

**Systemic Discrimination and Women's Human Rights**  
*Formulating Effective Remedies for States' Responsibility to  
Protect Women from Domestic Violence*

By Susannah Howard

A central difficulty in the project of enhancing the international protection of women's human rights is the continued widespread and systemic discrimination women face at the hands of private, non-state actors. While states may be found responsible for failing to protect individuals and failing to provide redress for such harms, the remedies available are extremely limited in their ability to address the systemic inequality that infringes women's enjoyment of their internationally protected human rights. Whereas many human rights violations may be systemic in the sense that they are widespread within a particular state, or can be seen to result from the structure of particular institutions, they do not frequently have to contend with claims that they result from practices and beliefs embedded within a particular culture. Violations of women's human rights are often systemic not only for the foregoing reasons, but are also systemic in the sense that they are reinforced by cultural beliefs and practices that legitimize women's inequality. This makes the conceptualization of remedies for violations of women's human rights much more difficult. Systemic discrimination that results in the widespread violation of women's human rights requires more creative remedial thinking, as the nature of the violation is far more complex. While this requires an engagement with local structures, it must also involve taking on cultural norms that serve to reinforce women's inequality.

In this paper, I attempt to provide a starting point for how to think about creative remedies for violations of women's human rights by focusing on the issue of domestic violence. Domestic violence is a useful example because of the way in which it clearly

involves cultural norms and beliefs that are reflected in the response (or lack thereof) of domestic justice systems. I argue that these beliefs and legal responses reinforce one another and that to be effective, we must conceive of remedies that can begin to unravel their association. Where cultural norms implicitly or explicitly endorse women's inequality, remedies for violations of women's human rights that stem from this inequality but that do not address the basis for it, will remain shallow at best.

Part II provides an overview of domestic violence as a women's human rights issue, focusing in particular on the underlying norms and beliefs that contribute to the problem worldwide. In addition, I discuss the challenge of cultural relativism, emphasising the need to confront this challenge in fashioning effective remedies for the violation of women's human rights. In Part III, I provide an overview of the remedies available from international human rights enforcement bodies. Despite the fact that women may invoke norms embodied within multiple human rights treaties to seek enhanced State protection from domestic violence, I argue that individual petition through the Optional Protocol of the Convention on All Forms of Discrimination Against Women<sup>1</sup> (CEDAW) offers the greatest remedial potential because of the Convention's emphasis on discrimination against women and the role this plays in limiting the enjoyment of their fundamental rights and freedoms. I stress, however, that recommendations issued by the Committee on the Elimination of Discrimination Against

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<sup>1</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18 1979, 1249 U.N.T.S. 13 [CEDAW]; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, GA RES 54/4, UNGAOR 44<sup>th</sup> Sess., U.N. Doc. A/RES/54/4 (1999) [Optional Protocol]

Women (CEDAW Committee) must make a greater effort to draw States' attention to the cultural norms and beliefs that reinforce women's inequality and perpetuate discriminatory practices.

### **Domestic Violence & Women's Human Rights**

Violence against women, sometimes referred to as gender-based violence, has been recognized by the international community as a serious human rights concern.<sup>2</sup>

Andrea Vesa has provided an overview of standards enshrined within eight international and regional human rights documents as well as under customary international law, and has explained how failures by States to protect victims of domestic violence can thereby constitute a violation of their international obligations.<sup>3</sup> Katherine Culliton articulates states' responsibility for domestic violence under international human rights law as follows:

“...the problem of domestic violence is the responsibility of states for the following reasons: (1) domestic violence threatens women's right to life and physical integrity, (2) the norms protecting people from violence prohibit a legal system's tolerance of and failure to protect people from domestic violence, and (3) human rights norms guarantee equality before the law and prohibit the systemic gender bias that has worked against women victims of domestic violence. In short, discrimination in a legal system that perpetuates a de facto legal norm tolerating violence against women violates women's fundamental rights to life, physical integrity and equality before the law. The right to state

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<sup>2</sup> See for example, the Vienna Declaration and Program of Action, *World Conference on Human Rights, Vienna, 14-25 June, 1993*, U.N. Doc. A/CONF.157/23); Beijing Declaration and Platform for Action, *Fourth World Conference on Women, Beijing, China, 15 September 1995*, U.N. Doc. A/CONF.177/20 and U.N. Doc. A/CONF.177/20/Add.1 [hereafter Beijing Declaration and Platform for Action]; Declaration on the Elimination of Violence Against Women, General Assembly Resolution 48/104, U.N. Doc. A/RES/48/104 (1994).

<sup>3</sup> Of course, States must be parties to these documents in order to have obligations arising from them. See Andrea Vesa, “International and Regional Standards for Protecting Victims of Domestic Violence” (2004) 12 Am. U. J. Gender Soc. Pol’y & L. 309 [Vesa, International and Regional Standards for Protecting Victims of Domestic Violence].

protection from violation of a person's fundamental human rights is inherent in every international human rights legal instrument"<sup>4</sup>

While international human rights treaties may guarantee rights without distinction on the basis of sex,<sup>5</sup> because they do not generally impose obligations on states to eliminate discrimination against women, the extent to which the provisions of these treaties can result in remedies that effectively address gender discrimination in general, and gender-based violence in particular, remains limited. It is likely that treaty enforcement bodies will only respond to formal distinctions on the basis of sex within a State's domestic legal system, but will not be able to address systemic or substantive gender inequality.

In this regard, the obligations enshrined under CEDAW have the potential to broaden the scope of a State's failure to address violence against women within its jurisdiction, and to fashion a more effective remedy accordingly. Although the text of CEDAW does not expressly address the issue of violence against women, the CEDAW Committee explained the relationship between gender-based violence, discrimination and women's enjoyment of their internationally protected human rights, in its General Recommendation 19:

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-

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<sup>4</sup> Katherine Culliton, "Finding a Mechanism to Enforce Women's Right to State Protection From Domestic Violence," 34 Harv. Int'l L. J. 507 (1993) at 513.

<sup>5</sup> See for example, *International Covenant on Civil and Political Rights*, Dec. 16 1966, U.N.T.S. 171 at Article 2(1)

based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.<sup>6</sup>

State parties to the Convention are therefore obligated to undertake measures to address domestic violence as part of their obligation to eliminate all forms of discrimination against women. Domestic violence is one form of violence against women that “impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions.”<sup>7</sup> While domestic violence is perpetrated by non-state actors, State parties to CEDAW are obligated to “eliminate discrimination against women by any person.”<sup>8</sup> Overall, CEDAW’s emphasis on State parties’ positive obligations to eliminate all forms discrimination makes the treaty a more effective mechanism for addressing gender-based violence.<sup>9</sup>

A recently completed multi-country study on domestic violence by the World Health Organization<sup>10</sup> highlights the complexity of the problem and why a focus on eliminating systemic cultural discrimination is required. Despite recognition of domestic violence as a human rights concern that engages States’ international legal obligations,

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<sup>6</sup> Violence Against Women: CEDAW General Recommendation No. 19, 11<sup>th</sup> Sess., U.N. Doc. A/47/38 (1992) at para 6-7 [hereinafter General Recommendation 19].

<sup>7</sup> *Ibid* at para 7. The Committee stated that these rights include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work.

<sup>8</sup> General Recommendation 19, *supra* note 3 at para 9. See Article 2(e) of CEDAW, *supra* note 2.

<sup>9</sup> This is elaborated upon, *infra*, in Part III.

<sup>10</sup> Claudia Garcia-Morena et. al., WHO Multi-Country Study on Women’s Health and Domestic Violence against Women: Initial results on prevalence, health outcomes and women’s responses (Geneva: World Health Organization, 2005) [WHO Multi-Country Study on Domestic Violence].

the extent to which domestic violence persists around the world remains a serious concern. Investigators in the WHO study conducted interviews with 24 000 women in Bangladesh, Brazil, Ethiopia, Japan, Namibia, Peru, Samoa, Serbia and Montenegro, Thailand, and the United Republic of Tanzania. Although data varied significantly between countries, researchers found that

“[f]or ever-partnered women, the range of lifetime prevalence of physical violence by an intimate partner was between 13% and 61%, with most sites falling between 23% and 49%. Between 4% and 49% of ever-partnered women reported severe physical violence.”<sup>11</sup>

In addition, the study highlights a clear connection between rates of domestic violence and the prevalence of beliefs that reinforce men’s power over women. Researchers asked women whether they agreed that a man has a good reason to beat his wife under certain circumstances (for example, when she refuses sex or does not complete the housework) and found that women who experienced violence themselves, or who lived in a community where women reported higher rates of domestic violence were more likely to agree with one or more of the justifications.<sup>12</sup> The authors note that “[t]he widespread acceptability of circumstances where wife-beating is justified highlights the extent to which, in many settings, partner violence is conceptualized as a form of chastisement of female behaviour that transgresses certain expectations.”<sup>13</sup> This illustrates the way in which domestic violence is gender-based: it is perceived as a tool to enforce gender norms that reflect and reinforce women’s inequality.

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<sup>11</sup> *Ibid* at 27.

<sup>12</sup> *Ibid* at 39-41. See pp. 29-31 for rates of domestic violence reported in each country.

<sup>13</sup> *Ibid* at 41.

This is precisely why a focus on the elimination of discrimination, as encompassed by CEDAW, is essential to addressing the problem. However, the extent to which gender norms are socially embedded presents a difficult challenge to the effectiveness of any international human rights instrument in its ability to hold states accountable and persuade them to take effective action; where beliefs that justify domestic violence attain a certain level of social and cultural legitimacy, States may have little incentive or ability to implement effective protections. It is important not to conclude from the findings of the WHO study or any other that where a significant number of women believe that domestic violence may be justified, a State's failure to protect women from domestic violence does not result in an infringement of their human rights. As the authors of the study point out, women may rationalize from their experiences of violence that the violence is justified.<sup>14</sup> This does not mean however that no infringement of their rights has occurred; it simply means that some women may believe that the infringement is permissible under certain conditions. However, if the elimination of gender-based violence is indeed a human rights norm, then the prevalence of beliefs that undermine that norm must be a priority in ensuring protection.

The perception that an infringement may in certain contexts be permissible raises the difficult challenge of confronting cultural relativism. Hilary Charlesworth and Christine Chinkin characterize cultural relativism as “[t]he claim [that] if international human rights norms conflict with particular cultural standards, the particularity of culture

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<sup>14</sup> *Ibid*, at 40.

must take precedence over universalizing trends.”<sup>15</sup> The way in which culture is invoked most often in discussions of women’s human rights is particularly concerning, and has been reflected upon and critiqued by feminist scholars.<sup>16</sup> Most notably, the critique points to the ways in which the version of “culture” invoked by cultural relativists is “falsely rigid, ahistorical [and] selectively chosen,”<sup>17</sup> and tends to ignore cultural change over time as well as deny women any cultural agency of their own. This is a valid critique; most notably because it challenges the notion culture as a fixed and impermeable entity. However, this does not negate the fact that remedies for violations of women’s human rights that challenge cultural norms face the risk of being characterized as culturally illegitimate and rendered ineffective or remaining unimplemented. This concern must be addressed if we are ever to develop effective remedies for gender-based violence and other forms of gender discrimination.

International human rights enforcement bodies carry an ability to persuade governments to comply with decisions, and may over time influence popular thinking about human rights. However, it is important that norms not be imposed, but develop in a way that does not deprive them of local, domestic legitimacy. This is a critical obstacle for tribunals and committees rendering judgements on human rights violations; where States do not comply with their decisions, their own legitimacy as authoritative adjudicators and decision-makers will be undermined. They must therefore keep in mind

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<sup>15</sup> Hilary Charlesworth and Christine Chinkin, “Feminist Theories and International Law” in Hilary Charlesworth and Christine Chinkin eds., *The Boundaries of International Law* (Manchester, U.K.: Manchester University Press, 2000) at 222 [Charlesworth and Chinkin].

<sup>16</sup> Ibid. See also Uma Naryan, *Dislocating Cultures* (London and New York: Routledge, 1997).

<sup>17</sup> Artai Rao as quoted in Charlesworth and Chinkin, *supra* note 13 at 225.

that it will be difficult for States to implement remedies that are considered to be “foreign” or inconsistent with cultural values. In addition, even where States do impose such remedies, they are likely to be ineffective due to on-going cultural resistance. Remedies that are perceived as going too far in terms of restructuring gender relations in the interest of gender equality may be resisted because gender relations are considered so foundational to a society.<sup>18</sup>

As mentioned above, the issue of cultural relativism is frequently raised in the context of women’s human rights as an argument against taking action to promote change. The argument suggests that because certain beliefs about women and their role in society are so integral to the society’s culture itself, identifying these beliefs as problematic passes judgement on the culture in its entirety, and requires the culture to abandon something inherent to its core in order to achieve the desired changes. In effect, it suggests that gender equality necessitates a kind of cultural destruction. Cultural relativism argues against such destruction in the interest of women’s equality because the cultural values of one society are no better or worse than the cultural values of another (including the international culture of universal human rights) – they are all relative. A particular culture’s inherent patriarchy cannot be condemned without condemning the whole culture, and this cannot be done without placing the value of gender equality above the value of the culture itself.<sup>19</sup>

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<sup>18</sup> As an example of this, see *Petrovic v. Austria* (1998) 33 EHRR 307.

<sup>19</sup> For a useful analysis on the use of cultural relativist arguments in the context of discussions regarding remedies for domestic violence in Chile, and with respect to Latina women more generally, see Katherine

However, it is misguided to say that there is something inherently patriarchal about a particular culture, rather than saying that cultures, in general, tend to be patriarchal. Given the global currency of patriarchy, there does not appear to be anything unique or fundamental about patriarchal norms within any particular culture. This would only be the case were it to be argued that the concept of culture itself is inherently patriarchal. In this sense, norms that undermined patriarchy and promoted gender equality would be aimed at cultural destruction – not of one culture, but of all. However, this is not the goal of women’s rights advocacy. The focus is not on destroying or eradicating a culture but on discrediting the patriarchal beliefs within it. This requires recourse to persuasive arguments that can separate the concept of “gender equality” from the understandings of what culture really is and what it is capable of being. We cannot say that cultures are inherently patriarchal, because they are completely socially constructed. Arguing that culture is inherently patriarchal is akin to arguing that we are incapable of conceiving and constructing anything outside of patriarchy. This privileges patriarchy as an immutable norm and extinguishes the project of gender equality before it has begun.

In order to achieve change we must approach the project with the attitude that change is possible. It is misguided to think that change can happen from outside of culture or can be imposed on culture, for as individuals we cannot be above culture; we cannot stand back and mould it as we see fit. While the arguments of cultural outsiders

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M. Culliton, “Legal Remedies for Domestic Violence in Chile and the United States: Cultural Relativism, Myths and Realities,” 26 Case W. Res. J.183 1994 [Culliton, Legal Remedies for Domestic Violence].

can be used to undermine (and affirm) beliefs that may be specific to a particular culture, these arguments are only significant so far as they are persuasive to those for whom the culture and its beliefs are relevant. As lawyers seeking to enhance the protection of women's human rights, our concern is what role the law can play in shaping cultural beliefs in accordance with gender equality. An examination of the types of remedies available for violations of women's internationally protected human rights suggests that they have been unable or unwilling to adequately address the challenge posed by cultural relativism and take on the issue of cultural change.

### **Remedies in International Human Rights Law: Evaluating Effectiveness**

Dinah Shelton has provided a comprehensive overview of the remedies available in international human rights law.<sup>20</sup> While Shelton does include some commentary on human rights commissions and committees, she places a large emphasis on the practice of international human rights tribunals, most notably the European as well as the Inter-American Court of Human Rights, and assesses their remedial jurisprudence under the categories of declaratory judgements<sup>21</sup>, non-monetary remedies (or judicial orders)<sup>22</sup> and compensation.<sup>23</sup> While Shelton does not expressly address the effectiveness of these categories in addressing violations stemming from gender-discrimination, her brief discussion of the European Court of Human Rights rejection of a claim for compensation

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<sup>20</sup> Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005) [Shelton, *Remedies in International Human Rights Law*]

<sup>21</sup> *Ibid* at 255-268.

<sup>22</sup> The types of non-monetary remedies discussed include: Restitution and Rehabilitation; Satisfaction; and, Guarantees of Non-Repetition. *Ibid* at 267-290.

<sup>23</sup> *Ibid* at 291-349.

in the case of *Airey v. Ireland*<sup>24</sup> illustrates the limitations of remedies for victims of domestic violence where the claim is based on a right conceptualized narrowly, without attention to the role of gender discrimination in limiting its fulfillment.

In regards to compensation, Shelton observes that “[d]amages are incapable of restoring or replacing rights that have been violated and, as a substitute remedy, are sometimes inadequate to redress fully the harm.”<sup>25</sup> While this is true of rights violations in general, compensation proves particularly problematic as a remedy to redress violations of women’s human rights. Compensatory remedies aim to restore the loss the victim has suffered as a result of the violation; however, where the violation is the result of systemic inequality, restoring the victim to the position she would have been in had the violation not occurred only returns the victim to a position in which she is vulnerable to suffer further repetitions. It does nothing to address the way in which the violation is systemic. That is not to say that no compensation should ever be warranted, however, where the right is defined narrowly, without attention to systemic discrimination, any compensatory awarded to cover the victim’s loss will be minimal because of the strict causal connection required between the violation and the loss suffered.

The *Airey* decision highlights these difficulties. The main complaint submitted by Johanna Airey, “was that the State had failed to protect her against physical and mental

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<sup>24</sup> *Airey v. Ireland*, (1979) EHCR App no 6289/73, 09/10/19791 [hereinafter *Airey v. Ireland* (Merits)]; and *Airey v. Ireland* (Article 50), EHCR (1981) App no 6289/73, 06/06/1982 [hereinafter *Airey v. Ireland* (Just Satisfaction)].

<sup>25</sup> Shelton, Remedies in International Human Rights Law, *supra* note 20 at 291.

cruelty from her allegedly violent and alcoholic husband.”<sup>26</sup> Mrs. Airey listed several concerns in this regards, however the case turned on the failure of the state to provide legal aide to Mrs. Airey in order to obtain a deed of separation relieving her from the duty of cohabitation with her abusive husband.<sup>27</sup> The Court found that the denial of access to the High Court for the purposes of petitioning for a decree of judicial separation violated Article 6-1 (right to a fair trial in civil and criminal matters) and Article 8 (right to respect for private and family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>28</sup>

Mrs. Airey applied for “just satisfaction” under Article 50 of the Convention, requesting compensation in respect of travelling and miscellaneous expenses, loss on re-housing, as well as legal costs.<sup>29</sup> While she was able to reach a settlement with Ireland regarding her domestic legal costs, the Court rejected her claim for compensation in respect of her loss on re-housing. The Court explained the basis of her claim as follows:

Mrs. Airey moved house in 1977. As a tenant, she had certain possibilities of purchasing her home under the Tenant Purchase Scheme operated by her landlord, Cork Corporation. She claimed that her move, which she attributed to her inability to gain effective access to a remedy for breakdown of marriage, the consequent deterioration in her position and her apprehension that her husband might attempt to return and live with her, had occasioned her a loss of £ 1,500 representing the difference in market value, as at July 1977, between the two premises in question.<sup>30</sup>

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<sup>26</sup> Airey v. Ireland (Merits), *supra* note 24 at para 13.

<sup>27</sup> In Ireland, a husband and wife are under a duty to cohabit. See *ibid* at para 33.

<sup>28</sup> *Ibid* at para 28 and 33. See also Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 at 223, EUR T.S. 5 [ECHR] at Articles 6-1 and 8.

<sup>29</sup> Airey v. Ireland (Just Satisfaction), *supra* note 24 at para 5.

<sup>30</sup> *Ibid* at para 12.

The government of Ireland contested the claim on the grounds “that there was no causal relation between her decision to move and the absence, in 1977, of legal aid for separation proceedings.”<sup>31</sup> The Court agreed that her loss was not attributable to the violations:

Her decision to move appears to have been motivated not by the fact that she did not enjoy an effective right of access to the High Court for the purpose of petitioning for judicial separation but rather by her general situation underlying her wish to have such access and, in particular, by her fear of molestation by her husband. Besides, even if she had obtained a separation decree, she would have remained subject to the risk of the molestation which rightly or wrongly she apprehended. The Court accordingly rejects this claim.<sup>32</sup>

As Shelton notes, “[t]he standard of proof required to demonstrate a causal link between the loss and the violation is high [...], even where common sense suggests the causal link was there.”<sup>33</sup> Shelton comments on the *Airey* decision specifically, noting that “*but for* the violation, Mrs. Airey likely would have had judicial protection against her husband and would not have needed to move to escape him.”<sup>34</sup> The Court’s rejection of her claim suggests a problematic framing of the issue.

While Mrs. Airey’s decision to move is considered too remote from her denial of access to the High Court to obtain a separation decree, the Court acknowledges that the extent to which obtaining such a decree would have sufficiently protected her from the risk posed by her husband would have been minimal. Despite the Court’s assertion that Article 8 of the Convention requires States to fulfill “positive obligations inherent in an

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<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Shelton, Remedies in International Human Rights law, *supra* note 20 at para 323.

<sup>34</sup> *Ibid.*

effective respect for private or family life,”<sup>35</sup> the decision not to award compensation to Mrs. Airey for her moving expenses makes such obligations appear to be of minimal scope and value. So long as Mr. and Mrs. Airey remained married, they remained under a legal obligation to live together. Mrs. Airey’s move appeared to be out of the fear that so long as her husband knew where she lived, he would be able to act upon some right of access to her home. The implication of the separation agreement is that Mrs. Airey would no longer be under a legal obligation to live with her husband; presumably this would have entitled her to some additional form of protection against any attempt by him to intrude upon her home.

The fact that the Court does not consider this implies an acknowledgement that separation agreements are weak protection for victims of domestic violence, to the extent that their denial cannot be the cause of other measures taken for protection. It seems odd that the court would allude to positive obligations for States to provide relief from the obligations undertaken between husbands and wives upon marriage if relief from such obligations carries only symbolic significance. The Court’s affirmation of Ireland’s agreement to cover Mrs. Airey’s domestic legal costs in seeking a separation as the only valid form of compensation suggests that the obligation has only procedural significance – to provide Mrs. Airey with access to a procedure by which she can change her legal relationship with Mr. Airey, but which serves no other purpose. It is as if the Court sees the purpose of the separation as providing Irish couples with a mechanism to live apart legally, rather than conceiving of the separation decree as a means of preventing one

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<sup>35</sup> *Airey v. Ireland (Merits)*, *supra* note 24 at para 32.

spouse from forcing cohabitation on another. Given that this was the very reason that Mrs. Airey was seeking the decree, it is disappointing that the court did not acknowledge the scope of its significance.

The *Airey* decisions illustrate the limitations of compensatory remedies for a State's failure to protect women from domestic violence where the rights violation does not take systemic discrimination and gender inequality into account; so long as protection at the domestic level remains weak, compensation claims for losses resulting from a State's failure to provide access to the limited range of domestic remedies that do exist will fail for lack of a sufficient causal connection. This is due largely to the way in which the right and its violation are framed; the right to a fair trial in civil and criminal matters (Article 6-1) and the right to respect for private and family life are conceived by the Court absent an awareness of how gender discrimination, and domestic violence as a manifestation of that discrimination, impact on rights fulfillment. The European Court of Human Rights was perhaps reluctant to grant compensation for Mrs. Airey's moving expenses because under their analysis it would extend Ireland's obligation to provide a means of spousal separation too far. Because the Court did not accept that the separation decree itself would not have eliminated "the risk of molestation" by her husband, awarding compensation for actions taken on her own to minimize that risk would open the door to compensation claims for all protective actions Mrs. Airey or any other claimant might have taken. The Court seems to implicitly accept that State action to protect women from domestic violence cannot be a part of the right to respect for private

and family life. This is likely due to the original conceptualization of the right as protecting individuals from state interference, rather than embodying notions of positive obligations necessitating state action.<sup>36</sup> If the right is conceived as protecting against state interference in family life, then to the extent that the family is itself a site that enforces of discriminatory gender norms<sup>37</sup>, the right actually serves to *reinforce* rather than provide any opportunity to challenge discrimination against women.

Compensation, as a remedy, is limited in this context because of its inherently backward looking nature: the basis of compensation is determined only after the scope of the violation. The analysis does not begin with what the complainant should be compensated for; compensation is only granted to the extent that there is recognition of a wrong. The wrong itself is determined only in relation to the scope of the right. Where the right is defined absent an awareness systemic discrimination, the scope will seem narrow in relation the actual loss and expense incurred by the victim. The European Court of Human Rights defined the issue in terms a woman being unable to obtain a separation decree because she was denied access to legal aid, whereas the facts suggests something much more complex. Mrs. Airey was not only seeking a separation decree, she was seeking to put an end to a legal relationship that required her to live with an abusive partner. Although, as mentioned above, compensation can never fully restore rights that have been violated, it is particularly limited as a remedy where the issue of systemic gender discrimination remains absent from the analysis.

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<sup>36</sup> Airey v. Ireland (Merits), *supra* note 24 at para 32.

<sup>37</sup> See the discussion on the WHO study and the way in which domestic violence reinforces concepts of appropriate gender behaviour, *supra*, in Part II .

An additional weakness of monetary compensation as a remedy in general is that it has the appearance of allowing those responsible for rights infringements to choose between respecting rights or paying damages; where a state finds compensation the more desirable option, rights become, in a sense, commoditised. Shelton notes that “[i]n the European system, the number of procedural delay cases stemming from inefficient legal systems suggests that governments have chosen to pay each litigant for delays in their judicial system rather than reform the system as the Convention requires.”<sup>38</sup> However, she raises the concern that the “risk of non-compliance may make Courts reluctant to issue an order, especially because the wrongdoer has already shown a disregard for the substantive law.”<sup>39</sup> International human rights courts are likely to be reluctant to issue orders that seek to address the structural reinforcement of gender inequality precisely because the issue is so often framed as a matter of local culture or religion. As mentioned above, the type of change that is required cannot be imposed.

States within the jurisdiction of international human rights tribunals, such as the European Court of Human Rights, who are continually found culpable for similar violations may benefit from the imposition of excessive damages that prevent the government ignoring the need for systemic change.<sup>40</sup> However this type of solution will only help victims of domestic violence once the systemic nature of the problem and a particular State’s reluctance to address the issue has been acknowledged. Because victims of domestic violence are likely to face obstacles in accessing mechanisms for legal

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<sup>38</sup> Shelton, Remedies in International Human Rights Law, *supra* note 20 at 290.

<sup>39</sup> *Ibid.*

<sup>40</sup> This is suggested by Shelton, *Ibid.*

redress, a reliance on numerous victims to come forward to expose the same kind of shortcoming on the part of the State is both unrealistic and unlikely to occur within a reasonable time frame. Further, while the Optional Protocol to CEDAW allows the CEDAW Committee to investigate a State's non-compliance by focusing directly on the State's failure to take adequate measures to eliminate discrimination against women, it is unable to issue binding orders and is essentially advisory in nature.<sup>41</sup> Ultimately, international judicial orders are unlikely to be the basis for significant reform.

Declaratory judgements<sup>42</sup> perhaps embody the greatest potential to serve as an effective remedy for States' failure to protect women from domestic violence. While the judgment can "be viewed as morally equivalent to an injunction, requiring a change in the law or practice," they are also, from the State's perspective, "the least intrusive remedy that a tribunal can afford the victim of a human rights violation."<sup>43</sup> Further, as Shelton notes, "for states committed to upholding a treaty and fulfilling in good faith their obligations, the adjudication itself may be of greatest significance."<sup>44</sup> However, in the context of rights claims centering on a State's failure to provide adequate protection to victims of domestic violence, the adjudication will not be effective so long as it fails to persuade States to address the underlying issue of systemic discrimination against women.

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<sup>41</sup> Optional Protocol, *supra* note 1 at Article 8.

<sup>42</sup> These are essentially "binding judgments that the state is in breach of its international obligations." See Shelton, Remedies in International Human Rights Law, *supra* note 20 at 255.

<sup>43</sup> *Ibid* .

<sup>44</sup> *Ibid*.

In this regard, recommendations issued by the CEDAW Committee in accordance with the Optional Protocol offer the greatest potential.<sup>45</sup> Because the State parties have undertaken obligations to eliminate all forms of discrimination against women, this should allow for a proper characterization of the issue of domestic violence as intrinsically linked to discrimination against women. Focusing on discrimination as a key factor that prevents women from enjoying their internationally protected human rights is a critical first step in the development of remedies for gender-based violence, as well as other rights infringements that stem from gender inequality.

Once a violation has been properly characterized and identified, the next challenge lies in providing recommendations to states on how to effectively remedy the situation. In doing so, the CEDAW Committee must keep in mind the arguments outlined above regarding the need to both confront discriminatory cultural norms and beliefs while keeping in mind that their recommendations may be resisted by both State governments as well as by local populations precisely because of these norms. This challenge is apparent in the views expressed by the Committee in the matter of *A.T. v. Hungary*. Mrs. A.T. filed a communication alleging violations by Hungary of articles 2(a), (b) and (e), 5(a) and 16 of CEDAW “for its failure to provide effective protection from her [abusive] former common law husband.”<sup>46</sup> While Hungary submitted that since the filing of the

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<sup>45</sup> Shelton states that “[t]he decisions and recommendations of commissions, committees and special rapporteurs can be considered as falling between an advisory opinion and binding judgments of courts, but closer in nature to the latter. They constitute authoritative findings on the facts and the law which states parties to the treaties should comply with in good faith.” *Ibid* at 267.

<sup>46</sup> *A.T. v. Hungary*, (2003) Communication No.: 2/2003, Views Adopted at the Committee on the Elimination of Discrimination Against Women at its 32<sup>s</sup> Sess, January 26<sup>th</sup>, 2005 at para 3.1 [available at: <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/A.T.-v-Hungary-2-2003.pdf>]

communication, it had “instituted a comprehensive action programme against domestic violence,” Hungary had yet to implement the program and subsequently conceded that “the legal and institutional system in Hungary is not ready yet to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.”<sup>47</sup>

In finding that Hungary had in fact failed to fulfil its obligations under each of the articles cited above, the Committee expressed concern “that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence.”<sup>48</sup> The Committee also drew attention to its observance “on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them,” and that it had

“recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002 and was concerned about the ‘persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family’.”<sup>49</sup>

The observations on the role of cultural beliefs and stereotypes are critical in their identification of the source of the problem; the concern that Hungary had not implemented legislation specifically to address domestic violence is also important as it identifies domestic violence as a form of violence that necessitates a specific kind of legislative action. However, what is disappointing about the ultimate recommendations

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<sup>47</sup> *Ibid* at para 7.4

<sup>48</sup> *Ibid* at para 9.3

<sup>49</sup> *Ibid* at para 9.4

issued by the Committee is that they make little no effort to link the source of the problem to the recommended actions aimed at remedying the violation. While the Committee calls on Hungary introduce “a specific law [...] prohibiting violence against women,”<sup>50</sup> and further calls on Hungary to “take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated,”<sup>51</sup> the connection between these two recommendations is not expanded upon.

Throughout the Committee’s consideration of the communication there is reference to the inability or the unwillingness of state actors to give effect to the minimal remedies available to victims of domestic violence. Ms. A.T. reported that despite the entry into force of a new protocol on police response to domestic violence, “batterers are not taken into custody” and that instead “the police mostly mediate on the scene.”<sup>52</sup> Ms. A.T.’s difficulty in making use of the domestic legal system generally, suggests resistance on the part of judges and police officers to take her efforts at seeking protection seriously. This strongly indicates that the implementation of new legislation will not be sufficient to afford women with adequate protection; so long as violence remains legitimized within the culture, state authorities are unlikely to adequately enforce even the most progressive laws.

The national action strategy developed by Hungary and outlined by the Committee included a “nationwide campaign to address indifference to violence within

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<sup>50</sup> *Ibid* at para 9.6

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid* at para 6.1

the family and the perception of domestic violence as a private matter.”<sup>53</sup> This campaign may have actually proven to be extremely beneficial in changing attitudes that stifle the effectiveness of legal reforms, had it in fact ever been launched. However, the Committee does not comment on the role such a campaign could serve in contributing to Hungary’s fulfilment of its obligations under CEDAW. While legal reforms are certainly important, they will remain meaningless if they are not properly implemented. The recommendations issued by the Committee would have benefited from an emphasis on why addressing attitudes of indifference towards domestic violence must be part and parcel of any effective project of legal reform. In doing so, the Committee could have identified the manner in which cultural norms influence legal institutions and actors and thereby have an enormous impact on the application of law in practice. This would not require anything close to a condemnation of the culture. Rather, it would involve an articulation that gender equality is a *legal norm*, and that the extent to which cultural views conflict with that norm, it is the responsibility of States to engage with culture and promote change, rather than compromise the scope and content of the norm itself.

## **Conclusion**

Encouraging States to engage with local cultures in a manner that promotes the full protection of and respect for women’s equal enjoyment of their human rights is a delicate and difficult challenge. However, it must be a crucial first step in formulating effective remedies for gender-based rights violations. Upon a consideration of the types of remedies currently available in international human rights law, recommendations

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<sup>53</sup> *Ibid* at para 5.7

issued by the Committee on the Elimination of Discrimination Against Women in response to claims filed through the Optional Protocol to CEDAW currently offer the greatest remedial potential. As CEDAW is specifically concerned with eliminating discrimination against women, recommendations by the Committee arising from petitions via the Optional Protocol are more likely to reflect the role of gender discrimination in preventing women from full enjoyment of their human rights, and will therefore be better able to persuade States to adopt measures that take systemic gender discrimination into account. Where, in cases such as *A.T v. Hungary*, the State has contemplated such remedies but has failed to implement them, it is incumbent on the Committee to emphasise the necessity of confronting discriminatory practices as essential in the fulfilment of States' obligations not only under CEDAW, but under all agreements that guarantee the protection of human rights.