the victim's family and friends for support, depriving the victim of financial resources, and threatening harm to the victim's children or other persons.

The Singaporean definition of family violence goes further than the Malaysian definition as it includes emotional harm. Section 64 of the Singaporean Women's Charter ("Women's Charter") includes any act "causing continual harassment with intent to cause or knowing that it is likely to cause anguish to a family member."³⁶ This is a promising clause but interpretations of "continual harassment" and "anguish" remain to be seen.³⁷ Recently, the Singapore High Court has recognized a new tort of harassment and defined it as a course of conduct characterized by direct or indirect behavior that is sufficiently repetitive in nature as would cause, and which the perpetrator ought reasonably to know would cause, worry, emotional distress, or annoyance to another person.³⁸ Clearly the type of harassment envisaged in the Women's Charter is of a higher order; anguish goes beyond mere worry or annoyance. However, the definition of family violence in the Women's Charter is oddly drafted in that anguish need not be caused; all that is required is that anguish be intended or foreseen. If that is the case, it is arguable that this definition of family violence may in fact be too broad.

Because domestic violence is not recognized as a crime in either Singapore or Malaysia, the Penal Code offenses in each jurisdiction have to be relied upon. This creates a procedural problem as these offenses are classified into seizable and nonseizable categories.³⁹ More than 90 percent of domestic violence offenses are classified as nonseizable.⁴⁰ Thus, in the vast majority of Malaysia's domestic violence cases, immediate response and protection of the victim is severely hampered. The Singapore situation is better as the problems caused by the distinction between seizable and nonseizable offenses is circumvented.⁴¹

35. Domestic Violence Act, *supra* note 1, § 2 contains four paragraphs describing different acts that constitute domestic violence.

36. Women's Charter, *supra* note 1, § 64.

37. Some guidance may be found in the Protection from Harassment Act, 1997, c. 40 (UK), which applies a reasonable person test.

38. Malcomson Nicholas Hugh Bertram & Anor v. Naresh Kumar Mehta, 4 SINGAPORE L. REP. 454 (2001).

39. A seizable offense requires a police officer to conduct immediate investigation and includes a power of arrest. Non-seizable offenses cannot be investigated without an order from the Public Prosecutor and a warrant is required for any arrest.

40. See Nor Aini bte Abdullah, *Domestic Violence Act 1994: An End to a Nightmare?*, 1 MALAYAN L.J. xli, xliii n.8 (1995).

41. See Women's Charter, *supra* note 1, at § 65(1).

A further aspect of the Malaysian DVA that discriminates against the victim is the provision dealing with exclusion orders.⁴² The Malaysian DVA allows for exclusion of the abuser from the shared home by granting the right of exclusive possession to the victim.⁴³ However, the DVA also makes it mandatory for courts to revoke an exclusionary order if suitable alternative residence is found for the victim.⁴⁴ If the victim can be accommodated in a shelter or with relatives or friends, the abuser has the right to return to the shared home. This forces the victim to depend on charity and lose the comfort and security of the home, further adding to the distress and degradation already suffered. What a victim of domestic violence needs most is a sense of empowerment; unfortunately, the Malaysian DVA does the opposite by allowing the abuser to force the victim out of the shared home, which is a devastating form of disempowerment. As one women's activist said, "[i]nstead of funding more women's shelters, we need to fund more men's shelters so the men can be moved out while the woman stays at home."⁴⁵

The policy approach of adopting a family-focused strategy has limited the range of people who can seek legal recourse. The new laws are limited to spouses, former spouses, children, parents, siblings, or other relatives. This excludes all other heterosexual and homosexual relationships. When questioned in Parliament on whether the Malaysian DVA would extend to unmarried couples living together, the Minister for National Unity and Welfare took the view that Malaysia did not encourage a permissive society and that unmarried couples should "get married."⁴⁶ The message appears to be that if they are not married they do not merit protection.⁴⁷ The fact that these women face the same risks of physical and psychological harm or that their rights are unprotected seems irrelevant. The range of persons protected should be greater and abused women should not be discriminated against based on their familial status. The attitude entrenched in the Malaysian DVA

42. Domestic Violence Act, *supra* note 1, § 6.

43. *Id.* § 6(1)(a).

44. *Id.* § 6(4)(a). Note that this problem does not exist under the Singapore provisions, as the Women's Charter does not have this requirement.

45. Conversation with Naina Kapur, Director of Sakshi, at the Salzburg Seminar Session 405 on Law as a Catalyst of Change in Asia (Dec. 2002).

46. See Hamid, *supra* note 31, at 28.

47. While conclusive evidence on cohabitation trends in Asia is not yet available, recent research suggests that there is evidence of increased levels of premarital sex as well as long-term sexually intimate relationships and a greater acceptance of cohabitation amongst unmarried adults. The official policy of not encouraging a permissive society may not reflect the reality. See Gavin Jones, *Not "When to Marry" but "Whether to Marry": The Changing Context of Marriage Decisions in East and Southeast Asia*, in (UN)TYING THE KNOT: IDEAL AND REALITY IN ASIAN MARRIAGE 3–36 (Gavin Jones & Kamalini Ramdas eds., 2004).

is testimony to the feminist complaint that women are never valued as individuals in their own right, but only as daughters, wives or mothers.

Perhaps the most disappointing and troubling aspect of the reforms in Malaysia and Singapore is the failure to recognize marital rape or similar nonconsensual sexual assault as an offence. Section 2 of the Malaysian DVA includes in the definition of domestic violence any act "compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain."⁴⁸ The notion that a woman can be forced or threatened to engage in sexual or other conduct because she does not have a legal right to abstain is troubling. In Malaysia and Singapore, where marital rape is not an offence,⁴⁹ it is unclear what meaning the phrase "right to abstain" has. It may be, and it is certainly hoped, that courts will interpret this as a right for a married woman to refuse to consent. Even so, other unsavory situations may not be covered by either Malaysia's or Singapore's Penal Codes. For example, the code may not apply to a husband who forces his wife to watch him with another person, or to pose in an obscene manner.⁵⁰ There are no offenses in the Penal Code to cover such situations.

Despite numerous representations, the Select Committee on the Women's Charter (Amendment) Bill⁵¹ in Singapore refused to include sexual violence or forced sex in the definition of family violence,⁵² although many other jurisdictions have done so.⁵³ The inconsistent conception of family as alternately private or public has the strange result that violent, nonconsensual, sexual activity cannot be included in the definition of family violence or criminalized, yet certain types of "unnatural sex" between two consenting adults, including married couples, remains criminalized.⁵⁴ Numerous criticisms can, and have, been made about the failure to include sexual misconduct in the definition of family violence.⁵⁵ The Select Committee's

48. Domestic Violence Act, *supra* note 1, § 2.

49. PENAL CODE § 375 (Cap 224, Rev. Ed. 1985) (Sing.); Penal Code § 375 (Revised 1997) (Malay.).

50. These and other examples are considered in WOMEN'S CRISIS CENTRE, *supra* note 33, at 8.

51. Women's Charter (Amendment) Bill, No. 5/96 (1996)(Sing.).

52. Select Committee on the Women's Charter (Amendment) Bill, *Report of the Select Committee* (1996).

53. For example, the various Australian states: Crimes Act 1900 (ACT) § 3; Domestic And Family Violence Protection Act 1989 (Qld) § 11A(1); Domestic Violence Act 1994 (SA) § 4(2); Crimes (Family Violence) Act 1987 (Vic) § 4; Crimes Act 1900 (NSW) § 4. See also New Zealand: Domestic Violence Act 1995 (NZ) § 3.

54. "[W]hen fellatio is a substitute for natural sexual intercourse between a man and a woman capable in law of giving consent, the woman's consent to perform the act of fellatio cannot save it from being an offence under § 377 of the Penal Code. See *Public Prosecutor v. Kwan Kwong Weng*, 1 SINGAPORE L. REP. 697, 706 (1997).

55. See Chan Wing Cheong, *Latest Improvement to the Women's Charter*, SING. J. LEGAL STUD. 553, 563-64 (1996) for some insightful criticisms.

suggestion that forced sex could be brought within the definition of Family Violence through the continual harassment limb is not realistic.⁵⁶ The information on the Family Court's homepage makes it clear that forced sex does not *per se* come within the definition of family violence: "If your spouse forces you to have sex against your will, it would be considered as family violence, *provided he also commits one of the acts set out in [the definition].*"⁵⁷

From a human rights perspective, the omission of forced sex from the definition of family violence is regrettable. Forcing a woman to have sex against her will is the most blatant form of enforcing male dominance.⁵⁸ It is a brutal statement that she has absolutely no autonomy or rights. Article 9.2 of the Asian Human Rights Charter recognizes the particular significance of sexual violence against women and draws a link to patriarchy and Asian values:

The roots of patriarchy are systemic and its structures dominate all institutions, attitudes, social norms and customary laws, religions and values in Asian societies, crossing the boundaries of class, culture, caste and ethnicity. Oppression takes many forms, but is most evident in sexual slavery, domestic violence, trafficking in women and rape . . . systematic rape is a war crime and a crime against humanity.⁵⁹

To refuse to recognize marital rape as a crime on the basis that such matters are considered private is no longer tenable under international human rights

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56. Select Committee on the Women's Charter (Amendment) Bill, *Report of the Select Committee*, iv (1996) suggests that this may be possible. See WAI KUM LEONG, FAMILY LAW IN SINGAPORE 167–68 (1990) (arguing that the marital rape immunity should not apply to married couples who are estranged). See also Cheng Han Tan, *Marital Rape—Removing the Husband's Legal Immunity*, 31 MALAYAN L. REV. 112 (1989).
 57. See Family Court of Singapore, Frequently Asked Questions, available at www.familycourtofsg.gov.sg/principles/FAQ_Family_Violence.htm (emphasis added).
 58. Rape and sexual assault have historically been the principal method of subjugating women, and during war it is a common form of attack against women as well as a means of torture, resulting in its being declared a war crime. See Platform for Action adopted at the Fourth World Conference on Women in Beijing (1995). *Report of the Fourth World Conference on Women: Action for Equality, Development, and Peace, Beijing Declaration and Platform for Action*, U.N. GAOR, U.N. Doc. A/CONF.177/20 (1995), reprinted in REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN (1995) (recommended to the UN General Assembly by the Committee on the Status of Women on 7 Oct. 1995). See also Rhonda Copelon, *Women and War Crimes*, 69 ST. JOHN'S L. REV. 61 (1995); Kelly D. Askin, *Women and International Humanitarian Law*, in WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 41 (Kelly Dawn Askin & Doreen M. Koenig eds., 1999); Ximena Bunster-Burotto, *Surviving Beyond Fear: Women and Torture in Latin America*, in WOMEN AND VIOLENCE 156 (Miranda Davies ed., 1994). The Malaysian Women's Aid Organisation has recently highlighted this issue again in the context of the Iraq War. Jaclyn Kee, *Violence of War on Women*, SUNDAY MAIL, 6 April 2003.
 59. Asian Human Rights Commission, The Asian Human Rights Charter: A People's Charter, art. 9.2 (1998), available at www.ahrchk.net/charter/mainfile.php/eng_charter/.

obligations. The official policy of prioritizing the family over women needs to be reconsidered. The concluding remarks of the Women's Crisis Centre in its memorandum reviewing the Malaysian DVA are pertinent:

Some of the reservations that have been directed against the DVA stem from the concern that the Act would encourage the disintegration of the family unit. This conceptualization of domestic violence is fundamentally flawed. In providing protection to an abused person, the DVA is assisting someone whose family is already attacked by domestic violence. In other words, a victim who seeks the assistance of the DVA is, by definition, seeking refuge from a broken family.⁶⁰

The argument that the Malaysian DVA is not anti-family is significant and valid, but more importantly, the guiding principle ought to be that women who are victims of domestic abuse deserve protection regardless of their marital status. This is one instance where Kantianism is imperative; women are individuals in their own right and not merely constituent elements of a family unit. This is not to devalue the family unit, merely to say that at the end of the day when a choice has to be made, the safety of the woman should prevail over the sanctity of the family unit.

III. WOMEN'S RIGHTS AND INTERNATIONAL NORMS

The reticence toward more progressive reforms in Singapore and Malaysia is due to a system that is overtly patriarchal and a legal culture that is not adequately exposed to gender issues. This section of the article attempts to bridge the gap that exists in some of the Asian jurisdictions by attempting to infuse international human rights norms and gender perspectives into the local systems. This section also suggests that Asian values are not incompatible with international norms and that many of the perceived cultural impediments are artificially constructed rather than inherently present.

Human history is replete with domestic violence perpetrated by men against women.⁶¹ This is partly because society has moved from a permissive to restrictive attitude toward sex, as men sought to have exclusive possession of women.⁶² The shift to an overt patriarchal model, some scholars have argued, resulted in a shift from a democratic to an authoritarian way of life;⁶³ power and control have become the norm. Violence against women has been legitimized by patriarchal legal systems and social

60. Women's Crisis Centre, *supra* note 33, at 19–20.

61. See Del Martin, *Domestic Violence: A Sociological Perspectives*, in *THE MALE BATTERER: A TREATMENT APPROACH* 8–11 (Daniel Jay Sonkin et al. eds., 1985).

62. See Terry Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 2 (Maria Roy ed., 1977).

63. See GORDON RATTRAY TAYLOR, *SEX IN HISTORY* (1954).

practices. The modern occurrence of domestic violence is part of this history and any strategy—legal or otherwise—must recognize that in many cases “men who assault their wives are actually living up to cultural prescriptions that are cherished in Western [and any other] society—aggressiveness, male dominance and female subordination.”⁶⁴ A gendered analysis of domestic violence is not just imperative, but inevitable.

A. Theories of Domestic Violence

UN literature identifies two types of theories on domestic violence, each representing the two extremes of a spectrum of theories.⁶⁵ At one end are theories that focus on the individual, and at the other, are theories that look to social structural explanations. A third category of theories focuses on the family and are situated along the spectrum.⁶⁶ The individualist theory looks at personal, social, and psychological explanations for violence. Causes of violence can be internal, for example, due to personality disorders, biological predispositions to violence, personal social conditioning brought about by environmental factors such as growing up in a violent home. Alternatively, the causes can be external, due, for example, to alcohol, drugs, provocation, jealousy, or sex.⁶⁷ It can, however, be argued that these individual factors are actually catalysts of violence and not necessarily the true causes of violence. There are many people who have personality disorders or drug and alcohol problems who are not violent toward their partners.

The family-centered theory locates the causes of violence within the family unit. It is argued that the unique nature of the family unit is intrinsically a source for violence because of its potential to generate conflict and frustration.⁶⁸ In a sense, these theories are extensions of the

64. R. EMERSON DOBASH & RUSSELL P. DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 24 (The Free Press, 1979).

65. See BUNSTER-BUROTTO, *supra* note 58, at 6–7; The United Nations, *Violence Against Women in the Family: What Causes Violence Against Women in the Home*, in *WOMAN BATTERING IN THE UNITED STATES*, *supra* note 5, at 147–56. See also DAVID LEVINSON, *FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE* 14 (1989) for a much wider variety of theories.

66. See KATHARINE D. KELLY, *The Family Violence and Woman Abuse Debate: Reviewing the Literature, Posing Alternatives*, in *A CROSS-CULTURAL EXPLORATION OF WIFE ABUSE* 28 (Aysan Sev'er ed., 1997).

67. See generally *THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING* (Maria Roy ed., 1982); *WOMAN BATTERING IN THE UNITED STATES*, *supra* note 5, ch. 3; *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 15–26 (Eve S. Buzawa & Carl G. Buzawa eds., 1990); LEVINSON, *supra* note 65.

68. See Keith M. Farrington, *Stress and Family Violence*, in *SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE* 94–114 (Murray A. Strauss & Gerald T. Hotaling eds., 1980).

individualist theories and therefore similar variables are considered, such as provocation, drugs, alcohol, disputes over money, sex, or violent child-hoods. The difference is that these factors are analyzed within a family context; thus, theorists treat "individual problem behaviours as a manifestation of a dysfunctional family unit, with each family member contributing to the problem."⁶⁹ The constant proximity between family members exacerbates these contributing factors and the family unit creates a pressure cooker situation. There are several disadvantages to this family-centred approach: it unfairly focuses on the conduct of the victim as contributing to the violence; it marginalizes more systemic factors contributing to violent cultures; it creates a conflict between protecting the victim and preserving the family unit; and it risks domestic violence being shifted out of the public domain and into the private, thus pushing it further away from criminal law and human rights discourse.

The social structural theories of domestic violence shift the debate from micro-level to macro-level analyses; instead of looking at individual or family factors, the focus is on structural factors in societies and cultures. Studies have shown that most societies have a history of condoning violence against women.⁷⁰ Cross-cultural research has also shown that societies in which women are accorded equal status have a very low rate of domestic violence.⁷¹ While theories along the entire spectrum from individual to social structural help explain different aspects and causes of domestic violence, it is suggested that the social structural theory be preferred and should be the platform upon which law reform is shaped. There are several reasons for this. First, this theory shifts the focus of interventions to the structural causes rather than catalytic factors or symptoms of domestic violence. Second, it leads to a confrontation of the fact that domestic violence is, to a large extent, a gender issue. Third, it forces domestic violence out of the private arena into the public, and thus transforms it into a criminal justice issue rather than a family matter. Last, it paves the way for treating domestic violence as a human rights issue, thus introducing international norms and the existing international human rights mechanism.

69. Kerry Healey et al., *The Causes of Domestic Violence: From Theory to Intervention*, in *WOMAN BATTERING IN THE UNITED STATES*, *supra* note 5, at 167.

70. See, e.g., UNITED STATES COMMISSION ON CIVIL RIGHTS, *UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS* (1982).

71. See generally, LEVINSON, *supra* note 65.

B. Feminist Constructs

Feminist constructions of domestic violence provide an alternative lens through which to appraise the issue. From a feminist perspective, domestic violence is not an aberration; rather, it is the norm because it is culturally and legally accepted or tolerated. Feminism also shifts the focus from women to men by explaining why the male partner's behavior traps women in violent relationships. Social psychologists have explained this phenomenon as a consequence of being exposed to a cycle of violence.⁷² According to this theory, domestic abuse occurs in a repeated cycle of three stages. The first is the tension-building stage, where the man becomes angry and the woman tries to calm him down to avoid being battered. This is followed by the actual violence, which in turn is followed by a loving phase, where the man tries to reconcile with the woman by assuring her that he still loves her while at the same time making her feel guilty. This creates a false hope in the relationship and the woman stays, thus perpetuating the cycle. After a while, the woman is simply unable to leave; what has been termed a condition of "learned helplessness" sets in.⁷³ Through these cycles, the victim believes or resigns herself to the fact that she cannot help herself.⁷⁴ Having explained why women are unable to leave, the more important question becomes why men batter.

Perhaps, most importantly, feminist theorists reveal the hegemonic nature of domestic violence. While feminists have constructed their theories from a gender perspective, the central thesis really is about a power differential or inequality; domestic violence results when those who are in a position of power exercise control and dominance over others. However, on closer reflection, there may well be a paradox. Is it power or the yearning for power that causes violence? "It has been said that it is not power that corrupts, but lack of it that does."⁷⁵ Power has been categorized into five basic types: exploitative, manipulative, competitive, nutrient, and integrative.⁷⁶ The first two types are clearly negative forms of power and the first is arguably violence simply confused for power; in other words, it involves a person who needs to be violent to overcome a sense of insecurity, real or

72. The person and work now almost synonymous with this theory is LENORE E. WALKER, *THE BATTERED WOMAN* 55 (1979).

73. Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 398 (1998).

74. Some feminists are critical of this approach as it perpetuates a victim mentality, which is not necessarily true in many cases. See WOMAN BATTERING IN THE UNITED STATES, *supra* note 5, at 131–32 and references therein.

75. *THE ABUSIVE PARTNER*, *supra* note 67, at 3.

76. *Id.* at 3–5, referring to ROLLO MAY, *POWER AND INNOCENCE: A SEARCH FOR THE SOURCES OF VIOLENCE* (1972).

perceived. Unfortunately, violence has become synonymous with power and is thus legitimized. Even today, war is the preferred option to resolve conflict. Failure to carry out a threat of war is seen as a sign of weakness;⁷⁷ violence thus equals power—from the bar room brawl through family violence to international conflict.⁷⁸ Violence is a tool to perpetuate dominance and “violence in the family should be understood primarily as coercive control.”⁷⁹

The gender analysis shows that domestic violence is located in an unequal power relationship and therefore the legal response to domestic violence cannot always be based on procedural equality; rather, it has to promote substantive equality. The gender perspective is essential in order to relocate the center of equilibrium, as well as to give the disempowered a greater voice in the legal system. Such an approach is particularly important in the Asian context, where the patriarchal and hierarchical structures have not facilitated an adequate appreciation of feminist perspectives in law and society. The UN Special Rapporteur on Violence Against Women underscored the historical exclusion of women’s voice in the public debate in Asia by reciting this famous quote:

Why have you appeared before this gathering?
Why do you bellow like a cow in labour?
Your time must be near.
Shameless women with no sense of decorum
Bellow in gatherings of respectable men.⁸⁰

C. Cultural Context

There is a popular perception that domestic violence may be more prevalent in certain cultures due to intrinsic “cultural” factors. For example, in a recent survey of Australian men, it was found that many linked violence against women to ethnic minority groups and held the belief that such violence was less prevalent in mainstream cultural groups.⁸¹ Such beliefs are

77. Clearly evident from much of the rhetoric emanating from the American and British political and military establishments prior to the recent Gulf War.

78. For an interesting study on the relationship between hawkish attitudes toward war and family values, see Robert A. Lewis, *Socialization into National Violence: Familial Correlates of Hawkish Attitudes towards War*, 33 J. MARRIAGE & FAMILY 699 (1971).

79. DOBASH & DOBASH, *supra* note 64, at 15.

80. See Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 39 (Rebecca J. Cook ed., 1994).

81. New South Wales Attorney General’s Department, *Strategy to Reduce Violence Against Women*, 2001, cited in Rochelle Braaf & Gargi Ganguly, *Cultural Challenges for*

not always supported by empirical evidence. An American study examining why the rate of domestic assault in Hispanic families in the United States was more than double that of non-Hispanic families found that when other variables such as youthfulness, economic deprivation, and urbanity were controlled, the rate of domestic violence among Hispanic families was not significantly different from that of non-Hispanic families.⁸² While there may be a correlation between violence and certain cultures, academic research suggests that there is not necessarily a causal link. The link, if any, can be explained by reference to larger structural factors based on the gender analysis of power differentials.

It is important to look beyond the cultural context and identify causal factors of violence; otherwise one gets trapped in the debate between cultural relativists and universalists.⁸³ Domestic violence is found in the vast majority of cultures.⁸⁴ As has been rightly noted, "No one culture has a monopoly on non-violence."⁸⁵ The United Nations, in its 1994 Declaration on the Elimination of Violence against Women, rejected cultural relativism by prohibiting member nations from invoking "any custom, tradition or religious consideration to avoid their obligations."⁸⁶ The cross-cultural studies on domestic violence suggest that the key feature is sexual inequality. David Levison, in a ground breaking work that studied family violence in ninety communities, identified the following four factors as the strongest predictors of domestic violence around the world: (1) sexual and economic inequality, (2) violent conflict resolution, (3) male domestic authority, and (4) divorce restrictions for women.⁸⁷

All of these factors point toward a dramatic power imbalance and a predisposition to violence as a "legitimate" option. Thus, it is not culture per se, but these underlying factors that are causative. The power differential thesis also explains the three types of wife beating identified by Levison—sexual jealousy, for cause, and at will;⁸⁸ each illustrating different aspects of

Violence Prevention: Working Towards an Ethical Practice of Sustainable Intervention 3 (2002) (Paper presented at Expanding Our Horizons Conference).

82. Donald G. Dutton & Cynthia E. van Ginkel, *The Interaction of Cultural and Personality Factors in the Etiology of Wife Assault*, in A CROSS-CULTURAL EXPLORATION OF WIFE ABUSE, *supra* note 66, at 102.
83. See Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUM. RTS. Q. 130 (2003) and references therein for useful literature on the subject.
84. LEVISON, *supra* note 65, at 31, found that wife beating occurred in about 85 percent of societies.
85. Braaf & Ganguly, *supra* note 81, at 9.
86. See ROGER J.R. LEVESQUE, CULTURE AND FAMILY VIOLENCE: FOSTERING CHANGE THROUGH HUMAN RIGHTS LAW 7 (2001).
87. LEVISON, *supra* note 65, at 88.
88. *Id.* at 33–36.

the gender analysis of domestic violence. The first, sexual jealousy, illustrates the power paradox argument, where insecurity results in power being manifested through violence. The second illustrates the subordination of women; where men arrogate the right to discipline and chastise women. The third illustrates the cultural acceptance of violence, where beating women is simply accepted as the norm.

The rate of domestic violence was markedly lower in societies where there was an absence of Levison's violence indicators; where conflict resolution was usually accomplished through peaceful means, women had greater authority and economic strength, as well as stronger social networks.⁸⁹ Conversely, where these predictors were present, the rate of domestic violence was much higher.⁹⁰ Levinson's factors, which contribute to increased levels of violence, create a vicious cycle; the cultural group becomes accustomed to violence and cultural practices reflect and perpetuate violence against women. Cultures where domestic violence is prevalent often have painful initiation ceremonies for young girls as "one means of alerting the girl to and preparing her for the physical pain she will likely experience at the hands of her husband."⁹¹

It is important to distinguish between cultural practices and patriarchal practices. Where cultural practices reflect and perpetuate gender discrimination, the law must be ever more cognizant of the underlying causes of violence against women. The cultural perception that women should tolerate some amount of violence must be reviewed in order to avoid situations such as occurred in the following example:

"Be patient," the religious officer told the battered wife. "Pray for change. As a woman, that's your role." So Hasnah, a 26-year-old Malaysian executive, went home and heeded the kadi's advice. The abuse continued. One day her husband broke her leg. On crutches, she went to see the kadi again. This time he helped her get a divorce.⁹²

A passage in the Koran states that one way of restoring marital peace if all else fails is by a single strike.⁹³ A Malaysian group of reformist Muslim women, Sisters in Islam, has explained that passage by placing it in context.

89. See, e.g., the results of a study of the Wape community in New Guinea. William E. Mitchell, *Why Wape Men Don't Beat Their Wives: Constraints towards Domestic Tranquility in a New Guinea Society*, in *TO HAVE AND TO HIT: CULTURAL PERSPECTIVES ON WIFE BEATING* 100–09 (Dorothy Ayers Counts et al. eds., 2d ed. 1999).

90. Barbara Diane Miller, *Wife Beating in India: Variations on a Theme*, in *TO HAVE AND TO HIT: CULTURAL PERSPECTIVES ON WIFE BEATING*, *supra* note 89, at 203–15.

91. LEVINSON, *supra* note 65, at 46.

92. *Lifting the Veil of Inequality*, 17 *ASIA WEEK*, 9 Aug. 1991, at 27. Hasnah is not the woman's real name.

93. Verse Al Nisa' 4:34.

It was argued that the particular passage was written at a time when violence against women was rampant. Seen in this light, the single strike rule should be interpreted as "a restriction on existing practice and not a recommendation."⁹⁴ In contemporary times, there should be no tolerance, official or otherwise, of violence against women.

The gendered nature of domestic violence must be emphasized to increase awareness of the root cause of the problem and to reject certain cultural assumptions. Cultural traditions should be celebrated, but cultural relativism should not be used as a shield against what is in fact a gender based problem. Care needs to be taken not to condemn cultural practices involving some degree of violence that may not necessarily be harmful or nonconsensual. As noted in the foreword to a text on cross-cultural dimensions of domestic violence, "[m]any feminists will find any level of violence against women intolerable and will be unimpressed by careful attempts to determine what is and is not accepted in another culture."⁹⁵ If a woman in a particular culture freely and willingly chooses certain practices that from an outside perspective may be discriminatory or violent, there is immediately a conflict between respecting the autonomy of the individual and challenging the cultural practice.

The phenomenon of using cultural relativism as a means of resisting universal norms in political and human rights discourse is particularly relevant in Asia, with vigorous promotion of the concept of "Asian values" by regional leaders.⁹⁶ The collapse of the Soviet Union and the end of the Cold War resulted in renewed Western interest in Asia with connotations of a new imperialism. Asian leaders feared that Western powers were using a redefined international order and human rights regime to suppress and control the vibrant economies of Asia, which were largely thriving due to low economic costs. The concept of Asian values was used to resist unilateral imposition of human rights obligations, which threatened the competitive advantage enjoyed as a result of low cost labor. While this concept was largely a response to economic and political concerns, it also impacted on social and cultural issues. Asian values, a paradoxical concept in that it assumes universality in Asia, which comprises over half the world's population and contains all the major religions represented in extraordinarily diverse cultures, has been summarized to refer to:

94. *Id.*

95. TO HAVE AND TO HIT: CULTURAL PERSPECTIVES ON WIFE BEATING, *supra* note 89, at ix.

96. Asian values are generally identified with three schools of thought; the Lee Kwan Yew-Singapore model, the Mahathir-Malaysia model and the Post-Tiananmen-Confucianism-Nationalism model: see Errol P. Mendes, *Asian Values and Human Rights: Letting the Tigers Free* (Human Rights Research and Education Centre, University of Ottawa, 1996), available at www.cdp-hrc.uottawa.ca/publicat/asian_values.html.

[R]espect for hierarchy and authority including a deference to such authority, centrality and cohesion of the family, social consensus including an avoidance of overt conflict in social relations, an emphasis on law and order and a desire not to have individual liberty undermine personal security concerns, an emphasis on stability to promote economic and social development, a reverence for traditional values and culture, an emphasis on education and self-discipline, and acceptance of diversity of spiritual and philosophical authority in theory, but enforced social consensus among such diversity in practice.⁹⁷

This concept of Asian values has been used to support cultural relativist arguments in resisting certain fundamental human rights norms.⁹⁸ While there may be a disjuncture between theory and practice, even the most ardent proponents of Asian values have rejected cultural relativism as a defense against human atrocities, including the suppression of women.⁹⁹ It should be noted that the concept of human rights, dignity and freedom as well as principles of equality existed in Asia long before the liberal philosophers of the West began to extol them.¹⁰⁰ It is unfortunate that issues of economic development have been conflated with social and political rights, giving rise to a false conflict between Asian and Western values with respect to fundamental issues such as human dignity and freedom. Arguably, one reason is China's strategy of prioritizing the right to subsistence and economic development over other rights.¹⁰¹ Instead of pitting Asian values against Western, a constructive approach is preferable and attainable:

97. TO HAVE AND TO HIT: CULTURAL PERSPECTIVES ON WIFE BEATING, *supra* note 89, at ix.

98. See Kevin Y. L. Tan, *What Asians Think about the West's Response to the Human Rights Debate*, HUMAN RIGHTS DIALOGUE, Series 1, No. 4 (1996), available at www.carnegiecouncil.org.

99. Malaysian Prime Minister Mahathir Mohamad, Address at the Senate House, Cambridge University (15 Mar. 1995) (transcript on file with author).

Having offended the universalists, the most militant of whom are congregated in the West, let me now be permitted to offend the authoritarians, so many of whom are said to congregate in "the East". The first thing that might usefully be said is that atrocity anywhere must not be tolerated. It should be punished. No one should be allowed to hide behind the cloak of cultural relativism.

Id.

100. See ASIAN FREEDOMS: THE IDEA OF FREEDOM IN EAST AND SOUTHEAST ASIA (David Kelly & Anthony Reid eds., 1998). The major Asian religions and cultural traditions including Hinduism, Islam, Buddhism and Confucianism all have such notions at their core although expressed in different ways. See generally Maria Serena Diokno, *Cultural Sources of Human Rights in East Asia: Consensus Building Toward a Rights Regime*, HUMAN RIGHTS DIALOGUE, Series 1, No. 5 (June 1996), available at www.carnegiecouncil.org.

101. Prior to the Vienna Declaration of 1993, China led a regional preparatory conference in Bangkok, which resulted in a declaration emphasizing Asian values over universalism. This resulted in the Vienna Declaration including an affirmation that the right to development was as universal and inalienable as other fundamental rights. See *infra* notes 105–07.

If we in Asia want to speak credibly of Asian values, we too must be prepared to champion those ideals which are universal and which belong to humanity as a whole. . . . No Asian tradition can be cited to support the proposition that in Asia the individual must melt into the faceless community.¹⁰²

To reiterate, domestic violence is found in the vast majority of cultures; it is probably more universal than relative. It has been argued that the universality of domestic violence in fact makes it particularly apposite to human rights intervention and the application of international laws.¹⁰³ Even if that argument is not accepted, it seems clear that a line can be drawn between cultural practices and violent discrimination against women; the latter being something that simply should not be tolerated. In order to do this, it is necessary to engage with human rights jurisprudence and reaffirm that there are certain universal and inalienable rights, which should not be trumped by cultural or religious practices.

D. Internationalizing Women's Rights

Judges have a creative function. They cannot afford to just mechanically follow the rules laid down by the legislature; they must interpret the rules so as to reconcile them with the wider objectives of justice which are encapsulated in the international norms of women's human rights. . . . The Goddess of Justice is shown blindfolded in Anglo-Saxon jurisprudence, but I do not agree with this image. The Goddess of Justice, in my view should keep her eyes wide open to see the injustice and inequality from which women suffer.¹⁰⁴

Women's issues, as part of international discourse, received a boost during the 1970s and 1980s when the UN General Assembly promoted the International Decade for Women between 1975 and 1985. The single most important international instrument for women's rights was created in 1979 when the Women's Convention was adopted by the General Assembly. A revitalization of a global women's movement at the end of the International Decade for Women resulted in several conferences and the recognition of

102. Anwar Ibrahim, Media and Society in Asia, Keynote Address at the Asian Press Forum (2 Dec. 1994), *cited in* Hoong-Phun Lee, Constitutional Values in Turbulent Asia, Papers of the 14th Lawasia Biennial Conference (16–20 Aug. 1995).

103. *Women's Rights are Human Rights: International Law and the Culture of Domestic Violence*, in *TO HAVE AND TO HIT: CULTURAL PERSPECTIVES ON WIFE BEATING*, *supra* note 89, at 292–93.

104. P.N. Bhagwati, Former Chief Justice of India and Member of the UN Human Rights Committee, Keynote Address at the Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights (20–22 May 1996), in *GENDER EQUALITY AND THE JUDICIARY* 35 (Kirstine Adams & Andrew Byrne eds., 1999).

violence against women as a human rights issue. It began in 1991 with the inaugural campaign of "16 Days of Activism Against Gender Violence," which linked violence against women with human rights.¹⁰⁵ The 1993 Vienna Conference on Human Rights condemned gender based violence and instructed the UN General Assembly to adopt a draft declaration on violence against women.¹⁰⁶ The General Assembly subsequently adopted a Declaration on the Elimination of Violence Against Women (Vienna Declaration),¹⁰⁷ which called upon member states to commit to preventing all forms of violence against women without distinction between private and public arenas. This was followed by a series of international conferences where women's issues, in particular violence against women, were brought to the fore. Further declarations affirming and strengthening the ideals of the UN Declaration were made.¹⁰⁸

The common theme of these declarations is a recognition that the root cause of violence against women is a manifestation of historically unequal power relations between men and women, and that the public/private divide should not be used as a shield behind which violence against women can continue. The Vienna Declaration also led to the appointment of a UN Special Rapporteur on Violence Against Women,¹⁰⁹ whose work has contributed immensely to bringing international human rights discourse to the domestic agenda in dealing with violence against women. This development is very significant: "In order to live up to their obligations under international human rights law, governments must address domestic violence as a criminal matter, guarantee women equal protection under the law, and take reasonable steps to punish and prevent such violence."¹¹⁰

105. The sixteen days linked 25 November (International Day Against Violence Against Women) to 10 December (International Human Rights Day).

106. Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., part I, ¶ 38, U.N. Doc. A/CONF.157/24 (1993), *reprinted in* 32 I.L.M. 1661 (1993).

107. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, *adopted* 20 Dec. 1993, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/104 (1993).

108. *Report of the Fourth World Conference on Women: Action for Equality, Development, and Peace, Beijing Declaration and Platform for Action*, U.N. GAOR, U.N. Doc. A/CONF.177/20 (1995), *reprinted in* REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN (1995) (recommended to the UN General Assembly by the Committee on the Status of Women on 7 Oct. 1995); *Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development*, *adopted* 12 Mar. 1995, U.N. Doc. A/CONF.166/9 (1995), *available at* [www.un.org/esa/socdev/wssd/agreements/](http://www.un.org/esa/socdev/wssd/agreements/HREF=http://www.un.org/esa/socdev/wssd/agreements/);

109. *Integrating the Rights of Women into the Human Rights Mechanisms of the United Nations*, C.H.R. Res. 1993/46, U.N. ESCOR, Comm'n on Hum. Rts., 49th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1993/122 (1993).

110. Dorothy Q. Thomas & Robin S. Levi, *Common Abuses Against Women*, in WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 58, at 139, 143.

More importantly, the Vienna Declaration gives women “access to a very powerful vocabulary—the vocabulary of rights.”¹¹¹ The UN Special Rapporteur has strongly advocated that the best strategy to combat domestic violence is through specific legislation that criminalizes abuse and offers protection to victims. The language of international human rights, coupled with feminist discourse, also forces states to engage with substantive concepts of equality and question the legitimacy of the public and private divide. While human rights law emphasizes equality, it is based on a formalistic concept that derives from a tradition of male dominance. Equality is often defined as nondiscrimination,¹¹² but the former is a positive concept while the latter is negative. The orthodox international instruments focus on the negative concept of nondiscrimination on the assumption that it will necessarily result in the positive concept of equality.¹¹³

This approach ignores the reality that men and women are not on level playing fields and that men and women have different orders of priorities. Thus, a feminist critique of international human rights is that it fails to deliver on substantive equality.¹¹⁴ It “assumes a world of autonomous individuals starting a race or making free choices [that] has no cutting edge against the argument that men and women are simply running different races.”¹¹⁵ Several critics have also pointed out that there is a hierarchy of discrimination in international law and human rights. For example, racial discrimination is treated more seriously than gender discrimination,¹¹⁶ and cultural or religious rights are accorded more weight than women’s rights. Not surprisingly, religious and cultural rights are the main reasons used by State signatories to the Women’s Convention to express reservations to certain obligations promoting women’s rights.¹¹⁷

The public and private divide is another artificial construct whereby the State defines certain conduct as public if it wants to regulate it and private if it prefers not to regulate it.¹¹⁸ These public and private arenas are often

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111. Sharon Pickering, *Australia*, in DOMESTIC VIOLENCE: A GLOBAL VIEW 9 (Randal W. Summers & Allan M. Hoffman eds., 2002).
 112. See the interesting introductory chapter to WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 1–13 (1983).
 113. Hilary Charlesworth, *Concepts of Equality in International Law*, in LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 145 (Grant Huscroft & Paul Rishworth eds., 2002).
 114. *What are “Women’s International Human Rights”?* in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, *supra* note 86, at 63–65.
 115. Nicola Lacey, *Legislating Against Sex Discrimination: Questions from a Feminist Perspective*, 14 J. L. & SOCIETY 411, 420 (1987).
 116. See Charlesworth, *supra* note 113, at 143.
 117. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 102–09 (2000).
 118. See *generally*, THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994), especially the penultimate

characterised by a gendered dichotomy.¹¹⁹ States characterize the family as private when it comes to domestic violence and argue for minimal intervention, thus avoiding responsibility.¹²⁰ On the other hand, States give families a public character when it comes to matters it wants to regulate, such as family planning, abortion, employment, and so on. The feminist construction of human rights provides a platform and the necessary tools for advocates of reform to argue for sensitive and effective laws on domestic violence. It is also making real progress by informing judges and therefore influencing the development of the law in a positive manner. In 1996, a colloquium of senior judges, lawyers, and academics from Asia and the South Pacific region reaffirmed the fundamental right of women to be free of violence and declared: "No law, custom, tradition, culture or religious consideration should be invoked to excuse violence against women. Judges and judicial officers at all levels should be gender-sensitive and aware of the need to protect women against violence through a proactive interpretation of the law."¹²¹

A powerful example of the impact of the Women's Convention in influencing domestic laws is seen in the Indian Supreme Court decision of *Vishaka and Others v. State of Rajasthan*,¹²² a case presided over by Justice Bhagwati, the then Chief Justice of India, whose quote begins this section. *Vishaka* involved the alleged rape of a woman by state employees and the failure of officials to investigate the complaint. A group of activists brought a "public interest litigation" action and requested the Supreme Court to frame guidelines for the prevention of sexual harassment and violence against women based on the Women's Convention. Although the Women's Convention does not have any specific provision on violence, CEDAW had interpreted "discrimination" as including all forms of violence against women.¹²³ Reading the Women's Convention together with the Committee's recommendation, the court held:

chapter dealing with human rights, Michele E. Beasley & Dorothy Q. Thomas, *Domestic Violence as a Human Rights Issue*, in *id.* at 323.

119. See CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY 8 (Susan B. Boyd ed., 1997) for references to literature on the feminist analysis of the public/private divide.
120. Nicola Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy*, 20 J. L. & Society 93, 97 (1993) (emphasis in original). See also, Radhika Coomaraswamy & Lisa M. Kois, *Violence Against Women*, in WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 58, at 185.
121. *Conclusion of Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights* (20–22 May 1996), in GENDER EQUALITY AND THE JUDICIARY, *supra* note 104, at 4.
122. A.I.R. 1997 SC 3011.
123. *UN Committee on the Elimination of Discrimination Against Women*, 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992), General Recommendation No 19.

In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of the interpretation of the guarantee of gender equality, right to work with human dignity in articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee.¹²⁴

The *Vishaka* decision is an example of the most direct impact of the Women's Convention and evidence that international human rights discourse and gender perspectives can play an effective and critical role, not just in informing reformers, but in actually influencing the law. The absorption of international human rights norms into domestic law is an important goal, which hopefully will slowly be realized.¹²⁵

IV. CONCLUSION

The resistance to gender analysis and international human rights in many Asian societies stems from a perceived threat of external forces undermining the local cultural and social fabric. The strategy employed in this paper is to avoid this perceived conflict by stressing that implementing human rights is not about replacing orthodoxy with feminism, nor about neocolonialism. Instead, this paper is merely an appeal to recognize that there is a different—arguably more appropriate—lens through which to view domestic violence. There is a concealed reality that needs to be exposed so that policy choices can be better informed and more effective. The gender analysis identifies some of the latent, fundamental causes of domestic violence and helps dissipate cultural relativist arguments by demonstrating that, in many cases, violence against women is a result of patriarchal interpretations of cultural norms. Cultural practices and traditions need to be preserved, while certain universal values must be equally protected.

A sensitive balance of cultural differences and universal values can be achieved by recourse to international human rights laws and norms. There is a clear distinction between allowing violence toward a woman and abiding by certain cultural prescriptions of male and female roles. While debate may continue about the latter, it should be beyond dispute that violence against individuals is not acceptable regardless of gender, class,

124. A.I.R. 1997 SC 3011, 3014.

125. See THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989).

creed, or culture. The notion that violence against women is tolerable in order to maintain the family unit is misguided. Asian values, which tend to favor collectivism over individualism, may be a positive concept as it places a premium on virtues such as selflessness, cooperation, caring, generosity, cohesiveness, support. These values, in fact, are cherished and espoused by feminists.¹²⁶ It is difficult to imagine that these values countenance violence against women.

Legal strategies to deal with domestic violence should always be informed by three considerations. First, the gender perspective must be recognized, and it is imperative that women's voices be heard in any debate. Preservation of the family, while important, should not take precedence over the fundamental rights of women. Second, at least at the macro-level, the problem can be linked to equality, or rather a lack of equality. The power imbalance between men and women, between abuser and victim must be redressed through mechanisms that promote substantive and not merely procedural equality. Third, domestic violence should be seen as a human rights issue. It should be treated as a public matter, albeit one that requires considerable sensitivity, and international norms and legal instruments should be brought to bear on the domestic agenda.

The reforms in Singapore and Malaysia are a step in the right direction. While the domestic violence situation in these two countries may be compared favorably to those in other Asian jurisdictions, strengthening the laws will only affirm the existing commitment to justice and human rights. The perception that feminist and international human rights perspectives on domestic violence laws may be antithetical to the family or to Asian values should be rejected. Women's rights are by no means peculiar to the West; they are germane to Asian cultures and religions.¹²⁷

126. See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL ED. 3 (1988).

127. It should be of note that Asia has the highest concentration of women leaders in the world, with Sri Lanka, India, Pakistan, Bangladesh, Indonesia and Philippines all having had, or are currently under, women as heads of government. Myanmar, presently under military rule, would also have had a woman as head of Government had the election results of 1998 been honoured. Anthony Reid, *Charismatic & Constitutional Queens: Women Rulers in Southern Asia* (4 Feb. 2003) (paper presented at a seminar at the Asia Research Institute, National University of Singapore) (forthcoming, abstract available at www.ari.nus.edu.sg/sem2003/030204.htm).