

# Culture, power and narratives in domestic violence law

This article presents the theoretical foundation for the claim that societal acceptance or rejection of domestic violence is shaped by those in positions of power and influence. The modern Westphalian state is uniquely invested with power to politically determine and mediate cultural narratives, as it can legitimize ethos, values, and practices through both legal and political machinations, as well as action and – more crucially – inaction. The state is thus imbued with the responsibility to encourage and create cultures free of domestic violence.

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First, an examination of the formulation of narratives of cultural discourse. Assertions that domestic violence is embedded in any one culture must be challenged to expose it as a practice supported and re-enacted through cultural narratives. Rather than essentializing domestic violence as culturally embedded, it is more constructive to acknowledge that it is a culture in and of itself. In this latter construction, culture is a socio-political symbolic discourse that changes over time with the state playing a role in its incarnation. Consequently, even if domestic violence exists as an oppressive and reprehensible practice within cultures, it should not be preserved, respected, and perpetuated. Second, an analysis of how and why domestic violence continues to be erroneously placed within culture, as well as the consequent difficulty in challenging it due to intersecting issues of privacy, culture, and honour. Third, the claim that the contestation of rights to privacy within the family and rights of victims of domestic violence cannot be resolved in favour of the former. And finally, an examination of the patterns of state action and inaction that condone and even encourage domestic violence. This discussion concludes by reiterating the primacy of eradication of violence in the construction of society and the nation state. In the endeavour to eliminate domestic violence, culture must be deconstructed; instead of justifying domestic violence in the name of culture, culture should be enlisted to create a non-violent society.

## The narrative of cultural discourse: conceptual understanding of culture and domestic violence

Cultural narratives that demand social and legal acceptance of domestic violence as well as assertions that all cultural practices be preserved need to be challenged. When conservative forces claim ownership over 'authentic' interpretations of culture, tradition, and religion that include domestic violence, women are not only told to accept violence, they are denied their role as equal and active contributors to the development and production of culture. Thus normative laws and rights are not only intrinsic to cultural formations, the formulation of the cultural narrative is itself bound to law making, power, and privilege.

The essentialization of domestic violence occurs more frequently and is more commonly accepted when located within the culture of the 'other'. This results in states' acceptance and tolerance of domestic violence as a manifestation of other cultures. Yet, victims of domestic violence are not limited to certain cultural backgrounds. The common view of domestic violence as embedded in cultural practice must thus be reconceptualized. Domestic violence as a culture phenomenon, with an understanding of culture as a system of practices that is distinct to a society or group, implies that only women from certain communities are victims of domestic violence. Furthermore, the conflation of acknowledging the prevalence of domestic violence and tolerating it as a manifestation of culture deserving of preservation allows culture to be invoked as explanation – if not justification – for domestic violence, thus conceptualizing women not as victims of violence, but transgressors of culture. Such reasoning sets up a false binary between domestic violence and culture, compelling both state and society to choose between honouring culture and eradicating domestic violence.

The interrelationship between culture, power and privilege must be examined. Power and the use of power to protect privilege not only leads to the defeat of the voices of the powerless but, over time, to their silence altogether. Thus, culture as a practice is reflected in wilful action, power relations, struggle, contestations, and contradictions. Such contestations can be illustrated, for example, by examining the gang-rape of Mukhtar Mai. The Pakistani Mastoi tribal leaders, powerful members of a remote community, ordered the gang-rape of Mukhtar Mai as punishment and revenge. In the case of Mukhtar Mai, the revenge was for the alleged audacity of a male member of her family (from a lower caste) to socially liaise with a woman from the higher caste of the Mastoi tribe. Many Pakistanis condemned the rape, and the Chief Justice of Pakistan ordered the provincial police chief and senior provincial officials to appear before the Supreme Court. Mukhtar Mai herself sought to create an alternative cultural narrative by using her compensation money to build two schools, with the belief in education's role in changing male mindsets.

Mukhtar Mai. Image reproduced under a creative commons license, courtesy of 'United Nations Photo' on flickr.

Local contestations within Pakistani society demonstrate that the justification of violence in the name of Pakistani 'culture' entails the adoption and legitimization of the narratives of only the male Mastoi tribal members. The role of the Pakistani state must be to mediate between contesting narratives; it is not the state that is held at the mercy of culture, but it is the state that moulds culture and with it, cultural identity. Punishing the tribal leaders and providing reparation for Mukhtar Mai sends a powerful signal that the state does not tolerate sexual violence against women, and that it is determined to root out sexual violence from institutional and cultural structures, thus creating a Pakistani culture free of sexual violence.

## Uncovering why domestic violence is erroneously essentialized as culture

The clash between traditional cultures and modernization in the discourse of domestic violence is misplaced. Domestic violence is a systemic global practice embedded in masculinities, patriarchy, and the domination of women that is then justified in the name of honour, culture, and religion; in the process, this re-conceptualizes women not as victims of violence, but as violators of culture and family (male) honour. Dominant societal notions of manhood depend on male superiority over, and entitlement to govern, women. Cultural justification of domestic violence obscures the fact that it is steeped not in culture, honour or religion, but in practices of violence. As long as men's 'conjugal mastery' over women can be rationalized as being rooted in tradition and culture, the right to maintain and enforce this mastery through domestic violence will remain unquestioned.

The state's conceptualization of the family as situated within the private realm under the husband's stewardship, away from state scrutiny and intrusion, further protects this status quo. In cases of domestic violence - through inaction - the state perpetuates a culture of domestic violence. Ironically, such inaction is an aberration, as the state has an interest and duty in confronting and eradicating all forms of violence. According to dominant theories of political philosophy, rules against violence and the use of force are the historical impetus for society-formation away from the Hobbesian "state of nature". Therefore, confronting violence is and must be the primary duty of the nation state. When the state assumes the right to punish transgressors in the name of society, the individual simultaneously gives up his right to do so.

In order to analyze the practice and prevalence of domestic violence, it is important to inquire not only into the subordination of women, but also into relationships between men. The continuous competition for social status and hierarchy between men has given rise to what anthropologists call a "culture-of-honour" stance. This stance links the idea of male honour to physical prowess, toughness, and courage. It also requires men to define themselves as dominant to women, using violence if necessary. Consequently, while other expressions of culture-of-honour are circumscribed by the state, violence against women generally, and domestic violence specifically, remain the main surviving expressions of culture-of-honour violence. This disinclination not only translates into impunity for perpetrators of domestic violence, it points to a breakdown of societal order and the failure of states in discharging their guarantee to protect women from violence. Indeed, the state is required to exercise a *higher* degree of vigilance in relation to domestic violence, as violence in the home is so easily rendered invisible.

If the state allows a man to commit domestic violence with impunity, or accepts his honour defence, the state signals that it will support domestic violence as providing symbolic meaning - at the expense of women's security and lives. Thus the state's actions (or inaction) signify that it is willing to incarnate domestic violence as a culture in and of itself. Domestic violence excused in the name of culture erases from view the injury to women, and actively re-inscribes it as injury to male and family honour. Legal rules not only influence the development of the 'honour' norm, they create it. Legitimizing the commission of a category of violence in the name of honour circumscribes the boundaries of 'honour'. The law, in espousing a norm that the ordinary

man can lose his self-control and commit violence against his wife and other women, removes the constraint on men to control their behaviour. When law provides domestic violence with an excusatory dimension, men are wont to practice it whenever an affront is perceived. It is the state's failure to take effective action against domestic violence that has resulted in a mainstream discourse that both accepts honour as a defence for domestic violence and incorporates the 'honour defence' as part of state cultural identity. (See *Opuz v. Turkey* ECHR 2009; *Maria Da Penha v. Brazil* IACHR 2000)

In law, the defence of honour and provocation, premised on the loss of self-control, are often used interchangeably. Like self-defence, the defence of provocation must be premised on an absence of opportunity to avert violence, and a provocation that is grave and sudden. Honour crimes, however, are often seen as punishment for moral transgressions against family and male honour, and therefore does not accord with the elements of the defence of provocation. It is also instructive to compare the treatment of the 'honour defence' to that of self-defence, which is more commonly used by victims of domestic violence when they are prosecuted for attacking or killing perpetrators of violence. In *State v. Stewart* (1988), the Supreme Court of Kansas held that Peggy Stewart could not avail of a self-defence instruction to the jury because there was an absence of imminent danger.

Therefore, it is not domestic violence per se that formed the basis of the courts' rationalization; rather, it is violence by a man against a woman in the name of male honour that the courts are willing to rationalize and, to a certain extent, accept and forgive, thus encouraging and perpetuating a culture of domestic violence against women.

## Contestation of rights

Cultures are shaped by states, either through affirmative action in promoting certain values, ethos, customs and practices, or through inaction in allowing values and practices to be enacted and re-enacted sans state interference. By extension, cultures, therefore, are not above reproach.

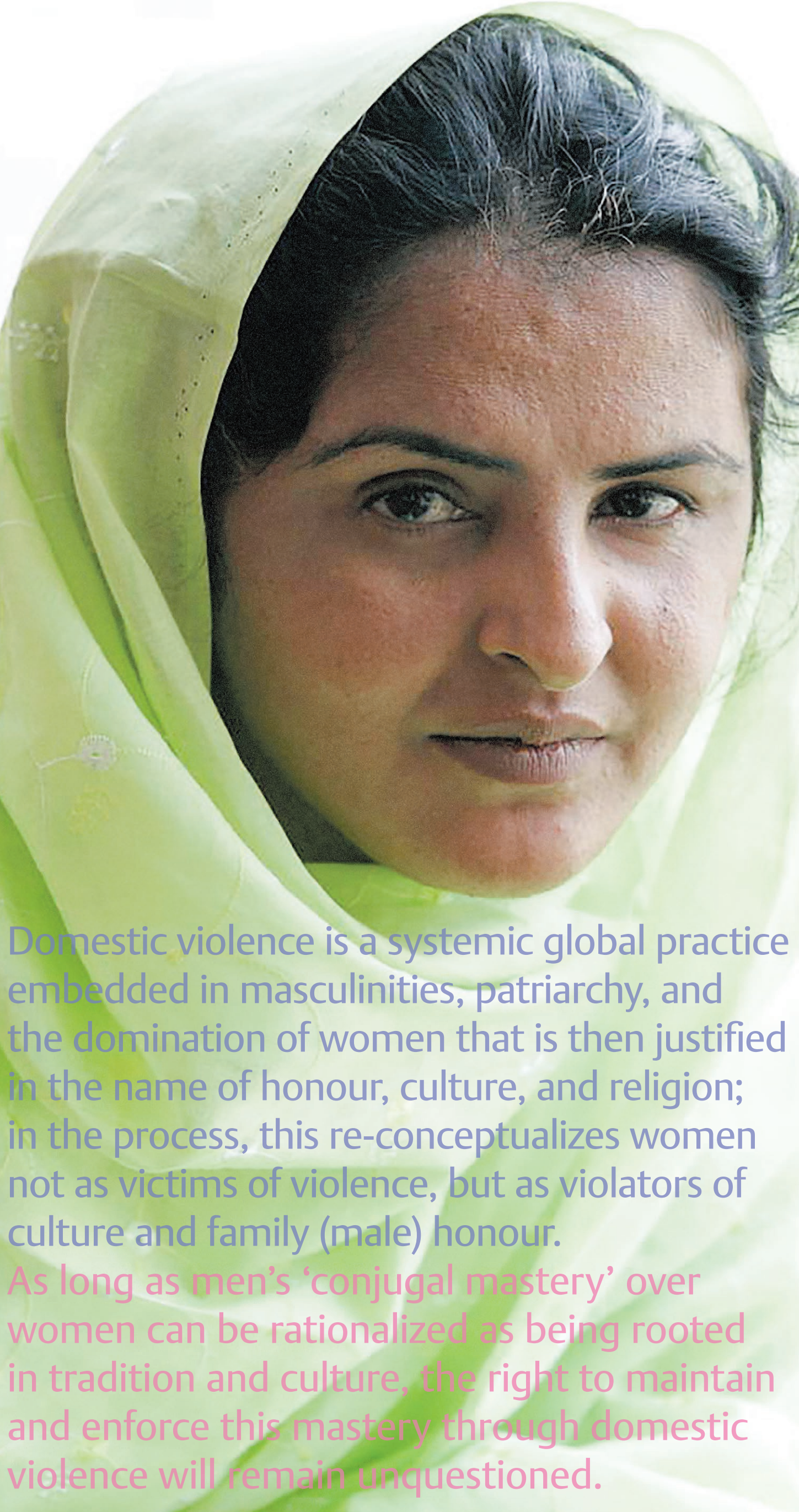
The state and society generally have a deep interest in the institution of the family, which in domestic violence cases, translates into prioritizing the perpetrator's right to family over that of the victim's human right to life and physical and mental integrity. Positing the institution of the family within the private sphere and removing the private sphere from scrutiny of the law and the community, the state can divest itself of all responsibility over the supervision of behaviour within the family. In so doing, the state cloaks itself in an aura of neutrality while turning a blind eye to injustice and violence within the family. In *Opuz v. Turkey*, the state relied on this contestation of rights to justify its non-interference with the family and the perpetrating husband's rights to privacy.

Although conflicts between rights are unavoidable, it is the state's duty to intervene in the commission of violence against another person. This duty embraces different notions of responsibility. Implicit is the state's positive obligation to promote and protect the right to security of every person. In considering the contestation of rights, states must, therefore, resolve in favour of protecting the safety and security of every person. Thus state intervention in private or family life of individuals is necessary not only to prevent the commission of criminal acts, but also to promote and protect the health and security of others.

## Role of the state in shaping culture

The condoning of domestic violence by the entire state system serves to perpetuate the alleged basis and factors that sustain and encourage domestic violence. Yet, the meaning of symbols change over time and place, which makes for autonomy in the cultural dimension. For signs to have meaning, there must be systematic relationships among signs and a group of people who recognize those relationships. When we take the meaningful aspect of human action out of the flow of concrete interactions, we are able to disentangle the semiotic influences on action from other sorts of influences. In this sense, culture may be thought of as a network of relationships.

Through its legal and political machinations, states create and perpetuate a culture of domestic violence. If society sees no evidence of willingness by the state to take effective



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action to sanction against domestic violence, society will more readily associate domestic violence with its own cultural identity. Thus, when states fail to prevent or prosecute domestic violence, it is the state and not traditional practice or ethos that should be the focus of our inquiry. Examining domestic violence from the perspective of the state's role exposes domestic violence as a culture in and of itself. State inaction in enforcing the letter of the law coupled with signals given by the legal and judicial officers that domestic violence is tolerated, implicitly sanction the continued practice of domestic violence. Thus where a culture of domestic violence exists, domestic violence is transformed into institutional and structural violence that is found formally or truly embedded in society.

In international law, states are required to act with due diligence to eliminate violence against women. Despite this and international and regional instruments investing states with the responsibility to eliminate violence against women, many states lodge reservations on the grounds of culture. These reservations, in so far as they apply to domestic violence, are made all the more serious in view of the argument that domestic violence should be understood and treated as a form of torture and, when less severe, ill-treatment.

The prohibition of torture as a whole is a *jus cogens* that violates the demands of humanity and dictates public conscience. Torture is *malum in se*, namely that torture is just wrong and would be wrong whether positive law prohibits it or not. Acknowledging that domestic violence can be torture, or at the very least ill-treatment, elevates it into *jus cogens* prohibition in international law, which necessarily means that states are not able to derogate from their obligation to intervene, prevent, stop, sanction and provide remedies in cases of domestic violence. As there can be no 'cultural defence' against torture, there can be no cultural defence against domestic violence.

#### Conclusion

Traditional practices, ethos and values that form the 'cultural excuse' for domestic violence must be questioned. Domestic violence cannot be justified in the name of the family, society or national/traditional culture. Neither can perpetrators be given impunity under any guise. States should be held accountable for complicity in domestic violence, whenever they create and implement laws that directly or indirectly trap women in abusive circumstances. This includes accepting, justifying and excusing domestic violence on cultural grounds. The state's sanction of domestic violence in the name of culture on the one hand, and its refusal to intervene into family life in the name of the right to privacy and family on the other, has created a fertile terrain for the perpetuation of domestic violence. It is essential that we remove the culture of violence from the family, eliminate state tolerance (and implicit encouragement) of domestic violence and emphasize the message that domestic violence has no part to play in the cultural identity of society.

The avoidance and prevention of violence constitute the basic purpose of lawmaking. The predominant model of addressing domestic violence both as discrimination and through the formal judicial system has borne limited success. Hence, it is essential that we broaden our understanding of domestic violence to emphasize the harm it causes. Domestic violence is an assault on human dignity, often seeking to reduce or eradicate a person's autonomy, destroy self-esteem and compel subjugation.

Deconstructing culture in the context of domestic violence, therefore, involves examining the identities of those claiming their rights to culture, the authorities that sanction these rights, and in the event culture is used to claim legal rights, the role of the state as the final arbiter in recognizing and perpetuating these claims. In this regard, it is more accurate to construct domestic violence as a culture in and of itself, rather than embedded in culture, and to scrutinize the role of the state in alternatively creating, tolerating, developing and encouraging a culture of domestic violence as well as the state's role and responsibility in its eradication.

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