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### **A Feminist Critique of Domestic Violence Laws in Singapore and Malaysia**

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## A Feminist Critique of Domestic Violence Laws in Singapore and Malaysia

Kumaralingam Amirthalingam\*

### Introduction

Domestic violence includes many forms of violence and affects various parties, including partners, parents, children and extended family. This paper is limited to partner violence, especially by men against women, and advocates a feminist or gendered approach.<sup>1</sup> “Partners” is taken to include a relationship between two people, which has some degree of continuity and extends beyond the husband-wife relationship. The research on domestic violence suggests that it is largely a women’s issue and that feminist perspectives are invaluable,<sup>2</sup> especially in the Asian context where such perspectives still remain on the periphery of legal inquiry. The significance of a feminist approach is that it forces a paradigm shift in our way of thinking about domestic violence, best captured by this observation of one feminist author: “Instead of asking why he batters, there is a tendency to ask why she stays.”<sup>3</sup>

Such reframing is vital for meaningful law reform, especially from criminal justice and human rights perspectives.<sup>4</sup> In many jurisdictions – and particularly in Asia – domestic violence is seen as a private matter and considerations of family and culture or religion tend to prevail over women’s interests. It will be argued that in so far as there is a conflict between women’s rights and other interests, the former should prevail. The key to understanding domestic violence from a feminist perspective is to recognise that the root cause of violence lies in an unequal power relationship between men and women, compounded in male dominated societies.

Part I of the paper demonstrates the gendered nature of domestic violence through historical and theoretical analyses. It draws on feminist theories of family violence and international human rights discourse. By defining family violence both as a women’s issue and a public issue, it shifts the locus of domestic violence away from the private domain to the public sphere. The theoretical and philosophical arguments are designed to provide the tools with which to challenge certain assumptions about domestic violence, family and cultural values as well as the public/private divide that defines the boundaries of State regulation. Part II undertakes this challenge and considers the extent to which a feminist analysis can

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<sup>1</sup> It is acknowledged that “feminist” and “gendered” are separate concepts but the terms are used interchangeably here to reinforce that while a greater recognition of the gendered aspect of domestic violence is important, the debate should not be perceived to be driven by radical or “political” feminism, mainly because, in real-political terms, it could alienate a segment of society and impede reform that could be more effective if all parties cooperate toward a common goal, rather than retreat into ideological camps.

<sup>2</sup> See text at nn 5-9.

<sup>3</sup> HM Eigenberg (ed), *Woman Battering in the US: Till Death Do Us Part* (Illinois: Waveland Press Inc, 2001) p 131.

<sup>4</sup> An important caveat must be introduced here. It is acknowledged that a multi-dimensional approach is crucial and while this paper focuses on criminal justice and women’s rights, it should not be ignored that there are other dimensions to domestic violence. What is contended here is that this particular aspect needs serious attention.

successfully engage this area with human rights and criminal justice discourse. It does so in the context of laws in the local jurisdictions of Singapore and Malaysia, examining the success of recent reform measures as well as identifying areas where further reform is necessary.

## PART I

### **Domestic Violence as a Women's Rights Issue**

Domestic violence began to receive the focused attention of activists, academics and policymakers in the 1970s in the United States, coinciding with the rise of feminism in socio-legal theories.<sup>5</sup> Much work has since been done in trying to define domestic violence and to identify its causes, as well as in developing theoretical frameworks to understand this issue. The World Health Organisation launched its first World Report on Violence and Health in 2002, which revealed that between 40% and 70% of women who die due to homicide are killed by current or former partners.<sup>6</sup> A United Nations working group established in 1989 published a manual on domestic violence,<sup>7</sup> which drew a distinction between domestic violence and family violence; the former being limited to abuse by males against female partners, the latter including child abuse, sibling abuse and elderly abuse.

The United Nations has repeatedly endorsed the view that domestic violence is a women's issue and has adopted a broad definition of it. It can be physical, including homicide, sexual abuse, beating, throwing acid or boiling water and setting on fire. It can be psychological or emotional, including repeated verbal abuse, harassment, imprisonment, deprivation of resources and limiting or preventing contact with family and friends. Drawing on this definition, a later United Nations Commission on Human Rights report described domestic violence in explicit feminist 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."<sup>8</sup> This is a highly commendable definition as it is broad enough to capture the nature of domestic violence,<sup>9</sup> while ensuring that it is sufficiently connected to the perpetrator by requiring the negative consequences to be intended or targeted. Thus, it avoids the criticism that the net is cast too broadly against potential abusers.

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<sup>5</sup> See S Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Boston: South End Press, 1982). The modern history of the struggle for women's rights can be traced to 1840 when an innocent wife was granted custody of her children. See GR Taylor, *Sex in History* (London, Thames & Hudson, 1953), p 285.

<sup>6</sup> World Health Organisation, *World Report on Violence and Health* (2002).

<sup>7</sup> United Nations Centre for Social Development and Humanitarian Affairs, *Strategies for Confronting Domestic Violence: A Resource Manual 7* (1993), UN Doc. ST/CSDHA/20 (1993). The manual followed a publication by the Centre in 1989 entitled, "Violence Against Women in the Family", cited in C Thomas, "Domestic Violence" in KD Askin & DM Koenig, *Women and International Human Rights Law I* (New York: Transnational Publishers Inc, 1998), p 219.

<sup>8</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, MS Radhika Coomaraswamy, submitted in accordance with the Commission on Human Rights resolution 1995/85 (E/CN.4/1996/53), para 28.

<sup>9</sup> See text at n 38 for a description of the nature of domestic violence.

### **A History of Violence**

Historically, most societies were patriarchal and had a male as head of the family, exercising control and ownership over the other members. Women were treated as inferior and severely discriminated against. For example, in the Laws of Cnut (circa 1020 AD), it is stated that the penalty for the offence of adultery is compensation, but when committed by a woman, the penalty included forfeiture of all she owned to her husband and she was to also lose her nose and ears.<sup>10</sup>

Human history is replete with domestic violence by men against women.<sup>11</sup> The history of violence against women in patriarchal societies is compellingly documented by Terry Davidson, (a journalist,) and he paints a very dark picture.<sup>12</sup> During pre-biblical times, when men did not understand their role in procreation, men “feared, adored and obeyed the matriarch; the hearth which she tended in a cave or hut being the earliest social centre, and motherhood their prize mystery.”<sup>13</sup> When men realised their role in procreation, their status increased while women’s decreased and patriarchy became the norm. Society moved from a permissive to restrictive attitude towards sex, as men sought to have exclusive possession of women. This shift from a matriarchal to patriarchal model has also been argued to have resulted in a shift from a democratic to authoritarian way of life;<sup>14</sup> power and control became the norm.

Davidson demonstrates how the biblical story of Adam and Eve has been misinterpreted to perpetuate the inferior status of women and sanction violence against them. Two points can be drawn from his work: the deliberate subordination of women by men in positions of power and the cultural acceptance of violence against women. The story, as known today, perpetuates the idea that God created Adam (man) in his image and that Eve (woman) was created from Adam’s rib. The status of the woman as secondary is clear. The blame for the events in the Garden of Eden is also laid on the woman, not the man; thus making “women culturally legitimate objects of antagonism.”<sup>15</sup>

This biblical interpretation left its mark on the laws through the ages, from the Apostle St Paul to St Augustine (354-430 AD), Gratian of Bologna (c1140 AD), Blackstone of England (18<sup>th</sup> century) and Napoleon of France (19<sup>th</sup> century). Vintage support for the above observation of Steinmetz and Straus is found in Gratian’s compilation of canon laws in the twelfth century:

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<sup>10</sup> D Whitelock, *English Historical Documents c 500-1042 AD* (London: Eyre Methuen, 2<sup>nd</sup> ed, 1979) p 463, cited in ES Buzawa & CG Buzawa (eds), *Domestic Violence* (Connecticut: Greenwood Publishing Group Inc, 1992), p 7.

<sup>11</sup> See D Martin, “Domestic Violence: A Sociological Perspective” in DJ Sonkin, D Martin & EL Walker (eds), *The Male Batterer: A Treatment Approach* (New York: Springer, 1985), pp 8-11.

<sup>12</sup> T Davidson, “Wifebeating: A Recurring Phenomenon Throughout History” in M Roy (ed), *supra n 14*, p 3.

<sup>13</sup> R Graves, *The Greek Myths: 1* (Baltimore: Penguin, 1955) quoted in T Davidson, “Wifebeating: A Recurring Phenomenon Throughout History” in M Roy (ed), *ibid*, p 5.

<sup>14</sup> See GR Taylor, *supra n 5*.

<sup>15</sup> SK Steinmetz & MA Strauss (eds), *Violence in the Family* (Toronto: Dodd, Mead & Co, 1974), quoted in T Davidson, “Wifebeating: A Recurring Phenomenon Throughout History” in M Roy (ed), *supra n 14*, p 7.

Women should be subject to their men ... The image of God is in man and it is one. Women were drawn from man, who has God's jurisdiction as if he were God's vicar ... Therefore woman is not made in God's image ... Adam was beguiled by Eve, not she by him. It is right that he whom woman led into wrongdoing should have her under his direction, so that he may not fail a second time through female levity.<sup>16</sup>

This concept of women as a subjugated class perpetuated discriminatory laws in various respects. Women were historically treated as chattel to be owned by men; injury to a wife or daughter allowed the father or husband to sue for loss of service; inheritance was through men and marital rape was not an offence.<sup>17</sup> Violence against women is just another example. Historically, it was the husband's duty and right to physically chastise his wife. Wife beating, rather than being condemned and criminalised, was instead regulated;<sup>18</sup> wife beating was accepted – and acceptable.<sup>19</sup> Feminist writers have used the story of Bluebeard to illustrate the extent to which wife beating and violence against women was an acceptable part of life. The “original” Bluebeard was a French soldier in the fifteenth century, a notorious paedophile who had raped and killed a large number of young boys. The true story of Bluebeard, a vicious sex-murderer of young boys gradually became a story about a man who killed his wives. As one author noted, “It is almost as if the *truth* of Bluebeard's atrocities was too frightening to men to survive in the popular imagination ...”<sup>20</sup> Conversely, the abuse or killing of wives was a phenomenon so much the norm that it was less difficult to accept.

This historical phenomenon tells us that there is entrenched discrimination against women and that violence against women has been legitimised by legal systems and social practices. The modern occurrence of domestic violence is part of this history and any strategy – legal or otherwise – must recognise 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 ...”<sup>21</sup> Therefore, to tackle the problem of domestic violence, we must first of all acknowledge its existence and make it a public matter; otherwise, it will remain a latent feature through our cultural acceptance of it. Secondly, the gendered nature of domestic violence must be made the focus of strategies for legal reform.

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<sup>16</sup> *Corpus Iuris Canonici*. Quoted in T Davidson, “Wifebeating: A Recurring Phenomenon Throughout History” in M Roy (ed), supra n 14, p 11-2.

<sup>17</sup> Reforms in many countries have abolished the marital rape immunity, but the immunity remains in many Asian countries including India, Singapore and Malaysia. Section 375 of the respective *Penal Code*.

<sup>18</sup> See the comment by Lord Denning on the dubious common law notion that moderate physical chastisement of wives was permitted: *Davis v Johnson* [1979] AC 264 at 270-1.

<sup>19</sup> See text at n 53 for a modern feminist interpretation of Islamic law, which demonstrates that some of these historical justifications for violence against women are unfounded.

<sup>20</sup> S Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Shuster, 1975), quoted in T Davidson, “Wifebeating: A Recurring Phenomenon Throughout History” in M Roy (ed), supra n 14, p 13.

<sup>21</sup> RE Dobash & RP Dobash, *Violence Against Wives: A Case Against Patriarchy* (New York: Free Press, 1979), p 24.

### Theoretical Approaches

There are many theories as to the causes of domestic violence. The United Nations literature identifies two types of theories, each representing the two extremes of a spectrum of theories.<sup>22</sup> At one end are theories which focus on the individual, and at the other, are theories which look to social structural explanations. A third category of theories focuses on the family and is situated along the spectrum.<sup>23</sup> The individualist theory looks at personal, social and psychological explanations for violence. These causes can be internal, for example, due to personality disorders, biological predispositions to violence, personal social conditioning brought about by environmental factors such as a violent home; or they can be external, for example due to alcohol, drugs, provocation, jealousy, sex.<sup>24</sup> 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, but are not violent towards their partners.

The family-centred 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.<sup>25</sup> In a sense, these theories are extensions of the individualist theories and therefore similar variables are considered, for example, provocation, drugs, alcohol, disputes over money, sex and violent childhoods. The difference is that these factors are seen in a family context, treating “individual problem behaviours as a manifestation of a dysfunctional family unit, with each family member contributing to the problem.”<sup>26</sup> 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 in contributing to the violence; it marginalises 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 the 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

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<sup>22</sup> See M Davies, *Women and Violence* (London: Zed Books Ltd, 1994) pp 6-7; HM Eigenberg (ed), supra, n 3, pp 147-56. See also D Levison, *Family Violence in Cross-Cultural Perspective* (California: Sage Publications Inc, 1989), p 14, for a much wider variety of theories

<sup>23</sup> The family-oriented theory is largely a product of scholars from the University of New Hampshire’s Family Studies programme in the late 1970s and early 1980s. See A Sev’er (ed) *A Cross-Cultural Exploration of Wife Abuse* (New York: The Edwin Mellen Press, 1997), p 28 and references therein.

<sup>24</sup> See generally M Roy, *The Abusive Partner: An Analysis of Domestic Battering* (New York: Van Nostrand Reinhold Co Inc, 1982); HM Eigenberg (ed), supra n 3, ch 3; ES Buzawa & CG Buzawa (eds), *Domestic Violence: The Criminal Justice Response* (California: Sage Publications Inc, 1990), pp 15-26; D Levinson, *Family Violence in Cross-Cultural Perspective* (California: Sage Publications Inc, 1989).

<sup>25</sup> See KM Farrington “Stress and Family Violence” in MA Strauss & GT Hotaling (eds), *Social Causes of Husband Wife Violence* (Minneapolis: University of Minnesota Press, 1980), pp 94-114.

<sup>26</sup> K Healey, C Smith & C O’Sullivan, “The Causes of Domestic violence: From Theory to Intervention” in HM Eigenberg (ed), supra n 3, p 167.

most societies have a history of condoning violence against women.<sup>27</sup> Cross-cultural research has also shown that societies in which women are accorded equal status have a very low rate of domestic violence.<sup>28</sup> Theories along the entire spectrum from individual to social structural help explain different aspects and causes of domestic violence. However, the author suggests 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, it allows us to deal with the structural causes rather than catalytic factors or symptoms of domestic violence. Secondly, it compels us to confront the fact that domestic violence is, to a large extent, a gender issue. Thirdly, it forces domestic violence out of the private arena into the public, and thus facilitates it becoming a criminal justice issue rather than a family matter. Fourthly, it paves the way for treating domestic violence as a human rights issue, thus introducing international norms and the existing international human rights mechanisms.

### **Feminist Constructs**

Feminist constructions of domestic violence provide an alternative lens through which to appraise the issue. It is argued that domestic violence is not an aberration; rather, it is the norm because it is culturally and legally accepted or tolerated. The historical evidence discussed earlier supports this. The focus is also shifted from women to men by explaining why women become trapped in violent relationships and are unable to leave. Social psychologists have explained this phenomenon as a consequence of being exposed to a cycle of violence.<sup>29</sup> 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 she 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. Through these cycles, the victim believes or resigns herself to the fact that she cannot help herself.<sup>30</sup>

Having explained why women are unable to leave, the focus can be shifted to the more relevant question of why men batter. Perhaps, most importantly, the hegemonic nature of domestic violence is revealed. While feminists have constructed their theories from a gender perspective, the central thesis really is about a power differential or inequality; it is about those who are in a position of power exercising 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.”<sup>31</sup> Power has been

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<sup>27</sup> See for example, United States Commission on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* (Report, 1982).

<sup>28</sup> See generally, D Levinson, *Family Violence in Cross-Cultural Perspective* (California: Sage Publications Inc, 1989).

<sup>29</sup> The person whose name is now almost synonymous with this theory is Lenore Walker. L Walker, *The Battered Woman* (New York: Harper & Row, 1979).

<sup>30</sup> Some feminists are critical of this approach as it perpetuates a victim mentality, which is not necessarily true in many cases. See HM Eigenberg (ed), *supra* n 3, p 131-2 and references therein.

<sup>31</sup> M Roy, *supra* n 26, p 3.



described as comprising five basic kinds: exploitative, manipulative, competitive, nutrient and integrative.<sup>32</sup> The first two types are clearly negative forms of power and the first is arguably simply violence confused for power; it is a person who needs to be violent to overcome a sense of insecurity, real or perceived. Unfortunately, violence has become synonymous with power and is thus legitimised. Even today, we see war as the preferred option to resolve conflict and failure to see through a threat of war is seen as a sign of weakness;<sup>33</sup> violence thus equals power – from the bar room brawl through family violence to international conflict.<sup>34</sup> Violence is a tool to perpetuate dominance and “violence in the family should be understood primarily as coercive control.”<sup>35</sup> The feminist lens provides a better understanding of the nature of domestic violence and how it is distinguished from other types of violence. Some key characteristics include the following:<sup>36</sup>

- 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 characterised by a “cycle of violence”
- The abuser uses domestic violence to control and coerce the victim
- 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.

The feminist perspective demonstrates 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 centre 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 Rapporteur for Women underscored the exclusion of women’s voice in public debate with this famous quote:<sup>37</sup>

“Why have you appeared before this gathering?”

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<sup>32</sup> M Roy, *ibid*, pp 3-5, referring to R May, *Power and Innocence: A Search for the Sources of Violence* (New York: WW Norton, 1972).

<sup>33</sup> Clearly evident from much of the rhetoric emanating from the American and British political and military establishments prior to the recent Gulf War.

<sup>34</sup> For an interesting study on the relationship between hawkish attitudes towards war and family values, see RA Lewis, “Socialization into National Violence: Familial Correlates of Hawkish Attitudes towards War” (1971) 33 *Journal of Marriage and the Family* 699.

<sup>35</sup> RE Dobash & RP Dobash, *supra* n 23, p 15.

<sup>36</sup> Womens’ Crisis Centre, *Review and Proposals for Amendments to the Domestic Violence Act 1994* (March 1999, report available from the Women’s Aid Organisation), p 3.

<sup>37</sup> This was addressed to Bhola Moiraon Poetess Jogeswari and her female troupe by a nineteenth century Indian poet. See R Coomaraswamy, “To Bellow Like a Cow: Women, Ethnicity and the Discourse of Rights” in RJ Cook (ed), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994), p 39.

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”

### 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 men in Australia, 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.<sup>38</sup> Such beliefs are not always supported by empirical evidence. An American study, which looked into why the rate of wife 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 to that of non-Hispanic families.<sup>39</sup> 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.<sup>40</sup> Domestic violence is found in the vast majority of cultures.<sup>41</sup> As has been rightly noted, “No one culture has a monopoly on non-violence.”<sup>42</sup> It should be noted that 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.”<sup>43</sup> All 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 90 communities, concluded that there were four sets of factors which were the strongest predictors of domestic violence around the world. They were sexual and economic inequality, violent conflict resolution, male domestic authority and divorce restrictions for women.<sup>44</sup>

All of these factors point towards a dramatic power imbalance and a predisposition to violence as a “legitimate” option. Thus, it is not culture per se, but

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<sup>38</sup> New South Wales Attorney General’s Department, *Strategy to Reduce Violence Against Women*, 2001, cited in R Braaf & G Ganguly, “Cultural Challenges for Violence Prevention: Working Towards an Ethical Practice of Sustainable Intervention” paper delivered at *Expanding Our Horizons Conference*, Sydney, 2002 (Australian Domestic and Family Violence Clearing House), p 3.

<sup>39</sup> DG Dutton & CE van Ginkel, “The Interaction of Cultural and Personality Factors in the Etiology of Wife Assault” in A Sev’er (ed) supra n 25, p 102.

<sup>40</sup> See S Harris-Short, “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” (2003) 25 *Human Rights Quarterly* 130 and references therein for useful literature on the subject.

<sup>41</sup> D Levison, supra n 24, p 31 found that wife beating occurred in about 85% of societies.

<sup>42</sup> R Braaf & G Ganguly, supra n 40, p 9.

<sup>43</sup> See RJR Levesque, *Culture and Family Violence: Fostering Change Through Human Rights Law* (Washington DC: American Psychological Association, 2001), p 7.

<sup>44</sup> D Levison, supra n 24, p 88.

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;<sup>45</sup> each illustrating different aspects of the gender thesis discussed so far. The first illustrates the power paradox argument, where insecurity results in power being manifested through violence. The second illustrates the first point drawn from the historical reflection – the subordination of women, where men arrogate the right to discipline and chastise women. The third illustrates the second point drawn from the historical reflection – the cultural acceptance of violence, where beating women is simply accepted as the norm.

In societies where there was an absence of Levison’s violence indicators, ie, where conflict resolution was usually through peaceful means, women had greater authority and economic strength as well as stronger social networks, the rate of domestic violence was markedly lower.<sup>46</sup> Conversely, where these predictors were present, the rate of domestic violence was much higher.<sup>47</sup> These factors which contribute to increased levels of violence create a vicious cycle; the cultural group becomes accustomed to it 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.”<sup>48</sup>

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 cognisant of the underlying causes of violence against women. The cultural perception that women should tolerate some amount of violence needs to be reviewed.

“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.<sup>49</sup>

A passage in the Koran states that one way of restoring marital peace if all else fails is by a single strike. A Malaysian group called Sisters in Islam have explained that passage by placing it in context. It is argued that Verse 4:34 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.”<sup>50</sup> It is an interpretation that makes sense.<sup>51</sup> In contemporary times, there should be no tolerance, official or otherwise, of violence against women.

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<sup>45</sup> D Levison, *ibid*, p 33-6.

<sup>46</sup> See for example, the results of a study of the Wape community in New Guinea. WE Mitchell, “Why Wape Men Don’t beat Their Wives: Constraints towards Domestic Tranquility in a New Guinea Society” in DA Counts, JK Brown & JC Campbell (eds), *To Have and to Hit: Cultural Perspectives on Wife Beating* (Chicago: University of Illinois Press, 2<sup>nd</sup> ed, 1999), pp 100-9.

<sup>47</sup> BD Miller, “Wife Beating in India: Variations on a Theme” in DA Counts, JK Brown & JC Campbell (eds), *ibid*, pp 203-15.

<sup>48</sup> D Levison, *supra* n 24, p 46.

<sup>49</sup> Asiaweek 17 (32), 9 August 1991 27. Hasnah is not the woman’s real name.

<sup>50</sup> *Ibid*.

The gendered nature of domestic violence must be emphasised 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 which may not necessarily be harmful or non-consensual. As noted in the foreword to a text on cross-cultural dimensions of domestic violence, “Many 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.”<sup>52</sup> If a woman in a particular culture freely and willingly chooses certain practices, which 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.<sup>53</sup> 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 and inadequate rights of workers. The concept of Asian values was used to resist unilateral imposition of human rights obligations. While this concept was largely a response to economic and political concerns, it also impacted on social and cultural issues. Asian values, although a paradoxical concept in that it assumes universality in Asia, which comprises over half the world’s population and contains all the major religions and diverse cultures, has been summarised to refer to:

respect 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.<sup>54</sup>

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<sup>51</sup> Cf the interpretation of the Adam and Eve story, text at n 17.

<sup>52</sup> DA Counts, JK Brown & JC Campbell (eds), *supra* n 48, p ix.

<sup>53</sup> 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 EP Mendes, “Asian Values and Human Rights: Letting the Tigers Free” (1996) *Human Rights Research and Education Centre*, University of Ottawa online publication: [http://www.cdp-hrc.uottawa.ca/publicat/asian\\_values.html](http://www.cdp-hrc.uottawa.ca/publicat/asian_values.html).

<sup>54</sup> EP Mendes, *ibid*.

This concept of Asian values has been used to support cultural relativist arguments in resisting certain fundamental human rights norms.<sup>55</sup> While there may be a disjuncture between theory and practice, even the most ardent proponents of Asian values have rejected cultural relativism as a defence against human atrocities, including the suppression of women.<sup>56</sup> 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 freedoms<sup>57</sup>. Instead of pitting Asian values against Western, a constructive approach is preferable and attainable:

If we in Asia want to speak credibly of Asian Values, we too must be prepared to champion these 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.<sup>58</sup>

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.<sup>59</sup> 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.

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<sup>55</sup> See KYL Tan, "What Asians Think about the West's Response to the Human Rights Debate" Human Rights Dialogue, Series 1, No. 4 (March 1996). Downloadable from Carnegie Council on Ethics and International Affairs: [www.cceia.org](http://www.cceia.org).

<sup>56</sup> Malaysian Prime Minister, Mahathir Mohamad's speech at the Senate House, Cambridge University, 15 March 1995. "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." Text of the speech available online at <http://www.smpke.jpm.my/WebNotesApp/PMMain.nsf/fsMainPM>.

<sup>57</sup> Prior to the Vienna Declaration of 1993, China led a regional preparatory conference in Bangkok, which resulted in a declaration emphasising 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 nn 66-8. Arguably, one reason for this conflation is China's role after the Tiananmen Square incident to prioritise the right to subsistence and economic development over other rights.

<sup>58</sup> Anwar Ibrahim, keynote address at the Asian Press Forum, Hong Kong, 2 December 1994, "Media and Society in Asia" cited in HP Lee, "Constitutional Values in Turbulent Asia" Papers of the 14<sup>th</sup> *Lawasia Biennial Conference*, 16-20 August, 1995, Beijing, China.

<sup>59</sup> JG Zorn, "Women's Rights are Human Rights: International Law and the Culture of Domestic Violence" in DA Counts, JK Brown & JC Campbell (eds), *supra* n 48, pp 292-3.

## Human 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.<sup>60</sup>

Women's issues as part of international discourse received a boost during the 1970s and 80s when the UN General Assembly promoted the International Decade for Women from 1975 to 1985. The single most important international instrument for women's rights was created in that era when the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly in 1979. A revitalisation of a global women's movement at the end of the International Decade for Women resulted in several conferences and the recognition of violence against women as a human rights issue. It began in 1991 with the inaugural annual campaign of "16 Days of Activism Against Gender Violence", which symbolically linked violence against women with human rights.<sup>61</sup> The 1993 Vienna Conference condemned gender based violence and instructed the UN General Assembly to adopt a draft declaration on violence against women.<sup>62</sup> The General Assembly subsequently adopted a Declaration on the Elimination of Violence against Women,<sup>63</sup> which was committed 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 and further declarations affirming and strengthening the ideals of the UN Declaration were made.<sup>64</sup>

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 shield behind which violence against women can continue. The Vienna Declaration

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<sup>60</sup> PN Bhagwati, Former Chief Justice of India and Member of the United Nations 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, Hong Kong 20-22 May 1996 in K Adams & A Byrne, *Gender Equality and the Judiciary* (London: Commonwealth Secretariat, 1999), p 35.

<sup>61</sup> The 16 days linked November 25 (International Day against Violence against Women) to December 10 (International Human Rights Day).

<sup>62</sup> The World Conference on Human Rights: Vienna Declaration and Programme of Action, UN Doc A/CONG.157/23 at para 38.

<sup>63</sup> 20 December 1993, GA Res 48/104, UN GAOR 48<sup>th</sup> Session, 85<sup>th</sup> Plenary Meeting, UN Doc A/RES/48/104.

<sup>64</sup> The 1993 World Conference on Human Rights in Vienna, the 1994 International Conference on Population and Development in Cairo, the Fourth World Conference on Women in Beijing in 1995 (Beijing Declaration and Platform for Action), the 1995 World Summit for Social Development in Copenhagen and the 1996 United Nations Conference on Human Settlements.

also led to the appointment of a UN Special Rapporteur on Violence Against Women.<sup>65</sup> The rapporteur's 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.<sup>66</sup>

More importantly, it gives women “access to a very powerful vocabulary – the vocabulary of human rights.”<sup>67</sup> The UN Special Rapporteur has strongly advocated that the best strategy to combat domestic violence is through specific legislation that criminalises it 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 emphasises equality, it is based on a formalistic concept that derives from a tradition of male dominance. Equality is equated with non-discrimination;<sup>68</sup> but the former is a positive concept while the latter is negative. The orthodox international instruments focus on the negative concept of non-discrimination on the assumption that it will necessarily result in the positive concept of equality.<sup>69</sup>

This ignores the reality that men and women are not on level playing fields and that men and women have different orders of priorities in terms of rights. Thus, a feminist critique of international human rights is that it fails to deliver on substantive equality.<sup>70</sup> 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.”<sup>71</sup> It has also been pointed out that there is a hierarchy of discrimination in international law and human rights. Racial discrimination is treated more seriously than gender discrimination,<sup>72</sup> and cultural or religious rights are accorded more weight than women's rights. Not surprisingly, religious and cultural

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<sup>65</sup> Resolution on the Special Rapporteur (Resolution Integrating the Rights of Women into the Human Rights Mechanisms of the United Nations) 2 March 1994, UN Doc E/CN.4/1994/L.8/Rev.1.

<sup>66</sup> DQ Thomas & RS Levi, “Common Abuses Against Women” in KD Askin & DM Koenig, *supra* n 7, p 143.

<sup>67</sup> S Pickering, “Australia” in RW Summers & AM Hoffman, *Domestic Violence: A Global View* (Connecticut: Greenwood Press, 2002), p 9.

<sup>68</sup> See the interesting introductory chapter to WA McKean, *Equality and Discrimination Under International Law* (Oxford: Clarendon Press, 1983), pp 1-13.

<sup>69</sup> H Charlesworth, “Concepts of Equality in International Law” in G Huscroft & P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart Publishing, 2002), p 145.

<sup>70</sup> H Charlesworth, “What are ‘Women’s International Human Rights?’” in RJ Cook (ed), *supra* n 39, pp 63-5.

<sup>71</sup> N Lacey, “Legislating Against Sex Discrimination: Questions from a Feminist Perspective” (1987) 14 *Journal of Law and Society* 411 at 415.

<sup>72</sup> See H Charlesworth, “Concepts of Equality in International Law” in G Huscroft & P Rishworth (eds), *supra* n 72, p 143.

rights are the main reasons used by State signatories to the Womens' Convention to express reservations to certain obligations promoting women's rights.<sup>73</sup>

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.<sup>74</sup> These public and private arenas are often characterised by a gendered dichotomy.<sup>75</sup> States characterise the family as private when it comes to domestic violence and argue for minimal intervention, thus avoiding responsibility.<sup>76</sup> 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.<sup>77</sup>

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*,<sup>78</sup> 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 CEDAW. Although CEDAW does not have any specific provision on violence, the UN Committee on the Elimination of Discrimination Against Women had interpreted "discrimination" as including all

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<sup>73</sup> H Charlesworth & C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000), pp 102-9.

<sup>74</sup> See generally, MA Fineman & R Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (New York: Routledge, 1994), especially the penultimate chapter dealing with human rights: ME Beasley & DQ Thomas, "Domestic Violence as a Human Rights Issue", p 323.

<sup>75</sup> See, SB Boyd, *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997), p 8 for references to literature on the feminist analysis of the public/private divide.

<sup>76</sup> N Lacey, "Theory into Practice? Pornography and the Public/Private Dichotomy" (1993) 20 *Journal of Law and Society* 93 at 97. (emphasis in original) See also, R Coomaraswamy & LM Kois, "Violence Against Women" in KD Askin & DM Koenig, *supra* n 7, p 185.

<sup>77</sup> 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, Hong Kong 20-22 May 1996 in K Adams & A Byrne, *supra* n 63, p 4.

<sup>78</sup> AIR 1997 SC 3011.



forms of violence against women.<sup>79</sup> Reading CEDAW together with the Committee's recommendation, the court held:

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, the 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 these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.<sup>80</sup>

This is the most direct impact of CEDAW and evidence that international human rights discourse and feminist perspectives can play an effective and critical role, not just in informing reformers, but actually influencing the law. The integration of international human rights norms into domestic law is an important goal, which hopefully will slowly be realised.<sup>81</sup>

### **Summative Remarks on Part I**

Legal strategies to deal with domestic violence should always be informed by three considerations. First, it is largely a women's issue and therefore 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. Secondly, at least at the macro-level, the problem can be linked to equality, or a lack of it. The power imbalance between men and women, between abuser and victim must be redressed through mechanisms that promote substantive, and not merely procedural, equality. Thirdly, 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.

## **PART II**

### **Domestic Violence Laws in Singapore and Malaysia**

This part of the paper evaluates the local domestic violence laws and reform process in light of the preceding theoretical and philosophical discussion as well as the three factors identified at the end of Part I. Domestic violence, or family violence,<sup>82</sup> has only recently received national attention in these countries. In Singapore and

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<sup>79</sup> UN Committee on the Elimination of Discrimination Against Women, 11<sup>th</sup> Session, UN Doc CEDAW/C/1992/L.1/Add.15 (1992), General Recommendation No 19.

<sup>80</sup> AIR 1997 SC 3011 at 3014.

<sup>81</sup> See T Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989).

<sup>82</sup> The term domestic violence is used in Malaysia and family violence in Singapore and they are treated interchangeably in this article.

Malaysia, concerted efforts to deal with domestic violence began in the early 1980s. While some headway has been made, reform is impeded because domestic violence is still treated primarily as a family matter; and the policies and laws are geared towards the preservation of the family unit.<sup>83</sup> There is an inherent injustice in placing the preservation of the family unit above the safety of an integral member of that family unit. An official policy of treating domestic violence as a family matter in a society that – to some degree – already tolerates violence against women in the family is problematic.<sup>84</sup> There are also additional cultural and constitutional problems because different laws govern Muslims and non-Muslims when it comes to family matters.

### **Background to the reform process**

#### *Malaysia*

A national survey conducted between 1990 and 1992 suggested that 39% of women had been abused by their partners.<sup>85</sup> From that research, it was estimated that in 1989, 1.8 million women over the age of 15 were beaten by their husbands or boyfriends, but in that same year only 909 women actually reported violence to the police. Reform of domestic violence laws began with a campaign against violence against women. The roots of this movement can be traced to the establishment of the Women's Aid Organisation in 1982 and the setting up of the first shelter for battered women in Malaysia. The movement took a more concrete shape in 1985 when various NGOs and individuals came together to form a Joint Action Group (JAG), which organised a workshop on issues related to rape, domestic violence, sexual harassment, prostitution and the negative portrayal of women in the media. This initiative created a greater climate of awareness and a further workshop was organised in collaboration with the National Council of Women's Organisations (an umbrella organisation of women's groups). This workshop resulted in a memorandum,<sup>86</sup> signed by over fifty organisations, which called for wide-ranging reforms to end discrimination against women. In particular, the memorandum demanded urgent legislative attention to deal with domestic violence.

In 1989, a Joint Committee was initiated by the Association of Women's Lawyer to draft the proposed domestic violence act, which was prepared in 1990 and submitted in 1992 to the Minister of National Unity and Social Development as well as the Attorney General. After further negotiations, the Domestic Violence Bill was passed in Parliament in 1994 but was unable to be implemented due to concerns over its application to Muslims. Two years later, the Pusat Islam declared that the Domestic Violence Act 1994 did not conflict with Syariah law and said that its implementation should not be delayed. The Act was finally implemented on 1 June 1996. The number of reported cases of violence against women the year after the Act came into force was 7279, still not a true representation of the extent of the problem, but certainly a far cry from the 909 cases reported in 1989. The Domestic Violence

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<sup>83</sup> See text at nn 27-29 for disadvantages of this type of approach.

<sup>84</sup> A 1995 survey by the Women's Aid Organisation showed that 15% of adults did not view physical abuse of women as wrong. *Battered Women in Malaysia: Prevalence, Problems and Public Attitudes*, (Report 1995) (report available from WAO office, Kuala Lumpur)

<sup>85</sup> Women's Aid Organisation, *ibid.*

<sup>86</sup> National Council of Women's Organisations, *Memorandum on Laws Discriminating against Women, Submission* to the Minister of Justice, Malaysia (1985).

Act, while far from perfect and not what its creators had envisaged, has certainly made some impact in terms of raising awareness and encouraging women to report violence.

### *Singapore*

Reformers in Singapore followed suit and attempted to introduce a Family Violence Bill in 1995. Unlike the developments in Malaysia, which involved a broad grassroots coalition of individuals and NGOs who lobbied the government,<sup>87</sup> the Singapore initiative was largely spearheaded by an Inter-Ministry Work Group<sup>88</sup> and an individual Nominated Member of Parliament, Dr Kanwaljit Soin. The groundwork for reform was laid through a long and sustained campaign by women activists, led by the Association of Women for Action and Research (AWARE). AWARE began a public education campaign on domestic violence in 1985, which included numerous forums and workshops as well as submissions on various issues relating to violence against women, culminating in the Family Violence Bill,<sup>89</sup> which was eventually defeated in Parliament. The preference was to amend the Women's Charter to give effect to some of the proposals in the Family Violence Bill. While the rejection of the Bill is regrettable, the other initiatives are certainly positive steps and very timely as they also demonstrate the Government's commitment to its obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women*, which Singapore ratified on 5 October 1995.<sup>90</sup> The Government also established a specialist Family Court on 1 March 1995.<sup>91</sup> In addition to legal reform, Singapore has also developed a sophisticated infrastructure to facilitate an integrated and multidisciplinary approach to domestic violence.<sup>92</sup>

The extent of domestic violence in Singapore is unclear. Different sources give different figures, but all of them support the conclusion that the vast majority of victims of family violence are women. Domestic violence in Singapore, as in many other places, is very much a women's issue. In 1995, there were 3639 reported cases of family violence, of which 90% or 3245 involved women as the victims.<sup>93</sup> The total

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<sup>87</sup> See BH Tan, "Women Organising for Change: Costing the Domestic Violence Act Campaign in Malaysia (c 1985-1996)" (1999) 17 *Kajian Malaysia: Journal of Malaysia Studies* 48.

<sup>88</sup> The group comprised of representatives from the Ministry of Home Affairs, Ministry of Community Development, Ministry of Health and the Singapore Council of Women's Organisations.

<sup>89</sup> For a history of activities and milestones, see C Singam, "Working for Gender Equality: An AWARE Experience" in C Singam et al (eds), *Building Social Space in Singapore* (Singapore: Select Publishing, 2002), pp 45-52.

<sup>90</sup> Note that Malaysia had also ratified CEDAW in the same year – 5 July 1995. See Thio Li-ann, "The Impact of Internationalisation on Domestic Governance: Gender, Egalitarianism and the Transformative Potential of CEDAW" [1997] *Singapore Journal of International and Comparative Law* 278.

<sup>91</sup> 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" [1995] 4 *Current Law Journal* lxxv at lxxx-lxxxiii.

<sup>92</sup> The structure involves all Neighbourhood Police Posts, Neighbourhood Police Centres, the Police Divisional Headquarters, government and restructured hospitals, the Family Court and more than 30 social service agencies and crisis shelters. See, Ministry of Community Development and Sports, "National Family Violence Networking System" in R Magnus et al, *Families in Conflict: Theories and Approaches in Mediation and Counselling* (2000) p 271.

<sup>93</sup> Singapore Parliamentary Debates, *Official Reports*, 2 May 1996, col 121.

number involving spousal violence was 2446.<sup>94</sup> In its report to the United Nations, the Government figures on police reports of spousal violence were 28, 33 and 25 respectively for the years 1995 to 1997.<sup>95</sup> On 1 May 1997, the Women's Charter was amended to broaden the scope of family violence and the number of reports of spousal violence in 1998 dramatically increased to 2223.<sup>96</sup>

### **Analysis of the Law Reform**

The reforms in Singapore and Malaysia have gone some way to addressing the problem of domestic violence in the region, but are constrained by certain cultural assumptions and philosophies. The 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 criminalised; and that it should not be precluded from public debate and scrutiny.<sup>97</sup> A perusal of the relevant provisions of the Malaysian Domestic Violence Act 1994 and the 1996 amendments to the Singaporean Women's Charter reveals that these pieces of legislation have fallen short of the reformers' goals.

### *Malaysia*

Before the enactment of the 1994 Act, injunctions for protection against domestic violence involved cumbersome procedures. Separate laws govern Muslims and non-Muslims when it comes to family matters. The former is governed by Federal law while the latter by State laws, as the Constitution provides that the State has jurisdictions over matters relating to Islamic law, including personal and family matters of Muslims.<sup>98</sup> Protection orders, whether under Federal or State Islamic law, could only be applied for after filing for divorce or legally separating.<sup>99</sup> This was often difficult, and in any case, involved considerable delays. The orders had to be

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<sup>94</sup> According to analysis by the subordinate courts, almost 90% of family violence complaints in 1997 comprised of spousal violence. In 1995, there were 695 complaints, all of which involved spousal violence. See, Subordinate Courts of Singapore, *Research Bulletin*, Issue No 13, August, 1998, 3. For a Singaporean study on victims of domestic violence, see E Seow et al, "Battered Women: Presentation at A&E Departments in Singapore" (1995) 8 *Asia-Pacific Journal of Public Health* 114. For some earlier Malaysian data, see B Yen, "Violence in the Family: A Malaysian Perspective" (1994) 4 *Asia Pacific Journal of Social Work* 104.

<sup>95</sup> Ministry of Community Development Singapore, *Singapore's Initial Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination Against Women* (January 2000) 52. It is not clear how spousal violence was defined in this report, as the Ministry of Home Affairs had given the figure of 2446 for 1995 in Parliament Question Time. The report is available online at: [http://www.mcds.gov.sg/MCDSFiles/download/CEDAW\\_initial\\_report.pdf](http://www.mcds.gov.sg/MCDSFiles/download/CEDAW_initial_report.pdf)

<sup>96</sup> Ministry of Community Development Singapore, *Singapore's Second Periodic Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination Against Women* (April 2001) 29. The report is available online at: [http://www.mcds.gov.sg/MCDSFiles/download/CEDAW\\_second\\_report.pdf](http://www.mcds.gov.sg/MCDSFiles/download/CEDAW_second_report.pdf).

<sup>97</sup> See generally, Dr Kanwaljit Soin's speech at the second reading of the *Family Violence Bill*: Singapore Parliamentary Debates, *Official Reports*, 1 November 1995, cols 94-110; website of the Women's Aid Organisation, especially the research and advocacy page: <http://www.wao.org.my/research.htm>.

<sup>98</sup> Federal Constitution, Art 74(2), Ninth Schedule, List II, Item 1.

<sup>99</sup> Law Reform (Marriage & Divorce) Act 1976 s 103. Under Syariah law, an abused wife has recourse to a type of divorce known as taklik or conditional divorce: Islamic Family Law (Federal Territory) Act 1984 (Act 303) s 52(h) See Salbiah Ahmad, "Domestic Violence in Malaysia" [1990] *Law Institute Journal* 527.

sought in the High Courts of the respective states, which meant travelling to the capital city and incurring considerable costs. The majority of abused women were not aware of their rights and simply unable to access justice. An option that was available to both Muslims and non-Muslims was to resort to the Specific Reliefs Act 1950 (Revised 1974, Act 137), which allowed for injunctions against violence to be sought independently of any matrimonial proceedings.

A complication was introduced in 1988 when the Constitution was amended to include Article 121 (1A) which had the effect of removing from the jurisdiction of the High Court any matter in respect of which the Syariah Courts had jurisdiction. As the Syariah Court has jurisdiction over family matters, it is arguable that the High Court should not have jurisdiction over the Specific Reliefs Act with respect to Muslims. On the other hand, it could be argued that since the Syariah Court has no jurisdiction over the Specific Reliefs Act, the High Court should not be precluded from applying it to Muslims in non-matrimonial matters.<sup>100</sup> The jurisdiction problem was overcome by linking the Act to the Penal Code in order to bring it under Federal jurisdiction and thus apply to all persons.<sup>101</sup>

The political process of turning the proposals into law forced the proponents of reform to compromise on many of the recommendations, which ultimately were not reflected in the legislation. The Act fails to deliver on many counts, as pointed out in a succinct summary of its failures in a critical note published in the Malaysian Law News soon after the Act was passed.<sup>102</sup> Some of the key defects of the Act include:

- Failure to recognise domestic violence as a specific crime
- Too narrow a definition of domestic violence
- Failure to extend protection beyond marital relationships
- Unnecessary constraints on obtaining protection orders
- Discriminating against the victim with respect to residential rights

The failure to recognise domestic violence as a specific crime is illustrative of the lack of appreciation of the nature and context of domestic violence. The legislators viewed domestic violence as another form of inter-personal violence that could adequately be covered by the existing provisions in the Penal Code.<sup>103</sup> This ignores the nature of domestic violence that distinguishes it from other types of violent offences.<sup>104</sup>

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<sup>100</sup> Salbiah Ahmad, "Towards a Common Law on Domestic Violence for Malaysians" Malaysian Law News (May 1990) 312 at 314.

<sup>101</sup> Domestic Violence Act 1994 (Act 521) s 3; I Josiah, SF Lee & Wasthalah, "Malaysia's Experience with the Domestic Violence Act" (July 2001) p 3 (paper available from the Women's Aid Organisation)

<sup>102</sup> Faridah Hamid, "Domestic Violence Act Passed But for Whom?" Malaysian Law News (June 1994) 27.

<sup>103</sup> Some of the provisions include ss 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 dishonour a person, otherwise than on grave provocation) 357 assault or criminal force in attempt to wrongfully confine a person, 376 (rape), 426 (committing mischief), 506 (criminal intimidation). This list was compiled by Fawziah Begum, "Implementing the Domestic Violence

None of the offences in the Penal Code, individually or collectively, adequately capture the concept of domestic violence. These offences are pertinent to one-off violent incidents usually between strangers; not continued violence by a close family member in the confined space of the home. Domestic violence manifests itself as violence but, as has been argued, it is really about control and subjugation. There is a further procedural problem introduced by relying on the Penal Code offences, as these offences are classified into seizable and non-seizable categories. A seizable offence requires a police officer to conduct immediate investigation and includes a power of arrest. Non-seizable offences cannot be investigated without an order from the Public Prosecutor and a warrant is required for any arrest.

The majority of domestic violence cases involve physical violence such as punching, kicking, bruising etc, which mainly fall under s 323 for voluntarily causing hurt and are classified as non-seizable. Over 90% of domestic violence offences are classified as non-seizable.<sup>105</sup> Thus, in the vast majority of domestic violence cases, immediate response and protection of the victim is severely hampered. Refusing to treat domestic violence as a crime is a result of a lack of appreciation of the gendered nature of domestic violence and that women as a class are especially vulnerable. A good contrast is the Child Protection Act 1991, where child abuse is a specific crime. There was no objection to this because there is a greater common or cultural appreciation of the vulnerability of the child and the need for adequate protection.<sup>106</sup>

The definition of domestic violence in the Act is also wanting, as it is limited to physical violence.<sup>107</sup> This ignores a central feature of domestic violence, which is about control and abuse of trust. Inflicting psychological and emotional harm are key elements of domestic violence; examples include constant ridicule, denying access to the victim's family and friends for support, depriving the victim of financial resources and threat of harm to victim's children or other persons. One exception is s 2(c), which includes in the definition 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." While a welcome extension to physical harm, the notion that a woman can be forced or threatened to engage in sexual or other conduct, as long as she does not have a legal right to abstain is troubling. There is no recognition of women's rights or individual autonomy. In Malaysia and Singapore, where marital rape is not an offence,<sup>108</sup> it is unclear what meaning the phrase "right to abstain" has when a man is forcing his wife. It may be – and it is certainly hoped – that courts will interpret this as a right for a married woman to refuse to consent to sex. Nevertheless, other unpleasant situations may not be covered by the definition, for example a husband who forces his wife to watch him in a sexual act with another person, or to pose in an obscene manner.<sup>109</sup> There are no offences in the Penal Code to cover such situations.

Act 1994" paper presented at HAWA *Workshop on Gender Perspectives in Family Violence*, 7 October 1996.

<sup>104</sup> See text at n 39 on the nature of domestic violence.

<sup>105</sup> See Nor Aini bte Abdullah, "Domestic Violence Act 1994: An End to a Nightmare?" [1995] 1 *Malayan Law Journal* xli at xliii, n 8.

<sup>106</sup> A similar situation exists in Singapore, where domestic violence is not a crime, but child abuse is: *Children and Young Persons Act 1993* s 5(1).

<sup>107</sup> Domestic Violence Act 1994 s 2 contains four paragraphs describing different acts that constitute domestic violence.

<sup>108</sup> Penal Code s 375.

<sup>109</sup> These and other illustrations are considered in *Womens' Crisis Centre*, supra n 38, p 8.

The policy approach of adopting a family-focused, rather than woman or victim focused strategy has limited the range of people who can seek the aid of the Act, as it is limited to spouses, former spouses, children, parents, siblings or other relatives. This excludes all other hetero and homo sexual relationships. When questioned in Parliament on whether the Act 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.”<sup>110</sup> The reality is that there are many unmarried couples living together in Malaysia and that most people have been, or are, involved in a relationship. But, the message appears to be that if they are not married they do not merit protection. That these women face the same risks of physical and psychological harm or that their rights are unprotected seems irrelevant. Had a gendered or feminist approach been adopted, the range of persons protected would have been far greater and abused women would not be discriminated against based on their status. The attitude entrenched in the Act is testimony to the feminist complaint that women are never valued as individuals in their own right, but only as daughters, wives or mothers.

The Act has improved the earlier situation with respect to protection orders, but it is still far from adequate. Interim protection orders can only be issued when an investigation is pending,<sup>111</sup> and for non-seizable offences, investigations can only commence when the Public Prosecutor orders it. Delays are inevitable and, as noted earlier, over 90% of domestic violence cases are classified as non-seizable offences. Long term protection orders can only be sought when criminal proceedings have been initiated.<sup>112</sup> A further aspect of the legislation that discriminates against the victim is the provision dealing with exclusion orders. The Act allows for exclusion of the abuser from the shared home by granting the right of exclusive possession to the victim.<sup>113</sup> However, the Act also makes it mandatory for courts to revoke an exclusionary order if suitable alternative residence is found for the victim.<sup>114</sup> So, 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 live off 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 legislation 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, “Instead 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.”<sup>115</sup>

The official policy of prioritising the family over women needs to be rethought. The concluding remarks of the Women’s Crisis Centre in its memorandum reviewing the Act are pertinent:

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<sup>110</sup> See, Faridah Hamid, “Domestic Violence Act Passed But for Whom?” *Malaysian Law News* (June 1994) 28.

<sup>111</sup> Domestic Violence Act 1994 s 4(1).

<sup>112</sup> *Ibid*, s 5(1).

<sup>113</sup> *Ibid* s 6(1)(a).

<sup>114</sup> *Ibid* s 6(4)(a).

<sup>115</sup> Naina Kapur, Director of Sakshi, a violence intervention centre in New Delhi. This was said in conversation with the author at the Salzburg Seminar Session 405, *Law as a Catalyst of Change in Asia*, 4-11 December 2002.

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 conceptualisation 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.<sup>116</sup>

The argument that the Act 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. 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 rights and safety of the woman should prevail over the sanctity of the family unit.

### *Singapore*

As with Malaysia, the procedures to obtain a protection order before the 1996 amendments to the Women's Charter were unduly complicated.<sup>117</sup> The Singapore law on family violence is in some respects better than the Malaysian, but it also suffers from the same overall defects in that it does not make domestic violence a specific crime; and the philosophy underlying the law is one that is family-oriented, rather than women-oriented. Much of the discussion with respect to the Malaysian laws applies to Singapore, so this section will simply draw out and comment on the differences. Before examining the details, some general observations are offered. Singapore lays great emphasis on the family unit and social cohesion. Sometimes however, there is a risk that the vision does not quite correspond with the reality or the perceptions of the community. For example, the Ministry of Community Development and Sports commissioned a large survey of social attitudes of Singaporeans on a variety of issues, including the family. The monograph dealing with the attitudes towards family does not mention family violence,<sup>118</sup> even though in the same year it was published, the Chief Justice of Singapore noted the need for greater deterrent sentences "especially in view of the deplorable increase in the number of cases involving family violence."<sup>119</sup>

The Family Violence Bill 1994 was defeated primarily because of concerns that the Bill called for unwarranted intrusion into the family sphere, which was regarded as private. Making family violence a specific crime;<sup>120</sup> including forced or

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<sup>116</sup> Womens' Crisis Centre, *supra* n 38, pp 19-20.

<sup>117</sup> The Women's Charter was first enacted in 1961 and the family protection provisions were introduced in a 1980 amendment. The 1980 provisions were then replaced in 1996 when a new part to the Women's Charter was added: Part VIA 'Protection of the Family', consisting of ss 64 – 67.

<sup>118</sup> D Chan, *Attitudes on Family: Survey of Social Attitudes of Singaporeans (SAS) 2001* (2002).

<sup>119</sup> *Public Prosecutor v Luan Yuanxin* [2002] 2 SLR 98 at 103.

<sup>120</sup> See for example, Singapore Parliamentary Debates, *Official Reports*, 1 November 1995, col 169.



non-consensual sex and related conduct within the definition of family violence;<sup>121</sup> and increasing the role of police in investigating family violence were seen to be anathema to the private concept of family.<sup>122</sup> However, in contrast, the Ministry of Community Development and Society advocates a very public concept of family:<sup>123</sup>

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.*

This conflicting conception of the family as private and public, depending on whether a particular policy should be restricted or expanded is troubling when viewed in light of the fact that the policy makers, while acting in good faith, may not necessarily be sufficiently attuned to women's issues. While the Singapore government has been progressive on women's rights, it remains wedded to certain traditions which have an inherent bias against women. For example, the United Nations Committee on the Elimination of Discrimination Against Women commended Singapore on its efforts in dealing with family violence,<sup>124</sup> but was critical of Singapore's reservations to some of the provisions in CEDAW on the basis of incompatibility with certain "Asian values". The Committee expressed concern that such views "might be interpreted so as to perpetuate stereotyped gender roles in the family and reinforce discrimination against women."<sup>125</sup> Although the prevailing attitude to family violence continues to display some lack of awareness of feminist perspectives, there are positive signs that the Singapore Government is committed to addressing this issue.<sup>126</sup>

The overwhelming view of women's groups and victims was that greater police powers and intervention were necessary.<sup>127</sup> A survey of ordinary Singaporeans also shows support for greater police involvement.<sup>128</sup> Evidence suggests that the greater use of police arrests in domestic violence cases has a deterrent effect. A small scale experiment in Minneapolis suggested that arrests were an effective deterrent.<sup>129</sup>

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<sup>121</sup> Ibid, col 114.

<sup>122</sup> Ibid, col 170

<sup>123</sup> Ministry of Community Development and Sports, "Family Matters" – Report of the Public Education Committee on Family, 15 April 2002. Report available on MCDS website: [http://www.mcds.gov.sg/web/faml\\_supfaml\\_publicedu.asp?szMod=faml&szSubMod=publicedu](http://www.mcds.gov.sg/web/faml_supfaml_publicedu.asp?szMod=faml&szSubMod=publicedu)

<sup>124</sup> Report of the Committee on the Elimination of Discrimination Against Women, 25<sup>th</sup> Session, UN GAOR 56<sup>th</sup> Session, Supp No 38, UN Doc A/56/38, p 53

<sup>125</sup> Ibid, p54.

<sup>126</sup> The Government has consulted extensively and committed resources to this issue. The fact that the Ministry of Community Developments and Sports has published in full the Report of the Committee on the Elimination of Discrimination Against Women UN Doc A/56/38 on its website and noted on its homepage that the Committee was critical of some aspects of Singapore's reservations to CEDAW speaks volumes of the Government.

<sup>127</sup> Supra n 123, cols 98, 105

<sup>128</sup> A Choi, "Formal Protection of Women from Wife Assaults in Singapore" [1994] 3 Malayan Law Journal xli.

<sup>129</sup> L Sherman & R Berk, *The Minneapolis Domestic Violence Experiment* (Police Foundation Reports 1984).

Later experiments and research have raised questions about the validity of the Minneapolis experiment.<sup>130</sup> Nevertheless, recent extensive data shows that while the deterrent effect may not be spectacular, it is still there.<sup>131</sup> It is not suggested that arrests should be made indiscriminately every time there is a complaint.<sup>132</sup> The argument simply is that domestic violence is a serious crime and the police should have the power to arrest and investigate it. Guidelines should be drawn up to help police exercise that power judiciously and this should help rather than destroy families.<sup>133</sup>

The new Women's Charter provisions on protection orders and exclusion orders have some advantages over the Malaysian provisions.<sup>134</sup> A protection order may be obtained when a court is satisfied that family violence has occurred or is likely to occur and that such an order is necessary for the protection of the applicant.<sup>135</sup> This avoids the unnecessary pitfalls of the distinction between seizable and non-seizable offences. The provisions on exclusion orders do not compel a court to allow the abusive partner to return if suitable alternative accommodation is found for the victim. Section 65(11) of the Charter also deems any breach of an order to be a seizable offence, thus emphasising the seriousness of the matter.

The definition of family violence goes further than the Malaysian definition as it includes emotional harm.<sup>136</sup> Section 64(d) of the Women's Charter is novel as it includes in the definition any act "causing continual harassment with intent to cause or knowing that it is likely to cause anguish to a family member." This is a promising clause but interpretation of "continual harassment" and "anguish" remain to be tested.<sup>137</sup> The Singapore High Court has recently recognised a new tort of harassment and defined it as a course of conduct characterised by direct or indirect behaviour 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

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<sup>130</sup> See LG Lerman, "The Decontextualisation of Domestic Violence" in HM Eigenberg (ed), *supra* n 3, p 226.

<sup>131</sup> See JH Garner & CD Maxwell, "What are the Lessons of the Police Arrest Studies?" (2000) 4 *Journal of Aggression, Maltreatment and Trauma* 83, cited in R Holder, "Domestic and Family Violence: Criminal Justice Interventions" *Issues Paper 3*, Australian Domestic and Family Violence Clearing House, 2001.

<sup>132</sup> 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." *Supra* n 123, col 102.

<sup>133</sup> Cf the view expressed by 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*, 2 November 1995, col 172.

<sup>134</sup> The results of a subordinate court's survey showed that 80% of victims of family violence who were able to obtain a protection order had positive feedback. Subordinate Courts Singapore, "Study on the Effectiveness of the Personal Protection Order" Research Bulletin No 28 (December 1996). Online at [http://www.subcourts.gov.sg/research\\_bulletin.htm](http://www.subcourts.gov.sg/research_bulletin.htm).

<sup>135</sup> Women's Charter s 65(1).

<sup>136</sup> Women's Charter s 64 contains four paragraphs describing various acts constituting family violence.

<sup>137</sup> See for example, the *Protection from Harassment Act 1997* which applies a reasonable person test.

person.<sup>138</sup> Clearly the type of harassment envisaged in the Women’s Charter is of a higher order; anguish goes beyond mere worry or annoyance. However, it is oddly drafted in that anguish need not be caused as long as it is intended or foreseen. If that is the case, it is arguable that this definition of family violence may in fact be too broad.

Despite numerous representations, the Select Committee on the Women’s Charter (Amendment) Bill refused to include sexual violence or forced sex in the definition of family violence,<sup>139</sup> although many other jurisdictions have done so.<sup>140</sup> The inconsistent conception of family alternately as private or public has the strange result that violent, non-consensual, sexual activity cannot be included in the definition of family violence or criminalised, yet certain types of “unnatural sex” between two consenting adults, including married couples, remains criminalised.<sup>141</sup> Numerous criticisms can, and have, been made about the failure to include sexual misconduct in the definition of family violence.<sup>142</sup> Marital rape is not an offence in Singapore and suggestions that forced sex could be brought within the definition of Family Violence through the continual harassment limb are not realistic.<sup>143</sup> The information on the Family Court’s homepage makes it clear that forced sex per se does not come within the definition of family violence. It states, “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].*”<sup>144</sup>

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.<sup>145</sup> It is a brutal statement that she

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<sup>138</sup> *Malcomson Nicholas Hugh Bertram & Anor v Naresh Kumar Mehta* [2001] 4 SLR 454.

<sup>139</sup> Select Committee on the Women’s Charter (Amendment) Bill, *Report of the Select Committee* (1996).

<sup>140</sup> For example, the various Australian states: *Domestic Violence Act* 1986 (ACT) s 3; *Domestic Violence (Family Protection) Act* 1989 (Qld) s 11(1); *Domestic Violence Act* 1994 (SA) s 4(2); *Crimes (Family Violence) Act* 1987 (Vic) s 4; *Crimes Act* 1900 (NSW) s 4; New Zealand: *Domestic Violence Act* 1995 (NZ) s 3.

<sup>141</sup> “...when 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 s 377 of the Penal Code. See, *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR 697 at 706.

<sup>142</sup> See WC Chan, “Latest Improvement to the Women’s Charter” [1996] *Singapore Journal of Legal Studies* 553 at 563-4 for some insightful criticisms.

<sup>143</sup> Select Committee on the Women’s Charter (Amendment) Bill, *Report of the Select Committee* (1996) iv suggests that this may be possible. Cf WK Leong, *Family Law in Singapore* (Singapore: Malayan Law Journal Pte Ltd, 1990) pp 167-8, who argues that the marital rape immunity should not apply to married couples who are estranged; see also, CH Tan, “Marital Rape – Removing the Husband’s Legal Immunity” (1989) 31 *Malayan Law Review* 112.

<sup>144</sup> See Family Court of Singapore’s Frequently Asked Questions: [http://www.familycourtofsgapore.gov.sg/principles/FAQ\\_Family\\_Violence.htm](http://www.familycourtofsgapore.gov.sg/principles/FAQ_Family_Violence.htm) (emphasis added).

<sup>145</sup> Rape and sexual assault have historically been the principal method of subjugating women; and during war, it is a common form of torture against women, resulting in its being declared a war crime. See Platform for Action adopted at the Fourth World Conference on Women in Beijing (1995). See also, R Copelon, “Women and War Crimes” (1995) 69 *St John’s Law Review* 61; KD Askin, “Women and International Humanitarian Law” in KD Askin & DM Koenig, *supra* n 7; X Bunster-Burotto, “Surviving Beyond Fear: Women and Torture in Latin America” in M Davies, *supra* n 24, p 156. The Malaysian Women’s Aid Organisation has recently highlighted this issue

has absolutely no autonomy or rights. Article 9.2 of the Asian Human Rights Charter recognises this significance of sexual violence against women and draws a link to patriarchy and Asian values:<sup>146</sup>

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.

Failing to include sexual violence in a law dealing with domestic violence is a failure to give due recognition to women's rights. To refuse to recognise marital rape as a crime on the basis that such matters are considered private in an Asian context is no longer tenable under international human rights obligations.

## CONCLUSION

The resistance to feminism and international human rights in many Asian societies is because they are seen as a threat to the local cultural and social fabric. The strategy employed in this paper is to avoid this phenomenon by stressing that it is not about replacing orthodoxy with feminism, nor about imposing neo-colonialism through human rights. It is merely an appeal to recognise that there is a different – arguably more appropriate – lens through which to view domestic violence. There is a hidden reality that needs to be exposed so that our policy choices can be better informed and more effective. The feminist approach 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, but equally certain universal values must be protected.

A sensitive balance of cultural differences and universal values can be achieved by recourse to international human rights law and norms. A clear distinction surely can be made between being violent towards a woman and adhering to 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 class, 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 favour communitarianism over individualism may not be a bad thing, as it places a premium on virtues such as selflessness, cooperation, caring, generosity, cohesiveness and support; values, in fact, that are cherished and espoused by feminists.<sup>147</sup> It is difficult to imagine that these values countenance violence against women.

The reforms in Singapore and Malaysia are a step in the right direction. While the domestic violence situation in these countries may not be as bad as in many other

again in the context of the Iraq War: J Kee, "Violence of War on Women" *Sunday Mail*, 6 April 2003.

<sup>146</sup> See [http://www.ahrchk.net/charter/mainfile.php/eng\\_charter/](http://www.ahrchk.net/charter/mainfile.php/eng_charter/) (Asian Human Rights Commission website).

<sup>147</sup> See for example, L Bender, "A Lawyer's Primer on Feminist Theory and Tort"(1988) 38 *Journal of Legal Education* 3.

places, strengthening the laws will only affirm the existing commitment to the family unit. While there are many private aspects to the family, domestic violence should be a public matter, which involves the community and the criminal justice system. 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.<sup>148</sup>

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<sup>148</sup> 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. A Reid, "Charismatic and Constitutional Queens: Women Rulers in Southern Asia", paper presented at a seminar at the Asia Research Institute, National University of Singapore, January 2003, publication forthcoming.