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## Piercing the Confucian Veil: Lenagan's Implications for East Asia and Human Rights

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# PIERCING THE CONFUCIAN VEIL: *LENAHAN'S* IMPLICATIONS FOR EAST ASIA AND HUMAN RIGHTS

JOY L. CHIA\*

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## INTRODUCTION

The Chinese proverb that "even the wisest judge cannot adjudicate

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family disputes” is emblematic of the fiercely-protected privacy shield around issues regarding the family in many East Asian jurisdictions. State reluctance to interfere in the family arguably stems from Confucian social norms that prioritize the patriarchal family unit at the expense of the individual, oftentimes in conflict with international human rights obligations of East Asian countries. The historic *Jessica Lenahan (Gonzales) v. United States*<sup>1</sup> decision by the Inter-American Commission on Human Rights (IACHR) affirms states’ obligations to exercise due diligence to combat domestic violence in *all* aspects, thereby specifically undergirding state responsibility to create and enforce a coordinated response to domestic violence across state agencies. The *Lenahan* decision’s explicit framing of domestic violence as: (1) a human rights issue, (2) a gender discrimination issue, and (3) an issue of state responsibility has several important implications for how East Asian countries should effectuate their obligations under international law to protect individuals from domestic violence.

This Article critically considers the meaning and ideology of the “Confucian” family and argues that it has impacted human rights and anti-domestic violence initiatives in East Asian jurisdictions on two levels. First, Confucian culture and social norms have been used as the ideological underpinning of state claims against universalist interpretations of human rights.<sup>2</sup> Although all the East Asian jurisdictions examined are parties to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>3</sup> their governments have interpreted the scope of women’s rights to be subject to each State’s particular cultural and historical circumstances, as indicated by State Party reservations to CEDAW and state practices in the international arena. This Article will examine how government policies and legislative efforts to regulate marriage and the family by East Asian jurisdictions challenge reductionist explanations for state non-intervention in the private sphere, arguing that state reliance on Confucian norms and values is primarily politically motivated and serves as an excuse to not take significant action to radically change social structures in line with international human rights obligations. Second, even where states took legislative action to protect women from domestic violence, such legislation manifests the prioritization of social harmony and value placed on family unity (as influenced by Confucian norms), thus undermining the efficacy of anti-domestic violence measures.

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1. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011).

2. *See infra* Part I.

3. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

To understand the impact of Confucian social norms on the human rights of women, this Article will examine three East Asian jurisdictions: the People's Republic of China (PRC), Singapore,<sup>4</sup> and Hong Kong<sup>5</sup>. These jurisdictions<sup>6</sup> have all acceded to CEDAW and have submitted extensive state reports about the situation of women in their countries. At the same time, the PRC, Singapore, and Hong Kong all belong to the Confucian cultural sphere,<sup>7</sup> and Confucianism has alternatively been used either to bolster the legitimacy of state policies regarding the family or as explanatory justifications for the continuation of traditional practices that impact human rights.

The PRC and Singapore are also examined because these two states share several important characteristics with the United States and thus provide a unique backdrop to discuss how *Lenahan* can educate human rights and legal advocacy around the state's role in the Confucian family. The PRC, Singapore, and the United States have all committed to preventing domestic violence in their countries in principle, either through participation in international instruments or the adoption of domestic legislation seeking to end violence against women. Yet all three states also have contested relationships with the universality of human rights standards and international scrutiny. Notably, the United States is not even a party to CEDAW.

Part I of this Article considers the interaction of Confucianism, human rights, and domestic violence. Part I first introduces state-articulated challenges to the universality of human rights, articulated as "Asian" or "Confucian" values, and considers how these so-called value systems are translated into state practice by the Singapore, Hong Kong, and Chinese governments. Next, before considering how the question of domestic

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4. Technically in Southeast Asia, the Singaporean State casts itself as having more in common with East Asian countries, like China, Japan, and South Korea. See, e.g., Bilahari Kim Hee P. S. Kausikan, *An East Asian Approach to Human Rights*, 2 BUFF. J. INT'L L. 263, 269 (1995-96) (using Singapore as an example of the East Asian approach).

5. Although Hong Kong is technically a special autonomous region of the PRC, the PRC operates on the "one China, two systems" policy where its legislative and legal system remains distinct and mostly autonomous. See Committee on the Elimination of Discrimination Against Women, *Combined Fifth and Sixth Periodic Report of States Parties: China (Addendum)*, ¶¶ 2-4, U.N. Doc. CEDAW/C/CHN/5-6/Add.1 (June 14, 2004) (describing general status of Hong Kong); *id.* ¶¶ 23-26 (describing judicial system of Hong Kong).

6. In discussing state practice on the international level, this Article will necessarily focus on the state practice of the PRC and Singapore because Hong Kong is not considered an independent member state at the United Nations.

7. See Albert H.Y. Chen, *Conclusion: Comparative Reflections on Human Rights in Asia*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 487, 495 (Randall Peerenboom et al. eds., 2006). South Korea, Taiwan, and Vietnam are also sometimes seen as part of this cultural sphere.

violence impacts the idealized family unit, the relationship between Confucianism and the family is explored. Part II provides an overview of domestic violence in international law and considers the participation of Singapore and the PRC in international instruments outlining domestic violence as a human rights violation. Part II then describes the legal frameworks in each jurisdiction that seek to prevent domestic violence and protect domestic violence victims.

In Part III, the Article considers lessons learned from the IACHR's *Lenahan* decision and argues that East Asian legal systems must reconsider the efficacy of their domestic violence laws and critically analyze the impact of Confucian social norms on legislation and enforcement. First, the *Lenahan* decision firmly establishes that domestic violence, and the measures taken by the state to prevent, punish, and eliminate such violence, should be subject to international scrutiny. Second, the *Lenahan* decision reaffirms that laws alone are necessary but not sufficient, and diligent enforcement is required; the role of police action within the anti-domestic violence framework given particular attention. Third, the Article argues that East Asian legal systems, like the United States, mistakenly place the burden on victims to determine and prove domestic violence, and argues that the meaning and interpretation of "the family" can act as a barrier to accessing justice. State focus on harmony in the family can channel domestic violence cases away from adjudication in the legal system into unregulated extra-legal dispute resolution mechanisms, an outcome that poses material risks to domestic violence victims. Part III addresses *Lenahan's* lesson that the due diligence standard requires state action against structural discrimination. The Article argues that in order to effectively address the treatment of domestic violence as a "family and private matter of low priority, as compared to other crimes,"<sup>8</sup> East Asian states must pierce the Confucian veil and combat notions of family privacy that obstruct transparency and accountability.

Finally, the Article concludes that *Lenahan* contributes to a cross-cultural conversation about the utility of international law in local contexts by challenging the mythology of the United States as a world leader in human rights and decreasing violence against women. *Lenahan* also pushes discussion about many East Asian stereotypes associated with domestic violence relating to poverty, urbanity, and development. The United States' response to *Lenahan* can likewise be educated by recent efforts in East Asian countries to effectively implement CEDAW and combat violence against women.

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8. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 42 (2011).

## I. CONFUCIANISM, HUMAN RIGHTS, AND DOMESTIC VIOLENCE

In 1993, Asian governments<sup>9</sup> adopted the Bangkok Declaration<sup>10</sup> in preparation for the World Conference on Human Rights, demarcating “a distinctive Asian point of view”<sup>11</sup> on human rights. The Bangkok Declaration adopted a cultural relativist position that challenged the universal application of human rights standards in Asia,<sup>12</sup> asserting that human rights must be considered within the context of “national and regional particularities and various historical, cultural and religious backgrounds.”<sup>13</sup> Asserting that human rights should be promoted through cooperation and consensus rather than “the imposition of incompatible values,”<sup>14</sup> the Bangkok Declaration also invoked state sovereignty in the determination of human rights standards, stating that such standards were a domestic matter.<sup>15</sup> Although these same Asian governments eventually signed on to the Vienna Program of Action reaffirming the universality of human rights,<sup>16</sup> the Bangkok Declaration sparked fierce discussions about the application of human rights in national contexts, culminating in the so-called Asian Values model of human development.<sup>17</sup> This model emphasized economic, social, and cultural rights over civil and political

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9. See Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT'L L. 215, 216 (1995-96) (stating that “China played a leading role in formulating this challenge”). Notably, Japan and the Philippines did not adopt the Declaration.

10. World Conference on Human Rights, Mar. 29-Apr. 2, 1993, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, pmbl., U.N. Doc. A/CONF.157/ASRM/8, A/CONF.157/PC/59 (Apr. 7, 1993) [hereinafter Bangkok Declaration].

11. Joseph Chan, *An Alternative View: Hong Kong, Singapore and “Asian Values,”* 8 J. DEMOCRACY 35, 35-48 (1997).

12. See Davis, *supra* note 9, at 216.

13. Bangkok Declaration, *supra* note 10, ¶ 8.

14. *Id.* at pmbl.

15. See Davis, *supra* note 9, at 216.

16. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 1, U.N. Doc. A/CONF.157/23 (July 12, 1993), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en).

17. See Kumaralingam Amirthalingam, *A Feminist Critique of Domestic Violence Laws in Singapore and Malaysia* 10 n.53 (Asia Research Inst., Working Paper Series No. 6, 2003), available at [http://www.ari.nus.edu.sg/docs/wps/wps03\\_006.pdf](http://www.ari.nus.edu.sg/docs/wps/wps03_006.pdf) (“Asian values have been generally identified with three schools of thought: the Lee Kwan Yew-Singapore model, the Mahathir-Malaysia model and the Post-Tiananmen-Confucianism-Nationalism model.”). China’s official interpretation of human rights has invoked “Chinese values” rather than “Asian values,” but the arguments in support of contextualized interpretation of human rights remain the same. See Ann Kent, *China’s Human Rights in ‘the Asian Century,’* in HUMAN RIGHTS IN ASIA 187, 188 (Thomas W.D. Davis & Brian Galligan eds., 2011) (noting that the concepts were “similar and mutually reinforcing”).

rights, which were considered second-order rights,<sup>18</sup> and the rights of the community over those of the individual.

Government leaders in Singapore and China have claimed a Confucian communitarian model of society,<sup>19</sup> arguing that the dichotomy between “Western” human rights values and the “Asian” tradition of deference to authority make human rights incompatible with “Confucian” societies. Societies based on “Asian” or “Confucian” values have been characterized as being “disciplined, group-oriented rather than atomized, and valuing duty to the community over the assertion of rights, . . . featur[ing] consensus-seeking and a deferential respect for public officials and institutions in the interest of public harmony.”<sup>20</sup> The self-conscious adoption of this Confucian model has resulted in the elevation of the family unit as the building block of society and the development of governmental policies focused on the preservation of the family unit, sometimes at the expense of individual protections.

Confucianism is deeply related to the conception and construction of the Singaporean and Chinese states. This is most explicitly seen in the claims made by the Singaporean government that Confucian social norms are a fundamental part of the Singaporean identity. Although Singapore is a multi-racial, multi-religious society, the government-authored 1991 Shared Values White Paper asserts that Singapore’s shared values include “nation before community and society before self; family as the basic unit of society; community support and respect for the individual; consensus, not conflict; and racial and religious harmony.”<sup>21</sup> These values are also expressed by governmental refusal to create monitoring bodies to check its own power; instead, “[c]itizens are advised to ‘trust’ their governors’ integrity and righteousness as honorable men (*junzi*), over placing faith in systemic checks.”<sup>22</sup> Similarly, experts note a Confucian revival in the

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18. See Kent, *supra* note 17, at 188.

19. Proponents of “Asian Values” have referred to Confucian values to legitimate government policy. See Li-ann Thio, *Implementing Human Rights in ASEAN Countries: “Promises to Keep and Miles to Go Before I Sleep,”* 2 YALE HUM. RTS. & DEV. L.J. 1, 19 (1999) [hereinafter Thio, *Implementing Human Rights in ASEAN Countries*] (referencing the Singapore government’s exposition of Confucian values); see also Craig Williams, *International Human Rights and Confucianism*, 7 ASIA-PAC. J. HUM. RTS. & L., 38, 38 (2006). It is important to bear in mind that Confucianism as a state philosophy is *not* monolithic and that its long legacy opens it to many different interpretations.

20. Thio, *Implementing Human Rights in ASEAN Countries*, *supra* note 19, at 2.

21. Li-ann Thio, *Taking Rights Seriously? Human Rights Law in Singapore*, in HUMAN RIGHTS IN ASIA, *supra* note 7, at 158, 180 n.3.

22. *Id.* at 160; see also Li-ann Thio, *Rule of Law Within a Non-Liberal ‘Communitarian’ Democracy: The Singapore Experience*, in ASIAN DISCOURSES OF RULE OF LAW 183, 194 (Randall Peerenboom ed., 2004) [hereinafter Thio, *Rule of Law*] (“Moral legitimacy is asserted in speaking of a government of virtuous Confucian *junzi*, superior gentlemen morally obliged to lead, enjoying popular ‘trust and

official narratives of the Chinese state, where “Confucian values of social stability, hierarchy, and respect for authority are in official favor once again.”<sup>23</sup>

It is important to note that any discussion of “culture” or “tradition” must necessarily consider the position of the persons interpreting and invoking those concepts.<sup>24</sup> Presenting the cultural values of a region or country as distinct, monolithic, and static ignores the fluidity of cultural norm formation and the existence of contested interpretations of such cultural practices.<sup>25</sup> Proponents of Asian/Chinese values are primarily government officials who are using these concepts to buttress the legitimacy of certain state policies,<sup>26</sup> while the contextualization of human rights, as expressed in the Bangkok Declaration, is vigorously opposed by NGOs, civil society actors, and academics.<sup>27</sup> Likewise, Confucianism itself is a tradition or philosophy that is contested<sup>28</sup> and can be interpreted to support many

respect.”).

23. JOHN DOTSON, U.S.-CHINA ECON. AND SEC. REVIEW COMM’N, *THE CONFUCIAN REVIVAL IN THE PROPAGANDA NARRATIVES OF THE CHINESE GOVERNMENT* 5 (2011); see also DANIEL A. BELL, *CHINA’S NEW CONFUCIANISM: POLITICS AND EVERYDAY LIFE IN A CHANGING SOCIETY* 3-18 (2008); Chen, *supra* note 7, at 503 (“[T]he modern synthesis of Confucianism with socialism has initially produced a society that is unsympathetic to the notion of the individual’s rights.”); Williams, *supra* note 19, at 38 (“[F]ollowing the delegitimation of Marxist thought, the political leaders of the People’s Republic of China have increasingly evoked visions of a Confucian Chinese heritage to justify authoritarian tendencies.”).

24. See Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 167, 167-75 (Julie Peters & Andrea Wolper eds., 1995) (indicating that any discussion of culture and gender must consider: (1) the status of the speaker, (2) in whose name is the argument from culture advanced, and (3) the degree of participation in culture formation of the social groups primarily affected by the cultural practices in question).

25. See Thio, *Implementing Human Rights in ASEAN Countries*, *supra* note 19, at 16 (“The presentation of ‘Asian’ and ‘Western’ cultural values as identifiable, distinct entities obscures the existence of divergent views within a region or within a single state itself.”).

26. See *id.* (noting that these officials sought to justify the operation of the regimes they represent); Yash Ghai, *Asian Perspectives on Human Rights*, 23 H.K. L.J. 342, 343 (1993) (noting that the apparent uniformity of an “Asian perspective” on human rights derives from international attention to the perspective of ruling elites united by “their notion of governance and the expediency of their rule” rather than on any true consensus).

27. More than 110 NGOs from 26 countries adopted their own Bangkok Declaration at the regional meeting, rejecting the argument that human rights can be conceived as an encroachment on national sovereignty and affirming the indivisibility of human rights. See World Conference on Human Rights, Apr. 19-30, 1993, *Rep. by the Secretariat: Bangkok NGO Declaration on Human Rights*, U.N. Doc. A/CONF.157/PC/83 (Apr. 19, 1993) [hereinafter *Bangkok Secretariat Rep.*].

28. Interpretation of Confucian thought is necessarily dictated by the time period of analysis, the specific texts being considered, and the understanding of the nature of Confucianism (is it a religious tradition, a philosophical tradition, or a state philosophy?). See generally Williams, *supra* note 19, at 47-58 (discussing evolution of Confucian thought through different historical periods).



(opposing) positions.<sup>29</sup>

Much has been written about the philosophical and political debates around the legitimacy of “Asian Values” and their fraught relationship with universal human rights.<sup>30</sup> Although it might appear that this debate has run its course, relativist interpretations of human rights continue to have salience in the international arena; both the Chinese and Singaporean governments continue to assert the necessity of acknowledging differing views of the role of human rights.<sup>31</sup>

### *A. Confucianism and the Family Unit*

In considering the compatibility of human rights and Confucianism, many scholars posit that the structure of an ideal Confucian society—where “moral duties or rights arise solely from social relationships, such as familial relationships, friendship and political associations”<sup>32</sup>—is fundamentally incompatible to an individualistic conception of human rights.<sup>33</sup> Society is essentially “the family writ large,”<sup>34</sup> where “the

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29. See Randall Peerenboom, *Human Rights in China*, in HUMAN RIGHTS IN ASIA, *supra* note 7, at 413, 422 (noting that Confucianism has been interpreted to support both liberal and authoritarian positions, but historically Confucianism was undeniably sexist, elitist, and inegalitarian, and failed to provide popular sovereignty or to protect even the most fundamental civil and political liberties).

30. See, e.g., Yash Ghai, *Human Rights and Asian Values*, 9 PUB. L. REV. 168, 168 (1998); Thio, *Implementing Human Rights in ASEAN Countries*, *supra* note 19, at 2 (noting that the Asian values challenge to the universalism human rights law was “buoyed atop a wave of impressive economic development and growth rates”).

31. For example, China considers that countries’ obligations to promote and protect human rights should be viewed in accordance with the UN Charter, international human rights, and “in the light of their national realities” as “it is natural for countries to have different views on the question of human rights” because of “differences in political systems, levels of development and historical and cultural backgrounds.” U.N. Human Rights Council, Working Grp. on the Universal Periodic Review, 4th Sess., Feb. 2-13, 2009, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: China*, ¶ 6, U.N. Doc. A/HRC/WG.6/4/CHN/1 (Nov. 10, 2008), available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A\\_HRC\\_WG6\\_4\\_CHN\\_1\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A_HRC_WG6_4_CHN_1_E.pdf). Likewise, while the Singapore government respects the universality and indivisibility of human rights, it maintains that “[t]he manner in which all rights are attained and implemented must nevertheless take cognizance of specific national circumstances and aspirations.” U.N. Human Rights Council, Working Grp. on the Universal Periodic Review, 11th Sess., May 2-13, 2011, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: Singapore*, ¶ 33, U.N. Doc. A/HRC/WG.6/11/SGP/1 (Feb. 2, 2011) [hereinafter *Singapore Resolution 5/1 National Report*].

32. See Joseph Chan, *A Confucian Perspective on Human Rights for Contemporary China*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 212, 217 (Joanne R. Bauer & Daniel A. Bell eds., 1999) [hereinafter Chan, *A Confucian Perspective*] (noting that Confucian teachings are about behavior in the five basic social relationships: father-son, husband-wife, elder brother-younger brother, ruler-ruled, and friend-friend).

33. See Randall Peerenboom, *What’s Wrong with Chinese Rights? Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29, 40 (1993) (arguing that, because human rights are rights to which humans are entitled from birth,

individual exists in the context of his family[;] . . . [t]he family is part of the extended family, and then friends and the wider society.”<sup>35</sup> Society is thus governed by social norms that emphasize these (familial) relationships including filial piety, face, collectivism, and social harmony.<sup>36</sup>

In emphasizing social harmony, value is placed on concession, negotiation, and consensus, rather than self-assertion or conflict-inducing competition.<sup>37</sup> Some scholars point to the Confucian preference for non-litigation methods of conflict resolution as an example of the expression of this social preference for harmony, where litigation and the courts are treated with suspicion because of the confrontational quality of such institutions.<sup>38</sup> Such societal mistrust of the legal system ostensibly highlights the incompatibility of asserting and adjudicating individualistic (human) rights with Confucian social norms.<sup>39</sup> Moreover, the intrinsic elitism of Confucianism is inconsistent with the democracy-oriented ethos of the international human rights movement,<sup>40</sup> as the paternalism of ruling elites reduces individuals’ agency and bestows rights that are qualified and

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human beings must be thought of as beings “*qua* members of a biological species” and not “*qua* social beings”—a view deeply incompatible with the Confucian one).

34. Chan, *A Confucian Perspective*, *supra* note 32, at 219.

35. Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, FOREIGN AFF., Mar.-Apr. 1994, at 109, 113 (attributing this organizational structure to “Eastern societies” and stating that “[t]he ruler or the government does not try to provide for a person what the family best provides”).

36. See Patricia L. Sullivan, *Culture, Divorce, and Family Mediation in Hong Kong*, 43 FAM. CT. REV. 109, 110 (2005) (“The family, as the basic social and economic unit of Chinese society, is most predominantly shaped by beliefs and values from the social philosophy of Confucianism. The relationship rules that govern social life and secure social stability include filial piety, the foundation stone of Chinese society; face; collectivism; social harmony; and limited and bounded trust. . . . Collectivism and social harmony require that family interests and goals take priority over those of the individual, with members expected to sacrifice their own needs and wishes for the preservation of relationships and the social unit. Decision making is characterized by consensus, cooperation, compromise, negotiation (sometimes with the assistance of a family elder), and the avoidance of conflict and direct confrontation.” (citations omitted)).

37. See Chan, *A Confucian Perspective*, *supra* note 32, at 226.

38. See, e.g., Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People’s Republic of China*, 10 TEMP. INT’L & COMP. L.J. 313, 314-16 (1996) (discussing the high value placed on compromise and mediation in Confucian society because such processes allow disputants to re-establish a harmonious relationship).

39. See, e.g., Albert H.Y. Chen, *Mediation, Litigation and Justice: Confucian Reflections in a Modern Liberal Society*, in CONFUCIANISM FOR THE MODERN WORLD 257, 260-61 (Daniel A. Bell & Hahm Chaibong eds., 2003) (explaining that traditional disdain for litigation derives from the view that “the pursuit of material self-interest that underlies civil litigation was perceived to be inconsistent with the Confucian ideal of moral self-cultivation, character formation, and personal growth”).

40. See *Bangkok Secretariat Rep.*, *supra* note 27, at 3 (“Democracy is a way of life. It pervades all aspects of human life: in the home, in the local community, and beyond. Democracy must be fostered and guaranteed in all countries.”).

contingent on the reciprocal obligations and duties of citizens.<sup>41</sup>

One manifestation of government paternalism and Confucian virtue in state policy is the emphasis on the family as the instrument of governance and through which the welfare of marginalized individuals is provided. In the context of China, social protection laws single out “vulnerable groups”—children, the elderly, and women—for special treatment, protecting the disadvantaged in accordance with “Confucian notions of benevolence”<sup>42</sup> while simultaneously reaffirming Confucian moral virtue by placing duties on family members to provide for their welfare. Similarly, the anti-welfarism of the (highly neo-liberal capitalist) cities of Singapore and Hong Kong has led to the privatization of compassion and charity.<sup>43</sup>

### B. The Question of Domestic Violence

While much of the debate about the compatibility of this Confucian worldview with human rights has focused on arguments for or against soft authoritarianism and the squelching of civil and political dissent,<sup>44</sup> the ascendancy of this discourse has overlooked the Confucian state’s impact on women’s rights, and domestic violence in particular. If a harmonious society is premised on people interacting in “virtuous relationships,”<sup>45</sup>

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41. Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC. INQUIRY 763, 764 (2002) (noting that conventional interpretations of the Chinese legal tradition characterize law as a means of state control and that “[a]ny rights that do exist are granted by the state and may be retracted”). Although the PRC legal system is not purely Confucian but reflects a blend of Confucianism and socialism, this idea is still expressed, for example in article 51 of the PRC Constitution. XIANFA art. 51 (1982) (China) (“The exercise of citizens of the People’s Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.”).

42. Michael Palmer, *On China’s Slow Boat to Women’s Rights: Revisions to the Women’s Protection Law, 2005*, 11 INT’L J. HUM. RTS. 151, 152 (2007) [hereinafter Palmer, *On China’s Slow Boat to Women’s Rights*] (“The stream of protective legislation is also very much the product of traditional paternalistic state attitudes. It is reminiscent of the imperial Chinese legal protection—based on Confucian notions of benevolence—extending special treatment to children, the elderly and women.” (footnotes omitted)).

43. For an interesting survey of welfare policies in Singapore, Hong Kong, and China, see chapters on each country in EAST ASIAN WELFARE REGIMES IN TRANSITION: FROM CONFUCIANISM TO GLOBALIZATION (Alan Walker and Chack-kie Wong eds., 2005).

44. See, e.g., Michael Davis, *Chinese Perspectives on Human Rights*, in HUMAN RIGHTS AND CHINESE VALUES 3, 3 (Michael C. Davis ed., 1995); Daniel A. Bell, *The East Asian Challenge to Human Rights: Reflection on an East West Dialogue*, 18 HUM. RTS. Q. 641, 641 (1996); Kim Dae Jung, *Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values*, FOREIGN AFF., Nov.-Dec. 1994, at 189, 189; Zakaria, *supra* note 35, at 109.

45. Chan, *A Confucian Perspective*, *supra* note 32, at 219 (“In this ideal community, the highest moral virtue is *jen* [*ren*] (benevolence) when expressed in an

where “reciprocal commitments” allow for the promotion of “shared goals and values over one’s own,”<sup>46</sup> domestic violence renders this ideal irrelevant since violence disrupts the virtuous relationship and destroys any reciprocity and shared goals. Where duties are emphasized over individual rights, there is no prescription for individuals to remove themselves from abusive relationships.

Violence against women is an interesting site of inquiry to consider the interaction of Confucianism and state practice. One could argue that the potential philosophical conflict between human rights and Confucianism is rendered moot by state participation in the international human rights regime. By acceding to international human rights treaties, like CEDAW and the Convention on the Rights of the Child (CRC), Singapore and China have explicitly accepted that human rights have a place in their society, even if that space is contested.<sup>47</sup> Moreover, the 1993 Bangkok Declaration simultaneously insisted on a contextualized interpretation of human rights, while reaffirming government commitment to gender equality and the eradication of discrimination and gender-based violence against women.<sup>48</sup> Therefore, on some level, these States do not view women’s rights as contradictory to their Confucian social models.

## II. DOMESTIC VIOLENCE IN INTERNATIONAL LAW

The *Lenahan* decision by the IACHR is the most recent decision to add to the corpus of international instruments and treaty-body decisions that identify domestic violence as a human rights violation and uphold the responsibility of states to protect individuals from domestic violence. While a full discussion about how and why domestic violence is an international legal issue is outside the scope of this Article,<sup>49</sup> it is important to highlight key instruments discussing domestic violence as a human

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active form; ‘overcoming one’s selfishness’ in a passive form.”).

46. *Id.*

47. China became a state party to CEDAW on November 4, 1980 and to CRC on March 2, 1992. Singapore acceded to both CEDAW and CRC on October 5, 1995. *CEDAW Ratification, Accessions and Successions*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last visited Sept. 23, 2012); *CRC Ratification, Accessions and Successions*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-11&chapter=4&lang=en](http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en) (last visited Sept. 23, 2012).

48. Bangkok Declaration, *supra* note 10, ¶ 22 (reaffirming Asian governments’ commitment to “the promotion and protection of the rights of women through the guarantee of equal participation in the political, social, economic and cultural concerns of society, and the eradication of all forms of discrimination and of gender-based violence against women”).

49. *See generally* BONITA MEYERSFELD, *DOMESTIC VIOLENCE AND INTERNATIONAL LAW 1* (2010) (discussing status of norms against domestic violence in international law).

rights issue, especially where they relate to East Asian jurisdictions.

CEDAW is among the most widely ratified international human rights treaties, with 187 state parties.<sup>50</sup> Article 2 of CEDAW articulates the far-reaching duties of state parties to prevent and eliminate discrimination against women by all appropriate means and without delay.<sup>51</sup> Although domestic violence was not mentioned in the text of CEDAW, General Recommendation No. 19 of the CEDAW Committee expressly states that discrimination includes gender-based violence and is defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately.”<sup>52</sup> General Recommendation 19 also recognizes violence in the family<sup>53</sup> as gender-based violence, emphasizing that discrimination under CEDAW is not restricted to action by or on behalf of Governments.<sup>54</sup> States are required to include, as part of their CEDAW reports, (1) information about the prevalence of violence against women and the effects of such violence on women victims; and (2) information on the form and effectiveness of legal, preventive, and protective measures against such violence.<sup>55</sup> States are thus required to take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act,<sup>56</sup> and may be held “responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>57</sup>

In 1994, the United Nations adopted the Declaration on the Elimination of Violence Against Women (DEVAW).<sup>58</sup> DEVAW requires that states make the justice system accessible to domestic violence survivors and

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50. *CEDAW Ratification, Accessions and Successions*, *supra* note 47. At the time of publication, the CRC, International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR) have 193, 167, and 160 state parties, respectively. See *CRC Ratification, Accessions and Successions*, *supra* note 47; *ICCPR Ratification, Accessions and Successions*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-4&chapter=4&lang=en) (last visited Sept. 23, 2012); *ICESCR Ratification, Accessions and Successions*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtsg\\_no=IV-3&src=TREATY](http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtsg_no=IV-3&src=TREATY) (last visited Sept. 23, 2012).

51. CEDAW, *supra* note 3, art. 2.

52. U.N. Comm. for the Elimination of Discrimination Against Women, 11th Sess., *General Recommendation 19: Violence Against Women*, ¶ 6, U.N. Doc. A/47/38 (1992).

53. *Id.* ¶ 23.

54. *Id.* ¶ 9.

55. *Id.* ¶ 24(u)-(v).

56. *Id.* ¶ 24(a).

57. *Id.* ¶ 9.

58. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

stipulates that “states should exercise ‘due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.’”<sup>59</sup> The 1995 World Conference on Women in Beijing galvanized women’s rights groups, and the resultant 1995 Beijing Declaration (drafted by governments in attendance) asserted States’ determination to eliminate and prevent all forms of violence against women and girls,<sup>60</sup> identified domestic violence as a health issue for women,<sup>61</sup> and categorized domestic violence as gender-based violence that “violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms.”<sup>62</sup> In 2004, the United Nations General Assembly adopted a seminal resolution on the elimination of domestic violence against women, Resolution 58/147, identifying it as a “human rights issue,” a “societal problem,” and “a manifestation of unequal power relations between women and men.”<sup>63</sup> Resolution 58/147 also recognizes the pervasiveness and invisibility of domestic violence,<sup>64</sup> that “domestic violence can take many different forms, including physical, psychological and sexual violence,”<sup>65</sup> and, very significantly, that “domestic violence is of public concern and requires States to take serious action to protect victims and prevent domestic violence.”<sup>66</sup> The UN General Assembly has followed up with two more resolutions on the subject, most recently in its 2009 Resolution 63/155.<sup>67</sup> Resolution 63/155 recognizes the “important role of the family in preventing and combating violence against women and girls . . . [and] the need to support its capacity to prevent and combat violence against women[,]”<sup>68</sup> and clearly states that custom, tradition, and religion may not

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59. MEYERSFELD, *supra* note 49, at 38.

60. Fourth World Conference on Women, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ann. I, ¶ 29, U.N. Doc. A/CONF.177/20/Add.1 (Sept. 15, 1995).

61. *Id.* ann. II, ¶ 100.

62. *Id.* ann. II, ¶ 224.

63. Elimination of Domestic Violence Against Women, G.A. Res. 58/147, pmb., U.N. Doc. A/RES/58/147 (Feb. 19, 2004).

64. *See id.* ¶ 1(b) (“[D]omestic violence is one of the most common and least visible forms of violence against women and that its consequences affect many areas of the lives of victims.”).

65. *Id.* ¶ 1(c).

66. *Id.* ¶ 1(d); *see* MEYERSFELD, *supra* note 49, at 61 (stating this recognition as “[o]ne of the most important components of the Resolution” and highlighting its engagement with States’ responsibilities regarding due diligence to prevent, investigate, and punish perpetrators of domestic violence, as articulated by the Special Rapporteur on Violence Against Women).

67. Intensification of Efforts to Eliminate All Forms of Violence Against Women, G.A. Res. 63/155, pmb., U.N. Doc. A/RES/63/155 (Jan. 30, 2009).

68. *Id.* ¶ 6.

be invoked as reasons not to comply with state obligations to eliminate violence against women.<sup>69</sup>

As much as these pronouncements by treaty bodies and the UN General Assembly have identified domestic violence as a human rights issue, whether these instruments create a legally binding obligation remains contested. This is seen by the United States' position in *Lenahan*. General recommendations made by the CEDAW committee are not automatically binding on state parties,<sup>70</sup> while the authority of UN Resolutions may be limited, especially where they were adopted without a vote.<sup>71</sup>

#### *A. Domestic Violence Legislation in China, Hong Kong, and Singapore*

As noted above, Singapore and the PRC are state parties to CEDAW, thereby making CEDAW also applicable to Hong Kong.<sup>72</sup> All three jurisdictions made reservations to article 29(1) of CEDAW (subjecting states to International Court of Justice processes) and neither the PRC nor Singapore have signed or ratified the Optional Protocol to CEDAW (which allows the CEDAW Committee oversight over individual complaints).

##### *1. Singapore*

Of these three jurisdictions, Singapore acceded to the CEDAW with the widest ranging reservations—aside from reservations related to equality in employment and citizenship rights.<sup>73</sup> Singapore reserved the right not to apply the provisions of articles 2 and 16 where compliance would be contrary to religious and personal laws.<sup>74</sup> The categorical rejection of

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69. *Id.* ¶ 9.

70. See MEYERSFELD, *supra* note 49, at 36-37 (“General recommendations made by UN treaty bodies are not automatically binding on states, not even to the states party to the treaty in question. They are used to explain or interpret provisions within the governing treaty. . . . Even though there is sufficient content in General Recommendation 19 to argue that states are obliged to investigate, prosecute and punish domestic violence, and pay compensation if they fail to do so (the obligation in respect of other human rights violations), there is no express statement to this effect.”).

71. All resolutions mentioned above were adopted without a vote.

72. Upon Hong Kong's return to the PRC, the PRC government informed the UN Secretary-General that the reservation made by China to article 29(1) would also apply to Hong Kong. See *CEDAW Ratification, Accessions and Successions*, *supra* note 47, at n.14 (“Upon resuming the exercise of sovereignty over Hong Kong, China notified the Secretary-General that the Convention with the reservation made by China will also apply to the Hong Kong special Administrative Region.”).

73. Singapore previously justified gender-inegalitarian citizenship laws because of patriarchal assumptions “in line with our Asian tradition where husbands are the heads of households.” Thio, *Taking Rights Seriously?*, *supra* note 21, at 161 (quoting Singapore's CEDAW Initial Report at paragraph 10.2). Singapore withdrew this reservation on July 24, 2007.

74. In June 2011, Singapore modified its reservations to articles 2 and 16, which now reads: “In the context of Singapore's multi-racial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal

States' responsibilities under article 2 (dealing with state responsibilities under CEDAW) and article 16 (regarding equality in marriage and the family) is of great concern because articles 2 and 16 can be considered fundamental to CEDAW<sup>75</sup> and reservations to their effect and state failure to implement the provisions can be considered to be contrary to the object and purpose of CEDAW.<sup>76</sup>

The CEDAW committee has expressed concern about "the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men within the [Singaporean] family and society at large," as these stereotypes "present a significant obstacle to the implementation of the Convention" and "are a root cause of violence against women in the private and public spheres."<sup>77</sup> Nevertheless, Singapore's State reports to the CEDAW Committee and to the Human Rights Council clearly indicate its understanding and acceptance that domestic violence is gender-based violence and considered discrimination against women under human rights law.<sup>78</sup>

Singapore does not have a specific law regarding domestic violence, partly due to government perception that such matters are considered primarily a family matter and to the role of the legal system as "geared toward the preservation of the family unit."<sup>79</sup> Efforts to legislate are intrusions into the private sphere, but "it is important for the entire community to support the formation and strengthening of families,"<sup>80</sup>

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laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws." *CEDAW Declarations & Reservations: Singapore*, U.N. TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#74](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#74) (last visited Aug. 24, 2012).

75. The CEDAW Committee has stated that it considered articles 2 and 16 to be "core provisions of the Convention." Comm. on the Elimination of Discrimination Against Women, Rep. on Its 18th & 19th Sess., ¶ 6, U.N. Doc. A/53/38/Rev.1 (May 14, 1998), available at <http://www.un.org/womenwatch/daw/cedaw/reports/18report.pdf>.

76. Under the Vienna Convention on the Law of Treaties, signatories and state parties to treaties may not undertake any action that is contrary to the object and purpose of the treaty. Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). This impermissibility principle is adopted in article 28(2) of the CEDAW Convention.

77. U.N. Comm. on the Elimination of Discrimination Against Women, 49th Sess., July 11-29, 2011, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Singapore*, ¶ 21, U.N. Doc. CEDAW/C/SGP/CO/4/Rev.1 (Jan. 16, 2012).

78. See *Singapore Resolution 5/1 National Report*, *supra* note 31, ¶ 73.

79. Kumaralingam Amirthalingam, *Women's Rights, International Norms, and Domestic Violence: Asian Perspectives*, 27 HUM. RTS. Q. 683, 686-88 (2005) (noting that there is simultaneously a conception of the family as private, and thus best left ignored by the law, and as public, and thus a matter for societal concern).

80. *Id.* at 688 (emphasis omitted).



presumably through mechanisms outside the legal and penal system.<sup>81</sup> Instead, domestic violence protections are incorporated into the Women's Charter of Singapore, which permits individuals to seek protection orders where they have been victims or are likely to be victims of family violence.<sup>82</sup> Family violence is defined as "(a) willfully or knowingly placing, or attempting to place, a family member in fear of hurt; (b) causing hurt to a family member by such act which is known or ought to have been known would result in hurt; (c) wrongfully confining or restraining a family member against his will; or (d) causing continual harassment with intent to cause or knowing that it is likely to cause anguish to a family member, but does not include any force lawfully used in self-defense, or by way of correction towards a child below 21 years of age."<sup>83</sup> Family members under the statute include spouses or former spouses, children, parents and parents-in-law, siblings, and other relatives.<sup>84</sup>

A proposed Family Violence Bill, which sought to give the police mandatory powers to arrest an abusive husband or spouse, was rejected due to state interest in avoiding entering the private realm of the home.<sup>85</sup> Thus, the burden is on the domestic violence victim to take legal action to seek protection from violence. This is described as "a soft approach" where "the focus is more on compulsory dialogue rather than compulsory sanction."<sup>86</sup>

## 2. *China*

Unlike Singapore, the PRC only had one reservation upon its ratification of CEDAW. The 2004 PRC Constitution states that the State "respects and preserves human rights"<sup>87</sup> and prohibits the maltreatment of women.<sup>88</sup> The

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81. U.N. Comm. on the Elimination of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Fourth Periodic Report of States Parties: Singapore*, ¶ D.1, U.N. Doc. CEDAW/C/SGP/4 (Apr. 3, 2009) (reporting that the government of Singapore emphasizes that "family undergirds society and that closely-knit and supportive families make for a cohesive nation" and states that its policies "are designed to promote the healthy development of families").

82. See Women's Charter § 65(1) (Cap. 353, 2009 Rev. Ed. Sing.) (permitting the court to "make a protection order restraining the person against whom the order is made from using family violence against the family member").

83. *Id.* § 64 (defining "hurt" as "bodily pain, disease or infirmity").

84. *Id.*

85. See Li-ann Thio, *Singapore Human Rights Practice and Legal Policy: Of Pragmatism and Principle, Rights, Rhetoric and Realism*, 21 SING. ACAD. L.J. 326, 351 (2009) (arguing that "when it comes to certain harms to women, the law needs to intervene").

86. *Id.*

87. XIANFA art. 33 (1982) (China).

88. *Id.* art. 49 ("Marriage, the family, and mother and child are protected by the state. Both husband and wife have the duty to practice family planning. Parents have

2001 PRC Marriage Law directly prohibits family violence, as well as maltreatment or desertion of one family member by another.<sup>89</sup> The 2005 PRC Law on the Protection of Rights and Interests of Women (LPRIW) prohibits “discrimination against, maltreatment<sup>90</sup> of, or cruel treatment in any manner causing injury, even death, of women.”<sup>91</sup> Unfortunately there is no definition in PRC law for either discrimination against women,<sup>92</sup> or domestic/family violence, or even a definition of “family.” An authoritative, but non-binding, interpretation has defined domestic violence as “behavior whereby a person causes certain physical or mental injuries to his family members by beating, binding, forced restriction of personal freedom or by other means,” and adds that “[d]urative or frequent family violence constitutes maltreatment.”<sup>93</sup> Legal provisions regarding divorce also consider the existence of family violence.<sup>94</sup>

Currently there is no national anti-domestic violence law, although all provinces have local prohibitions against domestic violence. Protection

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the duty to rear and educate their minor children, and children who have come of age have the duty to support and assist their parents. Violation of the freedom of marriage is prohibited. Maltreatment of old people, women and children is prohibited.”).

89. Hunyinfā (xiuzheng) (婚姻法 (修正)) [Marriage Law of the People's Republic of China] (promulgated by Order No. 9 of the Chairman of the Standing Committee of the National People's Congress, Sept. 10, 1980, amended Apr. 28, 2001) art. 3 [hereinafter Marriage Law of the People's Republic of China] (“Marriage upon arbitrary decision by any third party, mercenary marriage and any other acts of interference in the freedom of marriage shall be prohibited. The exaction of money or gifts in connection with marriage shall be prohibited. Bigamy shall be prohibited. Anyone who has a spouse shall be prohibited to cohabit with another person of the opposite sex. Family violence shall be prohibited. Maltreatment and desertion of one family member by another shall be prohibited.”).

90. See Interpretation No. 1 of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China, art. 1 (Dec. 27, 2001) [hereinafter Interpretation No. 1 of Marriage Law], available at <http://www.cnbjlawyers.com/article/en/Family/195.htm> (stating that frequent family violence constitutes maltreatment).

91. Funüquanyibaozhangfa (中华人民共和国 妇女权益保障法) [Law on the Protection of Rights and Interests of Women] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 3, 1992, amended 2005) art. 2 [hereinafter LPRIW] (“Women shall enjoy equal rights with men in all aspects of political, economic, cultural, social and family life. Equality between men and women is a basic State policy. The State takes the necessary measures to gradually improve the systems for protecting the rights and interests of women, in order to eliminate all forms of discrimination against women. The State protects the special rights and interests enjoyed by women according to law. Discriminating against, maltreating, abandoning, and physically abusing women are prohibited.”).

92. Dai Ruijun, *Promoting Domestic Implementation of CEDAW in China*, INST. L. CHINA, <http://www.iolaw.org.cn/global/en/showNews.asp?id=18172> (last visited Aug. 24, 2012).

93. Interpretation No. 1 of Marriage Law, *supra* note 90, art. 1.

94. Marriage Law of the People's Republic of China, *supra* note 89, art. 32 (stating that a divorce may be granted if “one party indulges in family violence or maltreats or abandons family members” or in “other cases which lead to the shattering of affection between husband and wife”).

orders against perpetrators of domestic violence are only available under pilot projects in select trial courts.<sup>95</sup> Even where these protection orders can be issued, they are only available within the context of divorce proceedings,<sup>96</sup> thus leaving individuals who are seeking protection from violence but not divorce without recourse. Reports indicate protection orders are not often issued, “in part, because judges remain somewhat hesitant to issue protection orders without a clearly defined legal framework and interpretive guidelines.”<sup>97</sup> Unmarried individuals also have no access to these protection orders. Under Chinese law, “all divorce petitions must first be mediated by a judge,” and judges are required by law “to help the couple reach a reconciliation, and even if the mediation efforts prove futile, the judge may or may not grant a divorce.”<sup>98</sup>

Chinese law encourages women to use mediation and administrative processes to express their grievances, rather than the courts.<sup>99</sup> The Marriage Law encourages women facing domestic violence to seek intervention from the People’s Mediation Committee, whose role is to persuade the spouse to cease the violence.<sup>100</sup> Where the case rises to a violation of public security regulations, victims may request that the local public security bureau intervene and impose administrative sanctions.<sup>101</sup> Wives who have suffered domestic violence may also bring private prosecutions (自诉, *zisu*) against their husbands.<sup>102</sup>

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95. Rangita de Silva de Alwis, *Opportunities and Challenges for Gender-Based Legal Reform in China*, 5 E. ASIA L. REV. 197, 271-73 (2010) (“The Applied Legal Institute of the Supreme People’s Court published a Trial Guide to Domestic Violence Related Cases in March 2008[;] . . . alleged victims can seek an emergency restraining order for fifteen days, or a long-term protection order for three to six months. The court is called upon to supervise this order. . . . The Guideline prohibited the accused from a 200 meters radius and prohibited the disposable [sic] of valuable property, amongst other provisions.”). By January 2012, seventy-two courts were part of the pilot project. ABA Rule of Law Initiative, *Initiative Supports Push for Gender Justice in China*, AM. BAR ASS’N (Jan. 2012), [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/asia/china/news/news\\_china\\_examining\\_us\\_domestic\\_violence\\_legislation\\_implementation\\_0112.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/china/news/news_china_examining_us_domestic_violence_legislation_implementation_0112.html); Jiang Xueqing & He Dan, *Domestic Violence Casts an Ugly Shadow*, CHINA DAILY (Nov. 17, 2011, 8:02 AM), [http://www.chinadaily.com.cn/cndy/2011-11/17/content\\_14108816.htm](http://www.chinadaily.com.cn/cndy/2011-11/17/content_14108816.htm).

96. de Alwis, *supra* note 95, at 272.

97. ABA Rule of Law Initiative, *supra* note 95.

98. Xin He, *Routinization of Divorce Law Practice in China: Institutional Constraints’ Influence on Judicial Behaviour*, 23 INT’L J.L. POL’Y & FAM. 83, 86 (2009).

99. Palmer, *On China’s Slow Boat to Women’s Rights*, *supra* note 42, at 165; Marriage Law of the People’s Republic of China, *supra* note 89, art. 43.

100. Marriage Law of the People’s Republic of China, *supra* note 89, art. 43.

101. *Id.* art. 58 (allowing domestic violence victims to apply to public security organs for administrative sanctions against the perpetrator, and bring a civil suit in a people’s court, where such acts violate public security administration regulations); LPRIW, *supra* note 91, art. 58.

102. Marriage Law of the People’s Republic of China, *supra* note 89, art. 45.

### 3. *Hong Kong*

It is interesting that China had far more declarations regarding the application of CEDAW to Hong Kong than upon its own accession. Noteworthy declarations include: (1) that China did not regard the Convention as “imposing any requirement upon Hong Kong to repeal or modify any of its existing laws and regulations, customs or practices which provide for women to be treated more favorably than men”;<sup>103</sup> and (2) that patrilineal inheritance and property laws for indigenous groups would continue.<sup>104</sup>

Unlike Singapore and China, Hong Kong has enacted legislation specific to domestic violence, the Domestic and Cohabitation Relationships Violence Ordinance (DCRVO).<sup>105</sup> The primary means of dealing with recurring domestic violence under the DCRVO is through court-ordered injunctions. Individuals may seek injunctions against (1) spouses and former spouses (section 3); (2) other relatives (section 3A, covering relationships in the immediate and extended family, whether biological, through marriage, or through adoption);<sup>106</sup> and (3) cohabitants and former cohabitants (section 2, applying to same sex or opposite sex couples, provided they live together “as a couple in an intimate relationship”).<sup>107</sup> Violations of the DCRVO injunctions are punishable through criminal sanctions; under some circumstances, the judge may attach an additional authorization for a warrantless arrest.<sup>108</sup> Additionally, charges may also be brought against the perpetrator through criminal statutes of general applicability.

Domestic violence, or intimate partner violence in government parlance, is treated by the Hong Kong government as an issue that requires multi-agency coordination, as seen from its Working Group on Domestic Violence Issues, which incorporates a wide-ranging group of representatives across disciplines, including police, social services workers,

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103. *CEDAW Declarations & Reservations: China*, U.N. TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#14](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#14) (last visited Aug. 24, 2012).

104. *Id.*

105. Domestic and Cohabitation Relationships Violence Ordinance, Cap. 189, §§ 1-11, L.N. 265 of 2009 (H.K.), available at [http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/2CD1B62629047F40482575EE004AF537/\\$FILE/CAP\\_189\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/2CD1B62629047F40482575EE004AF537/$FILE/CAP_189_e_b5.pdf).

106. *Id.* § 3A(2)(a)-(o).

107. *Id.* § 2.

108. *See id.* § 5 (the authorization for arrest can only be attached if the court “is satisfied that the person has caused actual bodily harm to the protected person; or it reasonably believes that the person will likely cause actual bodily harm to the protected person” and the injunction must either be one prohibiting a person from using violence against another person or prohibiting a person from entering or remaining in any premises or area).

lawyers, educators, and hospital staff, among others.<sup>109</sup> The official preferred approach to intimate partner violence<sup>110</sup> is through case management through social service providers,<sup>111</sup> rather than the courts.

### III. *LENAHAN* AND THE ROLE OF THE STATE

#### A. *The United States' Response to Petitioners' Claims in Lenahan*

The United States' response to the petitioners' claims in *Lenahan* must be understood within the context of its uneasy relationship with human rights and international law, as well as domestic jurisprudence on positive duties of the state. Although the United States has portrayed itself as a human rights leader, having "played a central role in the internationalization of human rights law and institutions,"<sup>112</sup> it has a poor record of treaty participation, especially where human rights treaties impose positive obligations on state parties. The U.S. Supreme Court has long opposed the imposition of positive duties on the state to "provide members of the general public with adequate protective services"<sup>113</sup>—a position most distinctively articulated in *DeShaney v. Winnebago County Department of Social Services*,<sup>114</sup> and reiterated in its decision in *Town of Castle Rock v. Gonzales*.<sup>115</sup>

In response to the petitioner's claims at the IACHR, the United States

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109. SOC. WELFARE DEP'T WORKING GRP. ON COMBATING VIOLENCE, PROCEDURAL GUIDE FOR HANDLING INTIMATE PARTNER VIOLENCE CASES, at ii (2011), [http://www.swd.gov.hk/doc/fcw/proc\\_guidelines/battered\\_spouse/Acrobat%20Document%20\(updated%20on%20211211\).pdf](http://www.swd.gov.hk/doc/fcw/proc_guidelines/battered_spouse/Acrobat%20Document%20(updated%20on%20211211).pdf).

110. *Id.*

111. *Id.* at 10-11. This case manager should generally be a social worker, and it is this individual's job to make referrals, coordinate with other service providers, brief the victim on rights, duties and procedures, and otherwise act as the primary contact point for the case.

112. U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW ¶ 5 (2010) [hereinafter U.S. UPR REPORT], <http://www.state.gov/documents/organization/146379.pdf>.

113. Ronagh J. A. McQuigg, *Domestic Violence and the Inter-American Commission on Human Rights: Jessica Lenahan (Gonzales) v. United States*, 12 HUM. RTS. L. REV. 122, 132 (2012).

114. 489 U.S. 189 (1989). The Rehnquist opinion decisively asserted that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors" and that the Clause is "not a guarantee of certain minimal levels of safety and security." *Id.* at 196.

115. 545 U.S. 748, 767 (2005) (holding that Jessica Gonzales (now Lenahan) did not, under the Due Process Clause, "have a property interest in police enforcement of the restraining order against her husband," and affirming that "the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations").

argued that federal laws, like the various Violence Against Women Acts (VAWA),<sup>116</sup> and existing state laws provided adequate protection against domestic violence.<sup>117</sup> The United States also alleged that such legislation demonstrates government recognition of the seriousness of domestic violence and the importance of a nationwide response, as evidenced by the billions of dollars of government money devoted to the implementation of programs related to domestic violence.<sup>118</sup> While acknowledging a “moral and political responsibility” to prevent and protect individuals in their jurisdictions from acts of abuse by non-state actors, the United States challenged any imposition of an affirmative *legal* duty to do so.<sup>119</sup> The U.S. position was that “the judg[ment] of governmental action such as in this case has been and will remain a matter of domestic law in the fulfillment of a state’s general responsibilities incident to ordered government, rather than a matter of international human rights law to be second-guessed by international bodies.”<sup>120</sup>

*B. Domestic Violence as Human Rights Violation:  
Lessons from Lenahan*

*1. Domestic Violence Is Worthy of International Scrutiny*

The first lesson from *Lenahan* is that states cannot point to the abundance and sufficiency of existing laws alone to absolve responsibility for a failure to protect women and girls from domestic violence. The IACHR firmly rejected the U.S. position that international law (and international bodies) did not have a place in determining the adequacy of government action to eliminate discrimination against women. This is a particularly salient issue with regards to the contested relationships Singapore and China both have with international scrutiny and human rights.

Singapore has made all its international obligations under CEDAW and CRC subject to Singaporean law and the constitution,<sup>121</sup> on the premise that

116. Referring to Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40000-40702, 108 Stat. 1796, 1902-1955; Violence Against Women Act of 2000, Pub. L. No. 106-386, §§ 1001-1603, 114 Stat. 1464, 1491-1539; and Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-271, 120 Stat. 750.

117. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 54 (2011).

118. *Id.*

119. *See id.* ¶¶ 57, 106 (citing Reply by the Government of the United States of America to the Final Observations Regarding the Merits of the Case by the Petitioners, p. 41).

120. *Id.* ¶ 57.

121. Suzannah Linton, *ASEAN States, Their Reservations to Human Rights Treaties*

Singapore's domestic laws were already compatible with the international obligations undertaken.<sup>122</sup> By construing its international obligations under human rights treaties as being confined primarily to reporting obligations, no real changes in domestic laws and policies have been enacted.<sup>123</sup> However, a state may not invoke its internal law to justify the non-performance of treaty obligations,<sup>124</sup> and Singapore (like the U.S.) must critically consider the efficacy of its laws.

## 2. Laws Alone Are Necessary but Insufficient

By holding that the U.S. government's lack of a systemic, coordinated, and effective response to protect women and girls from domestic violence constituted an act of discrimination on the part of the state,<sup>125</sup> the IACHR clearly stated that enacting legislation against domestic violence is insufficient to protect individuals from domestic violence, and that the state must take a proactive stance in ensuring the diligent enforcement of protective measures.<sup>126</sup>

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and the Proposed ASEAN Commission on Women and Children, 30 HUM. RTS. Q. 436, 441 (2008). Singapore's reservation to the Convention on the Rights of the Child explicitly indicates its position that Singaporean laws "provide adequate protection" to the rights of children, and that "accession to the convention by the Republic of Singapore does not imply the acceptance of obligations going beyond the limits prescribed by the Constitution of the Republic of Singapore nor the acceptance of any obligation to introduce any right beyond those prescribed." *Id.*

122. Thio, *Implementing Human Rights in ASEAN Countries*, *supra* note 19, at 28.

123. One could argue that international treaty processes have motivated Singapore to re-consider its reservations to CEDAW as it has withdrawn parts of its reservations upon accession to the treaty. Unfortunately, such reconsideration has not resulted in significant change, however, as Singapore continues to have reservations to CEDAW articles relating to state duties (art. 2), equality in the family (art. 16), and employment contexts. See *CEDAW Declarations & Reservations: Singapore*, *supra* note 74.

124. See Thio, *Implementing Human Rights in ASEAN Countries*, *supra* note 19, at 29. This principle is articulated in article 27 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). Singapore is not a party to this treaty; however, several states objecting to Singapore's reservations upon accession to CEDAW and CRC on this basis referred to this principle as well-established under international treaty law. See, e.g., *CEDAW Declarations & Reservations: Objections of Finland and Norway*, Nov. 21, 1996, U.N. TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last visited Aug. 24, 2012).

125. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 170 ("The systemic failure of the United States to offer a coordinated and effective response to protect Jessica Lenahan and her daughters from domestic violence, constituted an act of discrimination, a breach of their obligation not to discriminate, and a violation of their right to equality before the law under Art. II of the American Declaration.").

126. *Id.* ¶ 163.

*a. Content of the Laws*

It has been suggested that the failure of the PRC's National People's Congress to pass the draft national Anti-Domestic Violence Law is due to the belief that existing legal prohibitions provide adequate legal protection to domestic violence victims.<sup>127</sup> Although the PRC has prohibited domestic violence under several national laws, those legal mandates are generic prohibitions and do not provide for legally enforceable definitions of domestic violence.<sup>128</sup> Mere legal prohibitions in this form are insufficient because legislation fails to contemplate how such prohibitions are to be enforced, in violation of the due diligence standard.<sup>129</sup> Even when the idea that domestic violence should be stopped gains traction within the community, the effectiveness of anti-violence laws and systems can be limited by a lack of awareness about enforcement mechanisms and procedures. In 2010, the All-China Women's Federation received 51,171 complaints about spousal violence from women throughout China, while a 2010 survey indicated that about twenty-five percent of Chinese women have, at some point in their lives, faced verbal, physical or sexual abuse perpetrated by their spouses.<sup>130</sup> That same year, a mere forty-eight protection orders were issued by Chinese courts enrolled in a trial project on restraining orders.<sup>131</sup> The large discrepancy not only highlights the urgent need for more resources against violence, it also shows how divorced legal solutions and protections can be from the first point of institutional contact by individuals affected by domestic violence.

*b. Role of the Police*

The *Lenahan* decision acknowledges the "historical response of police officers . . . to treat [domestic violence] as a family and private matter of

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127. Rong Weiyi, *The Appeal and Action Against Domestic Violence Outside the Legislative Framework*, WOMEN'S WATCH E-NEWSLETTER, September 2011, at 4, 7, available at <http://www.womenwatch-china.org/FckHandler.ashx?id=363> ("Members of the Committee for Internal and Judicial Affairs under the National People's Congress believed that since principles and regulations against domestic violence are to some extent recognized in China's Constitution, the Marriage Law, the Law of the PRC on the Protection of Rights and Interests of Women, Criminal Law, the Law of the PRC on Public Security Administration Punishments, criminal procedure law, civil procedure law, and other laws as well as many local regulations, the domestic violence situation is now equipped with enough legal reference.").

128. Marriage Law of the People's Republic of China, *supra* note 89, art. 3; LPRIW, *supra* note 91, art. 46.

129. See Jiang Xueqing & He Dan, *supra* note 95 (quoting a researcher as saying that in the absence of definition for domestic violence in the PRC Marriage Law, "the police cannot decide which behavior falls into the category of domestic violence, and which belongs to family disputes").

130. *Id.*

131. *Id.*



low priority, as compared to other crimes”<sup>132</sup> in the United States, and draws particular attention to weak incentives for police enforcement of protection orders (even where the state law seeks mandatory arrest).<sup>133</sup> Law enforcement officers play an integral role in both the actual protection of individuals from domestic violence as well as the perceptions around domestic violence—as the *Lenahan* decision notes, police mistreatment of domestic violence victims “results in a mistrust that the state structure can really protect women and girl-children from harm, which reproduces the social tolerance toward these acts.”<sup>134</sup> Police reticence in the face of domestic violence allegations is pervasive in many jurisdictions, and China and Singapore are no exceptions. Chinese public security bureaus have traditionally refrained from interfering in family disputes. Rather than exercising legal provisions in the LPRIW that allow them to impose penalties, the bureaus often refer domestic violence victims to local branches of the Women’s Federation.<sup>135</sup> While the Women’s Federation does play an important role in providing counseling and services to women domestic violence survivors,<sup>136</sup> funneling women to informal non-judicial enforcement organs, like the local Women’s Federation, is problematic because it could send the message that domestic violence is a “woman” problem or “family” problem that does not deserve state interference.

### 3. “The Family” as Barrier to Human Rights

The third lesson from the *Lenahan* decision is that concepts of “the family” and familial relationships can sometimes act as a barrier to the protection of human rights, particularly where cultural assumptions about the content and meaning of family relationships affect how the police and the legal system address and determine risk. In the tragic case of the Gonzales children, the police and other state actors wrongly assumed that there was no imminent danger because the children were with their father.<sup>137</sup> Thus, the assumption that the existing family/parental

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132. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 42 (2011).

133. *Id.* (discussing the consistent failure of law enforcement to protect victims of domestic violence).

134. *Id.* ¶ 167.

135. Yuhong Zhao, *Domestic Violence in China: In Search of Legal and Social Responses*, 18 UCLA PAC. BASIN L.J. 211, 229-30 (2001).

136. *Nation-Wide “12338” Telephone Hotline to Provide Counselling and Services to Women Victims/Survivors of Domestic Violence*, U.N. SECRETARY-GENERAL’S DATABASE ON VIOLENCE AGAINST WOMEN, <http://webapps01.un.org/vawdatabase/searchDetail.action?measureId=24516&baseHREF=country&baseHREFId=346> (last updated July 10, 2009) (reporting the handling of more than 50,000 domestic violence cases a year).

137. *Lenahan*, Case 12.626, Report No. 80/11, ¶ 31 (“The police simply replied that the father of the children had the right to spend time with them, even though she

relationship between Simon Gonzales and his daughters is unequivocally protective directly led to state inaction despite the existence of a protection order. In the East Asian context, assumptions about “the family” similarly affect how governments and societies perceive domestic violence. Even where states have taken greater action to protect women from violence, underlying assumptions about the ideal (Confucian) structure of society and the family have impacted the laws and regulations that govern marriage and divorce. State emphasis on harmony has translated into policy preferences for the use of extra-legal methods to settle family disputes, as well as judicial discretion in determining the possibility of, and encouraging, reconciliation. This legal framework for marriage and divorce can impact the ability of individuals to protect themselves from domestic violence by increasing the barriers that they face in accessing the justice system.

*a. Harmony and Family Law*

Governments of China, Hong Kong, and Singapore have all expressed a state interest in the preservation of the family unit, manifested in an emphasis on family harmony. The PRC’s 2001 Marriage Law emphasizes the role of family members while reinforcing (Confucian) social ethics: article 4 states that a “husband and wife shall be loyal to each other and respect each other; family members shall respect the old and cherish the young, help each other, and maintain the marriage and family relationship characterized by equality, harmony and civility.”<sup>138</sup> Even though China’s LPRIW seeks to implement China’s CEDAW obligations<sup>139</sup> to protect women and afford them legal rights within society, these rights are qualified by corresponding obligations to “abide by the laws of the State, respect social morality and perform their obligations prescribed by law.”<sup>140</sup> The contingent nature of these rights<sup>141</sup> and the on-going preoccupation with women’s roles in upholding “social morality” is troubling, because it could potentially undermine the ability of women to step outside of traditional gender (and family) roles to seek legal redress. Likewise, Singapore’s Women’s Charter incorporates a “moral foundation” to the marital relationship, deeming it to be an “equal co-operative partnership of

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repeatedly mentioned the restraining order against him and that no visitation time had been agreed upon.”).

138. Marriage Law of the People’s Republic of China, *supra* note 89, art. 4 (1980) (amended 2001).

139. Palmer, *On China’s Slow Boat to Women’s Rights*, *supra* note 42, at 172.

140. LPRIW, *supra* note 91, art. 5.

141. Palmer, *On China’s Slow Boat to Women’s Rights*, *supra* note 42, at 157 (noting that continuing concern with social ethics is important because it not only indicates that women’s rights are contingent rather than absolute, but also because women have particular responsibility to bear for the decline in moral standards in China about which the party-state leadership is concerned).

different efforts.”<sup>142</sup> Family law in Singapore therefore expects spouses to behave reasonably, but refrains from intervention while the spouses remain married.<sup>143</sup>

The moral and ethical obligations implied by these constructions of the marital relationship can affect how the legal system constructs the definition of domestic violence. Although there are legal prohibitions against family violence, the PRC legal system categorizes family abuse based on severity, and only punishes the “maltreatment” of family members as a crime if circumstances are “flagrant.”<sup>144</sup> Maltreatment, in turn, is defined as “durative” or “frequent family violence.”<sup>145</sup> The law, therefore, ranks violent acts in the family, and differentiates between one-off acts of violence and repeated acts, thus signaling that infrequent physical violence does not require legal sanction. The law also equates severity with repetition, and fails to recognize that domestic violence, whether a single incident or not, can create imminent harm to the victim.<sup>146</sup>

Harmony ideology has also impacted the framing of domestic violence legislation in Singapore, China, and Hong Kong. All three jurisdictions place the burden on domestic violence victims to seek state action, and to prove the validity of their claims. In Singapore, where personal protection orders are available, the onus is on the domestic violence victim both to seek the protection order in the first place, and then to undertake measures to enforce the order. In the PRC, where family violence rises to the level deemed worthy of criminal sanction as discussed above, state action is only taken when a complaint is first filed by the victim.<sup>147</sup> Placing such a burden on victims creates further obstacles to the prevention of domestic

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142. Leong Wai Kum, *Fifty Years and More of the Women’s Charter of Singapore*, SING. J. LEGAL STUD., July, 2008, at 1, 16.

143. *Id.* (“The family law in Singapore does regulate a spouse’s conduct towards the other but it judiciously stops short of formally intervening in their relationship where intervention threatens at least as much harm as good. It does expect spouses to behave reasonably, and will condemn unreasonable behavior, but this condemnation must rightly be restrained while the spouses remain married. Sanction by law should be deferred until one spouse chooses to initiate legal proceedings against the other . . .”).

144. Criminal Law of the People’s Republic of China, art. 260 (1979) (amended 1997) (“Whoever maltreats a member of his family, if the circumstances are flagrant, shall be sentenced to fixed-term imprisonment of not more than two years, criminal detention or public surveillance. Whoever [maltreats a member of his family] and causes serious injury or death to the victim shall be sentenced to imprisonment of not less than two years but not more than seven years.”).

145. See Interpretation No. I of Marriage Law, *supra* note 90, art. I (“Behavior whereby a person causes certain physical or mental injuries to his family member(s) by beating, binding, forced restriction of personal freedom or by other means. Durative or frequent family violence constitutes maltreatment.”).

146. See MEYERSFELD, *supra* note 49, at 61 (discussing the immediacy of domestic violence, regardless of the timing of violent incidents).

147. Criminal Law of the People’s Republic of China, art. 260.

violence; as noted by the *Lenahan* decision, the “mistaken . . . position that victims are themselves responsible for monitoring the preventive measures . . . leaves them defenseless and in danger of becoming the victims of the assailant’s reprisals.”<sup>148</sup>

*b. Reconciliation, Mediation, and Judicial Discretion*

The strong state interest in family harmony also leads to legislated preference for reconciliation, and the channeling of family disputes outside of the legal system and the courts. Singapore family law gives judges wide discretion in determining and encouraging reconciliation or resolution outside of the courts. Under the Women’s Charter, judges have a duty to consider the possibility of reconciliation between individuals seeking a divorce,<sup>149</sup> and may refer parties for (mandatory) mediation should the judge consider that the matter could be resolved harmoniously.<sup>150</sup> Hong Kong’s Matrimonial Causes Ordinance also explicitly encourages reconciliation in divorce cases if there is a “reasonable possibility” of it, allowing the court to adjourn proceedings as it sees fit to enable reconciliation.<sup>151</sup> The ordinance goes further in pushing for family unity by using prolonged presence in the marital home as an indicator of potential for reconciliation. Under this ordinance, in determining whether a petitioner cannot reasonably be expected to live with his or her spouse, judges must disregard material incidents if the parties to the marriage have lived with each other more than six months after the incidents.<sup>152</sup> This has a significant impact on domestic violence victims because the law essentially penalizes a domestic violence victim if she stays with an abusive spouse for longer than six months after an incident and because her prolonged presence in the marital home is used as evidence that reconciliation is possible. In the Hong Kong context, the high cost of

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148. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 158 (2011).

149. Women’s Charter § 49 (Cap. 353, 2009 Rev. Ed. Sing.).

150. *Id.* § 50 (“A court . . . may give consideration to the possibility of a harmonious resolution of the matter and for this purpose may . . . refer the parties for mediation . . .”).

151. Matrimonial Causes Ordinance, (1997) Cap. 179, § 15A(1) (H.K.), available at [http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/EF17B3FD55EACC5D482575EE004A3491/\\$FILE/CAP\\_179\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/EF17B3FD55EACC5D482575EE004A3491/$FILE/CAP_179_e_b5.pdf).

152. *Id.* § 15A(4) (“Where the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him, but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the court to support his allegation, that fact shall be disregarded in determining, for the purposes of section 11A(2)(b), whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together is 6 months or less.”).

housing might force domestic violence victims to remain in the same household as the perpetrator because they cannot afford separate accommodations.<sup>153</sup>

Confucian skepticism about the utility of litigation and courts can impact the ability of domestic violence survivors to seek redress. Mediation has been touted by Singapore and China as a preferred means of resolving family conflict, yet, as Palmer notes, “[t]o the extent that [the] ideal of the harmonious family involves an emphasis on traditional authority norms between family members, and a preference for suppressing rather than expressing grievances within the family, the likelihood is that it will undermine rather than promote gender equality in the domestic context.”<sup>154</sup> In domestic violence cases, however, mediation poses significant risks.<sup>155</sup> The Special Rapporteur on Violence Against Women (Special Rapporteur) has warned that mediation between domestic violence victims and perpetrators may undermine the severity of domestic violence while increasing risk to the victim.<sup>156</sup> In the example of police officers acting as mediators, the Special Rapporteur expressed concern that there would be confusion in community perception about the role of the police in law enforcement, and thus send the wrong message that family violence is not serious enough to warrant criminal investigation.<sup>157</sup> Likewise, judicially mandated mediation could similarly create confusion about the role that legal institutions play in adjudicating harm and meting out punishment where warranted. A focus on mediation could also affect official ability to document instances of abuse; for instance, where police officers, in acting as mediators, fail to question both sides of a conflict and record critical information about violent incidents.<sup>158</sup>

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153. Sullivan, *supra* note 36, at 113 (noting that Hong Kong lacks support enforcement mechanisms and the majority of post-divorce families do not receive child support or alimony even when it has been court-ordered).

154. Palmer, *On China's Slow Boat to Women's Rights*, *supra* note 42, at 163.

155. It is necessary to differentiate between the mediation of family law cases (like custody disputes or separation proceedings) where there is a history or risk of domestic violence and mediation of domestic violence (i.e., mediating as to the existence of domestic violence, or mediating to stop domestic violence). The latter can perpetuate the idea that misunderstanding or lack of communication caused domestic violence, and that both/all parties have responsibility for the violence (de facto blaming of the victim) without considering the power imbalances and gender discrimination that creates the environment within which violence against women occurs.

156. Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: Violence Against Women in the Family*, Comm'n on Human Rights, ¶ 34, U.N. Doc. E/CN.4/1999/68 (Mar. 10, 1999) (by Radhika Coomaraswamy).

157. *Id.*

158. Jiang Xueqing & He Dan, *supra* note 95, at 2 (“In many cases, police officers acted as mediators, rather than interrogating both sides and taking a clear record of what happened.”).

Mediation in the context of domestic violence (and especially mandatory or directed mediation) remains a highly contested issue, in part because of concerns about power imbalances between partners,<sup>159</sup> the impact of safety concerns for the abused partner,<sup>160</sup> and the difficulties of ensuring appropriate procedural and substantive safeguards.<sup>161</sup> It is therefore particularly troubling that the push made by the Singaporean, Hong Kong, and Chinese governments towards the mediation of family law cases has not been accompanied by conscious efforts to screen for a history or risk of domestic violence within these cases, thus potentially exposing domestic violence victims to further harm.<sup>162</sup> Moreover, where mediation is undertaken at the grassroots/community level outside of the courts, such as in the PRC where village leaders, members of the local People's Mediation Committee or local Women's Federation officials are given threshold responsibility for dealing with domestic violence cases,<sup>163</sup> it is important to note that such mediations do not take place in a neutral environment, but rather within a community which may reflect stereotypes regarding gender roles, the nature of families and the propriety of violence.<sup>164</sup>

In the PRC, the official push towards mediation<sup>165</sup> has also affected the

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159. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991), for a critical analysis of mandatory mediatory processes that can exacerbate existing power imbalances.

160. See, e.g., Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 244-45 (2002) (recognizing that safety interests may impact a victim's ability to self-advocate on an equal footing); see also Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53, 56-57 (2005) ("Victims of domestic violence might be incapable of directly participating in mediation or even recognizing the full extent of their harm due to the psychological scars of the battering or by a fear that participating in the mediation might provoke the batterer to engage in retaliatory violence during or after the session." (citations omitted)).

161. A full accounting of the myriad issues regarding mediation and domestic violence is outside the scope of this Article, but there is consensus (at least among Western scholars) that decisions about the appropriateness of mediation where there is a history of domestic violence are critical and require a nuanced view of the processes. See Murphy & Rubinson, *supra* note 160, at 54.

162. In a study about the use of family mediation as a means of resolving family disputes in Hong Kong, 50% of women and 39% of men who used mediation service reported a history of domestic violence. Sullivan, *supra* note 36, at 116.

163. See *supra* Part II(A)(2) for details.

164. The idea of "community" is often essentialized and "community mediation" is often presented as an unqualified good, yet communities consist of individuals whose relationships are marked by competing interests, alliances, and stereotypes and often reflect social norms that allow for domestic violence to occur in the first place. See Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 42, 52-55 (Heather Strang & John Braithwaite eds., 2002).

165. It is worth noting that the 2005 amendments to the LPRIW gave some indication that China had moved away from viewing domestic violence as a "purely family dispute to be dealt with by means of mediation to seeing it as an issue of criminal justice to be dealt with by the public security organs, the procuracy and the

treatment of domestic violence in the Chinese legal system. The February 2011 Supreme People's Court Opinion<sup>166</sup> promotes increased mediation efforts in criminal cases of private prosecution (such as "serious" cases of domestic violence)<sup>167</sup> with the goal of bringing about reconciliation between the two parties.<sup>168</sup> The Opinion also stipulates that "in cases where of civil conflicts such as love affairs, marriages, family and neighbor disputes, unexpected crimes caused by the mistakes of victims in righteous indignation and self-defense should be reviewed with discretion and punished with prudent judgment,"<sup>169</sup> thus carving out disputes that affect family and community harmony as different from other disputes. In the context of domestic violence, the fear is that judicial discretion has the potential to excuse violence against women in the family by classifying it as a crime of passion, or worse, to return it to the private sphere.<sup>170</sup>

#### 4. Due Diligence Requires State Action Against Structural Discrimination

The IACHR's strong admonishment of the U.S. government response to the abduction of the Gonzales children underscores that the privacy of the family is not impermeable, and that state action is necessary to defeat discrimination against women. As the *Lenahan* decision states, "[s]tate inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence 'since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.'"<sup>171</sup> Moreover, states have a duty to act with due diligence in addressing violence against women, which also involves measures to prevent and respond to the discrimination that

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courts in a manner that is more consistent with the PRC's international obligations under CEDAW." Michael Palmer, *Transforming Family Law in Post-Deng China: Marriage, Divorce and Reproduction*, 2007 CHINA Q. 675, 695 [hereinafter Palmer, *Transforming Family Law*]. However, scholars have noted a troubling shift in official policy away from the use of courts and litigation towards mediation processes in recent years. See, e.g., Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 935-36 (2011). See also Rong Weiyi, *supra* note 127, at 6.

166. The PRC Supreme People's Court issued "The Opinions on the Implementation of the Criminal Policy of Combining Punishment with Leniency" on Feb. 8, 2011. See Rong Weiyi, *supra* note 127, at 6.

167. See *id.* (discussing LPRIW giving right to undertake private prosecution to women domestic violence victims).

168. *Id.*

169. *Id.*

170. *Id.* at 9 ("[W]hen it comes to detailed issues such as the compensation for victims and the punishments for the perpetrators people [sic] slip back into the old ideas that domestic violence is a family dispute and should not be interfered with . . .").

171. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 168 (2011) (quoting *Maria da Penha*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111 doc. 20 rev. ¶ 56 (2001)).

perpetuates such violence.<sup>172</sup>

In the context of East Asian states, family privacy is likely more of an excuse for state inaction against gender discrimination than a commitment to Confucian privacy principles. Although there is a tendency to point to the privacy of the family as the reason for the Chinese and Singaporean states not to use law and the courts to further intervene in issues of domestic violence, state willingness to legislate in other areas of family life, such as family planning and support of the elderly, indicate that the sanctity of family privacy is selectively applied.<sup>173</sup> For example, the Singaporean and Chinese governments have sought to legislate how adult children relate to their elderly parents.<sup>174</sup> Under such legislation, parents who are unable to support themselves have the right to be supported by their children who have come of age.<sup>175</sup> This codification of the Confucian notion of filial piety<sup>176</sup> may appear on its face to sustain the parent-child relationship, but necessarily fails because “the use of a legal instrument would fail to promote filial piety as a virtue, for it fosters a false motivation for children—supporting their parents out of fear of punishment.”<sup>177</sup> What such legislation does, however, is to protect parents’ interests when the familial relationship has broken down beyond repair. The law is thus a blunt instrument that indicates government preference, and shows government comfort with establishing far-reaching legislation where such

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172. *Id.* ¶ 126.

173. A glaring example of state legislation of family life is Chinese regulations around family planning, which is deemed to be a “demographic problem” rather than a matter of reproductive rights. *See* Palmer, *Transforming Family Law*, *supra* note 165, at 687 (noting that article 2 of the Law on Population and Birth Planning of the People’s Republic of China (2001) “declare[d] that birth planning is a fundamental policy of the state and re-affirms the commitment to both the quantitative and eugenics aspects of population control”). It is clear that, where state interests lie with interference in the family, the full weight of state machinery is employed—in Beijing, public security organs bear responsibilities for birth planning and population policy enforcement. *Id.*

174. Singapore’s Maintenance of Parents Act allows elderly parents (above sixty years) who are not able to support themselves to seek maintenance from their children. Maintenance of Parents Act § 3 (Cap 167B, 1996 Rev. Ed. Sing.). Article 49 of the PRC Constitution states that “children who have come of age have the duty to support and assist their parents” and that the maltreatment of old people is prohibited. XIANFA art. 49 (1982) (China); *see also* Thio, *Implementing Human Rights in ASEAN Countries*, *supra* note 19, at 20 & n.57 (arguing that “legally compel[ling] children to maintain their parents seems contrary to the Confucian ethic of filial piety” and that “the selective adoption of some Confucian values” undermines the coherence of the Asian Values ideology).

175. Chan, *A Confucian Perspective*, *supra* note 32, at 235.

176. Thio argues that such codification goes against Confucian norms of filial piety. *See* Thio, *Implementing Human Rights in ASEAN Countries*, *supra* note 19, at 20 n.57. I would argue that this is an example of using the law as a blunt instrument to indicate social or government preference.

177. Chan, *A Confucian Perspective*, *supra* note 32, at 236.



legislation promotes state interests.<sup>178</sup>

Outside such direct legislation, states have provided incentives for its citizens to support their family members. For example, the Hong Kong government grants tax exemptions for children who live with or support their parents and siblings,<sup>179</sup> while the Singapore government provides increased incentives for married children to live near, and presumably take care of, their elderly parents.<sup>180</sup> Inheritance laws, likewise, express traditional Confucian notions of familial relationships, putting parents on equal (or possibly lower) footing than the spouse.<sup>181</sup> The contrast between active legislation on these family law issues and that of domestic violence raises the question of whether domestic violence is a matter of lower priority because it is pigeonholed as a “women’s” issue.

#### CONCLUSION: DOMESTICATING INTERNATIONAL LAW

The *Lenahan* case, and the recent IACHR decision, has already contributed greatly to cross-cultural conversation about the utility of international law in local contexts. First, *Lenahan* undercuts the mythology<sup>182</sup> of the United States as a world leader in human rights and decreasing violence against women, and has forced the U.S. government to explain on-going human rights violations against victims of domestic violence within its borders. It has also highlighted how the reluctance of various branches of the U.S. government to accept or impose positive duties on state actors to protect individuals from the violent acts of other individuals<sup>183</sup> is increasingly out of step with developing international norms. The U.S. government response to the *Lenahan* decision should attempt to close this gap between U.S. Supreme Court jurisprudence and

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178. In this case, legislating support for elderly parents supports the anti-welfarism policies of the Singaporean and Hong Kong governments.

179. Chan, *A Confucian Perspective*, *supra* note 32, at 235.

180. *HDB Tweaks Rules to Protect Serious Buyers, Will Launch 4,640 Flats in May*, CHANNELNEWSASIA.COM (Mar. 28, 2012, 11:25 AM), <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1191710/1.html> (regarding launch of public housing schemes that give priority allocation of public housing to married children who live with their parents (Married Child Priority Scheme), or near their parents (the Multi-Generation Priority Scheme)).

181. See Lusina Ho, *Traditional Confucian Values and Western Legal Frameworks: The Law of Succession*, in CONFUCIANISM FOR THE MODERN WORLD 288, 310 (Daniel A. Bell & Hahn Chaibong eds., 2003). Article 10 of the Inheritance Law lists parents, spouses, and children as heirs of first priority, and presumptive distribution is equal amongst them. See Law of Succession of the People’s Republic of China, art. 10 (1985).

182. The idea of the mythology of the United States “as a human rights leader and role model” is drawn from Stacey Sobel, *The Mythology of a Human Rights Leader: How the United States Has Failed Sexual Minorities at Home and Abroad*, 21 HARV. HUM. RTS. J. 197, 197 (2008).

183. See *supra* Part III.A.

international human rights law developments.

Current controversies in the United States surrounding the reauthorization of VAWA underscore the vulnerability of domestic violence protections in the United States to partisan politics.<sup>184</sup> In this way, the U.S. response to *Lenahan* could be educated by recent efforts in East Asian countries to effectively combat violence against women, for example, through conscious efforts to extend protections to married and unmarried couples, including same-sex cohabitating couples.<sup>185</sup> Discourse about localizing international law should include finding ways to reduce the contingent nature of the human rights of women and domestic violence survivors, and could help frame efforts to increase and secure long-term domestic violence protections in the United States.

*Lenahan* also undercuts many stereotypes associated with domestic violence in East Asia relating to poverty, urbanity, and development, thus underscoring the truly global nature of domestic violence and gender discrimination. By explicitly framing domestic violence as gender discrimination, the *Lenahan* decision invokes a central tenet of international law—the principle of non-discrimination. Thus, in conceptualizing effective responses to domestic violence, states must interrogate existing legislation for hidden assumptions in legislative policies that perpetuate structural discrimination, and which impede the ability of individuals affected by domestic violence from seeking and securing protection.

As U.S. Secretary of State Hillary Clinton has affirmed, “[h]uman rights are universal, but their experience is local. This is why we are committed to holding everyone to the same standard, including ourselves.”<sup>186</sup> The *Lenahan* decision offers advocates and policy-makers an opportunity to reflect upon the content of international standards, and to consider how those standards can be meaningfully effectuated in communities and families. Legislation and government policies that replicate norms of

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184. At the time of this writing, the U.S. Senate and the U.S. House of Representatives have passed drastically different versions of bills seeking to reauthorize the Violence Against Women Act of 1994. See Robert Pear, *House Vote Sets Up Battle on Domestic Violence Bill*, N.Y. TIMES (May 16, 2012), <http://www.nytimes.com/2012/05/17/us/politics/house-passes-domestic-violence-bill.html>. The current Senate bill seeks to expand services and protections to underserved populations, including LGBT individuals, American Indians, and illegal immigrants. See Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Cong. (as introduced in the Senate, Nov. 30, 2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1925is/pdf/BILLS-112s1925is.pdf>.

185. This is the case under Hong Kong’s inclusive ordinance against intimate partner violence.

186. U.S. UPR Report, *supra* note 112, ¶ 5 (quoting Hillary Rodham Clinton, Secretary of State, U.S. Department of State, Preface to 2009 Country Reports on Human Rights Practices (Mar. 11, 2010)).

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family privacy and gender stereotypes that reinforce structural discrimination must be actively confronted so that lasting protections against domestic violence can be achieved.