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Volume 11, numéro 1, 1998

URI : <https://id.erudit.org/iderudit/1100695ar>

DOI : <https://doi.org/10.7202/1100695ar>

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Éditeur(s)

Société québécoise de droit international

ISSN

0828-9999 (imprimé)

2561-6994 (numérique)

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Citer cet article

Cook, R. J. (1998). FOSTERING COMPLIANCE WITH WOMEN'S RIGHTS IN THE INTER-AMERICAN SYSTEM. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 11(1), 129–142. <https://doi.org/10.7202/1100695ar>

Résumé de l'article

Cet article examine les raisons pour lesquelles les États des continents américains ont tardé à se conformer aux droits des femmes depuis l'adoption en 1948 de la *Déclaration américaine des droits et devoirs de l'homme*. Cet article explique que les États ne tendent à obéir au droit international qu'à la suite d'interventions répétées de la part des acteurs transnationaux. Afin d'encourager la soumission des États, on doit donc, en premier lieu, habiliter plus d'intervenants intéressés par la situation des femmes, surtout celle des femmes marginalisées. En second lieu, il importe d'explorer comment les différentes tribunes, tant au niveau régional qu'international, ont servi ou pourraient servir dans l'application du domaine des droits de l'homme aux préjudices vécus par les femmes. En rapport avec cette deuxième étape, l'article fait un survol de la jurisprudence au sujet des femmes élaborée par la Cour interaméricaine des droits de l'homme, par la Commission interaméricaine des droits de l'homme et par les différentes instances internationales établies par traités. Une troisième étape pouvant favoriser cette soumission des États, consiste à évaluer les stratégies sur la meilleure façon de mettre en oeuvre les droits des femmes dans le droit, les politiques et les pratiques internes de ceux-ci. Relativement à cette dernière étape, l'article identifie quelques-unes des observations et conclusions clé formulées dans les rapports sur les États préparés par les instances internationales conventionnelles, et prend note du fait que la majorité des États se doivent, aujourd'hui encore, de modifier leurs lois afin de respecter ces observations. En conclusion, l'article examine comment un système de sanctions et de récompenses, ou une combinaison des deux, pourrait servir à améliorer pour le futur l'acquiescement des États aux prescriptions des droits humains établis en faveur des femmes.

FOSTERING COMPLIANCE WITH WOMEN'S RIGHTS IN THE INTER-AMERICAN SYSTEM

Par Rebecca J. Cook*

Cet article examine les raisons pour lesquelles les États des continents américains ont tardé à se conformer aux droits des femmes depuis l'adoption en 1948 de la *Déclaration américaine des droits et devoirs de l'homme*. Cet article explique que les États ne tendent à obéir au droit international qu'à la suite d'interventions répétées de la part des acteurs transnationaux. Afin d'encourager la soumission des États, on doit donc, en premier lieu, habiliter plus d'intervenants intéressés par la situation des femmes, surtout celle des femmes marginalisées. En second lieu, il importe d'explorer comment les différentes tribunes, tant au niveau régional qu'international, ont servi ou pourraient servir dans l'application du domaine des droits de l'homme aux préjudices vécus par les femmes. En rapport avec cette deuxième étape, l'article fait un survol de la jurisprudence au sujet des femmes élaborée par la Cour interaméricaine des droits de l'homme, par la Commission interaméricaine des droits de l'homme et par les différentes instances internationales établies par traités. Une troisième étape pouvant favoriser cette soumission des États, consiste à évaluer les stratégies sur la meilleure façon de mettre en oeuvre les droits des femmes dans le droit, les politiques et les pratiques internes de ceux-ci. Relativement à cette dernière étape, l'article identifie quelques-unes des observations et conclusions clé formulées dans les rapports sur les États préparés par les instances internationales conventionnelles, et prend note du fait que la majorité des États se doivent, aujourd'hui encore, de modifier leurs lois afin de respecter ces observations. En conclusion, l'article examine comment un système de sanctions et de récompenses, ou une combinaison des deux, pourrait servir à améliorer pour le futur l'acquiescement des États aux prescriptions des droits humains établis en faveur des femmes.

This article explores why the practice of states in the Americas has been slow to comply with the human rights of women since the adoption of the *American Declaration of the Rights and Duties of Man* in 1948. The article explains that since states tend to obey international law as a result of repeated interaction among transnational actors, a first step toward fostering compliance is to empower more actors concerned with women, particularly marginalized women, to participate in the process. A next step is to explore how the available forums at both the regional and international levels have been and could be used to apply human rights to the harms experienced by women. Consistent with this step, the article reviews the case law concerning women developed by the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the international treaty bodies. A third step toward fostering compliance is to assess strategies of how best to internalize women's rights into domestic laws, policies and practices. Pursuant to this step, the article identifies some of the key concluding observations in the country reports of treaty bodies, and notes that most states have yet to change their laws to comply with these observations. The article concludes by examining how sanctions and rewards, or a mixture of the two, could be used to improve compliance with the human rights of women in the future.

Este artículo examina las razones por las cuales los Estados de los continentes americanos tardaron en conformarse a los derechos de las mujeres desde la adopción en el 1948 de la *Declaración americana de los derechos del Hombre*. Este artículo explica que los Estados tienden a obedecer el derecho internacional sólo después de repetidas intervenciones por

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parte de actores transnacionales. Con el fin de alentar la sumisión de los Estados, se debe, en una primera etapa, facultar más actores interesados en asuntos de mujeres, sobre todo los que se refieren a mujeres marginadas. Una etapa siguiente consiste en explorar como los distintos foros, tanto a nivel regional como internacional, sirvieron o podrían servir para la aplicación de los derechos del hombre en relación con los perjuicios experimentados por las mujeres. Consecuentemente con esta segunda etapa, el artículo revisa la jurisprudencia sobre asuntos de mujeres elaborada tanto por la Corte como por la Comisión interamericana de derechos humanos así como por las diferentes instancias internacionales establecidas por tratados. Una tercera etapa, hacia el fomento de la sumisión de los Estados consiste en valorar las estrategias sobre la mejor manera para «internalizar» los derechos de las mujeres en el derecho, en las políticas y en las prácticas internas de dichos estados. En relación con esta última etapa, el artículo identifica las observaciones y conclusiones claves formuladas respecto de los informes sobre los Estados por parte de organismos internacionales convencionales, y toma nota del hecho de que la mayoría de los Estados deben modificar, todavía hoy en día, sus leyes para respetar esas observaciones. En conclusión, el artículo examina como un sistema de sanciones y recompensas, o una combinación de los dos, podría servir para mejorar, en el futuro, el cumplimiento de los Estados con los derechos humanos que benefician a las mujeres.

I. Introduction

The 50th anniversary of the *American Declaration of the Rights and Duties of Man*¹ offers an important opportunity to reflect on what the Inter-American system has done and could do to foster compliance with the human rights of women. Most feminist international legal scholars have tended to focus on why nations should obey international law to improve women's status. This paper tries to stand back from the normative question, and to ask why in practice nations have been slow to comply with international law regarding women. The paper is exploratory, recognizing that much more work is needed to adequately address this issue.

The protection of women's rights through the Inter-American system is evolving through four overlapping stages of development.² During the first stage of development, states focused on the promotion of specific legal rights of women, such as through the negotiation of specialized conventions, for instance concerning nationality,³ and civil⁴ and political⁵ rights. During the second stage of development states have succeeded in including sex as a prohibited ground of discrimination in the *American Declaration*, the *American Convention on Human Rights*⁶ (the *American Convention*) and, for example, the *International Covenant on Civil and Political Rights*⁷ (the *Political Covenant*). The third stage of development addresses the pervasive and structural nature of violations of women's rights through the effective application of the *Convention on the Elimination of All Forms of Discrimination Against Women*.⁸ The elimination of *all forms* of discrimination includes work on eliminating gender discrimination, meaning socially constructed in contrast to discrimination on biological grounds, such as the exclusion of women from positions of authority on a presumed basis of intellectual or temperamental unfitness. The fourth stage of development seeks to integrate women's concerns into more generalized treaties such as the one establishing an international criminal court.⁹

The *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, known as the *Convention of Belém do Pará* for

¹ OR OEA/Ser.L/V/II.23/Doc.211 rev. 6 (1949) [hereinafter *American Declaration*].

² R.J. Cook, "The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women" (1995) 5 *American Society of International Law Issue Papers on World Conferences* 23.

³ *Inter-American Convention on the Nationality of Women*, 26 December 1933, O.A.S.T.S. No. 4.

⁴ *Inter-American Convention on the Granting of Civil Rights to Women*, 2 May 1948, O.A.S.T.S. No. 23.

⁵ *Inter-American Convention on the Granting of Political Rights to Women*, 2 May 1948, O.A.S.T.S. No. 3.

⁶ *American Convention on Human Rights*, 22 November 1969, O.A.S.T.S. No. 36.

⁷ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 [hereinafter *Political Covenant*].

⁸ *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, UN Doc. A/20378 (1979) 13; *Opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14 [hereinafter *Women's Convention*].

⁹ *The Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc. A/CONF O. 183/9.

the place of its adoption,¹⁰ is a hybrid of all four stages. It addresses a specific problem, but it requires states to address the structural causes of violence, such as discrimination and vulnerability to violence, such as in the workplace, situations of armed conflict and conditions of poverty. Characterizing all four stages of development in principle is a lack of state compliance in practice.

The development of the regional law on women has been supported by the work of the Inter-American Commission on Women. This Commission is a specialized organization of the Organization of American States.¹¹ International law on women has been reinforced by four United Nations conferences on women, held in Mexico City in 1975,¹² in Copenhagen in 1980,¹³ in Nairobi in 1985,¹⁴ and in Beijing in 1995.¹⁵ The four conferences have provided important opportunities to generate understanding about the nature of the subordination that women face, how they are marginalized by different developments, whether locally or globally, and how international law might be made more responsive to women's needs. The conferences have helped to build political momentum necessary to advance international law regarding women. Nonetheless, the Beijing Platform observed the failure of the previous Women's Conference, finding that "[m]ost of the goals set out in the Nairobi Forward-Looking Strategies for the Advancement of Women have not been achieved."¹⁶

II. Fostering Compliance

Significant modern work has been undertaken to address why certain rules of international law "exert more pull towards compliance than others."¹⁷ Some suggest that nations obey rules of international law because of considerations of legitimacy and distributive justice.¹⁸ One analyst has shown how two intellectual traditions in international legal scholarship "have historically defended [international law] against two divergent claims: on the one hand, the realist charge that international law is not really law, because it cannot be enforced; on the other, the rationalistic claim that nations

¹⁰ 9 June 1994, O.A.S. Treaties Register A. 61 (also known as the *Convention of Belém do Pará*).

¹¹ M. Caplan, "The Inter-American Commission on Women, The Inter-American Commission on Human Rights" in *Women and International Human Rights Law* (Ardsey: Transnational Publishers, [forthcoming in 1999]).

¹² Commission on the Status of Women, *Report of the World Conference on the International Women's Year*, UN Doc. E/Conf. 66/34, 1976 (1975).

¹³ Commission on the Status of Women, *Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace*, UN Doc. A/Conf.94/35 (1980).

¹⁴ Commission on the Status of Women, *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, UN Doc. A/Conf.116/28/Rev.1 (1985).

¹⁵ Commission on the Status of Women, *Report of the Fourth World Conference on Women*, UN Doc. A/Conf.177/20 (1995).

¹⁶ *Ibid.* at 42.

¹⁷ T.M. Franck, "Legitimacy in the International System" (1988) 82 A.J.I.L. 705 at 708.

¹⁸ T.M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

'obey' international law only to the extent that it serves national self-interest."¹⁹ A deeper examination is suggested to show how "[the transnational legal] process of interaction, interpretation and internalization of international norms into domestic legal systems is pivotal to understanding why nations 'obey' international law, rather than merely conform their behavior to it when convenient."²⁰

While much work is needed to understand "the process by which nations and other transnational actors promote compliance, and ultimately, obedience,"²¹ three steps might be useful starting points in promoting compliance with women's rights.

- i. If transnational actors, whether they be governments, international governmental or non-governmental organizations, obey international law as a result of repeated interaction with other actors in the transnational legal process, a first step is to empower more actors to participate.²²

Significant strides have been made to empower women to participate in the protection and promotion of human rights of women. Experts on women's rights are increasingly found on treaty monitoring committees, international legal academics are addressing issues of concern to women in their research,²³ and women's rights activists are beginning to use human rights treaties to advance their causes.

Much more work is needed to empower marginalized women, such as indigenous, immigrant and black women, to use human rights law. Scholars have begun to question the effectiveness of single axis frameworks to expose discrimination against certain groups of women.²⁴ Unidimensional applications of gender equality provisions are inadequate to expose the full depth of discrimination suffered by women within social groups exposed to additional discrimination, on grounds unrelated to sex and gender. Further, stereotyped discrimination may exist within racial or other social subgroups themselves that is not a feature of the wider society. More refined work of this nature is required for improved understanding of the interaction of racial, gender, economic and other discrimination, and to translate this understanding into the legal prohibition and elimination of multi-dimensional forms of discrimination.

- ii. If the goal of interaction is to foster compliance through improved interpretation and application of human rights norms, it must be enquired

¹⁹ H.H. Koh, "Why do Nations Obey International Law?" (1997) 106 Yale L.J. 2599 at 2602.

²⁰ *Ibid.* at 2603.

²¹ *Ibid.* at 2634.

²² *Ibid.* at 2656.

²³ See, for an introduction to the legal literature, online : The Women's Human Rights Resources, <<http://www.law-lib.utoronto.ca/diana/ana>>.

²⁴ See, for example, K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) The University of Chicago Legal Forum 139; M.E. Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 C.J.W.L. 174; C. Romany, "Claiming a Global Identity: Latino/a Critical Scholarship and International Human Rights" (1996) 28 Miami Inter-American Law Review 215.

what forums are available for these purposes both within and without existing human rights regimes?²⁵

There are a variety of different forums for interpretation and application of human rights norms to remedy the violations experienced by women. The jurisdiction of the Inter-American Court of Human Rights to give advisory opinions was used to determine that a proposed amendment to the Costa Rican *Constitution* distinguishing between Costa Rican men and Costa Rican women marrying foreigners, if enacted, would be held discriminatory.²⁶

The Inter-American Commission on Human Rights has considered the merits of at least three cases on women and has decided that two cases are admissible to consider the merits.²⁷ The first case decided that according to Article 1 of the *American Declaration*, protecting the right to life does not necessarily apply to national laws permitting abortion in certain circumstances.²⁸ The next decision held the Peruvian state responsible under the *American Convention* for not respecting and ensuring the free exercise according to Article 1 (1) of Raquel Mejia's right not to be subjected to torture and inhuman and degrading treatment under Article 5, and her right under Article 11 to have her honor and dignity respected and not be the object of arbitrary or abusive interference with her private life because of the repeated rapes by a member of the security forces, following the kidnapping of her husband.²⁹

The most recent decision of the Commission held Argentina responsible for violating Ms. X's rights to physical integrity under Article 5, privacy under Article 11, family under Article 17 and the rights of her thirteen year old daughter, Y, to protection in her best interest under Article 19, by conditioning a visit by Mrs. X to her husband and by Y to her father, on vaginal inspections. The Commission explained that less invasive means of contraband detection must be available, and any physical examinations must be conducted by qualified medical personnel.³⁰

The Inter-American Commission has recently held two cases admissible for consideration of their merits. One case concerns the inability of Maria Eugenia Morales de Sierra to represent her family, to administer marital property and to exercise a profession without her husband's authorization under Guatemalan law.³¹ The other case concerns the fairness of a judicial decision in Trinidad and Tobago to impose the

²⁵ *Supra* note 19 at 2656.

²⁶ *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (1984), Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A), No. 4.

²⁷ E. Abi-Mershed, *The Inter-American Commission on Human Rights, Women and International Human Rights Law* (Ardsley, New York: Transnational Publishers, [forthcoming in 1999]).

²⁸ *Case 2141 (United States)* (1981), Inter-Am. Comm. H.R., No. 23/81, *Annual Report of the Inter-American Commission on Human Rights: 1980-1981*, OEA/Ser.L/V/II.54/doc. 9 25.

²⁹ *Case 10.970 (Peru)* (1996), Inter-Am. Comm. H.R., *Annual Report of the Inter-American Commission on Human Rights: 1995-1996*, OEA/Ser.L/VIII.91/doc. 7 157.

³⁰ *Case 10.506 (Argentina)* (1996), Inter-Am. Comm. H.R., No. 38/96, *Annual Report of the Inter-American Commission on Human Rights: 1996-1997*, OEA/Ser.L/V/II.95/doc. 7 50.

³¹ *Case 11.625 (Guatemala)* (1998), Inter-Am. Comm. H.R., No. 28/98, *Annual Report of the Inter-American Commission on Human Rights: 1997-1998*, OEA/Ser.L/V/II.98/doc. 6 144.

death penalty on Indravani (Pamela) Ramjattan for the murder of her common law husband.³²

In both these admissibility decisions, the Commission determined, in accordance with Article 46 of the *American Convention*, that "remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."³³ The Commission explained that this exhaustion requirement "ensures the state concerned [has] the opportunity to resolve disputes within its own legal framework. The remedies generally required to be exhausted in accordance with the principles of international law are those which are available for and effective in addressing the allegations at issue."³⁴

The Human Rights Committee has held two different states responsible for violating the rights of women under the *Political Covenant*. The first decision held Canada responsible for the denial of Sandra Lovelace's right to enjoy her culture under Article 27 because of a law providing that only Indian women, but not Indian men, lose their status and rights when they marry a non-Indian.³⁵ The Committee held Peru responsible for a denial of Mrs. Ato del Alvellanal's rights to equality before the courts, because of a Peruvian law that requires the husband to represent his wife in court.³⁶

Procedures exist under other conventions, such as the *Convention of Belém do Pará* that requires states to include in their reports to the Inter-American Commission on Women³⁷ information on what they have done to prevent, punish and eradicate violence against women. This *Convention* also enables any person or group of persons, or any non-governmental entity legally recognized in one or more member states, to petition the Inter-American Commission on Human Rights for alleged violations.³⁸ Accommodation of a complaints procedure under the *draft Optional Protocol to the Women's Convention* has recently been approved by the UN Commission on the Status of Women and awaits final approval of the UN General Assembly.³⁹ The *Protocol* to the *Women's Convention* also allows for a procedure of inquiry, which may include a visit to a territory, if reliable information is received indicating grave or systematic violations of women's rights under the *Convention* by a State Party.⁴⁰ Both the complaints and inquiry procedure would be submitted to and considered by the Committee on the Elimination of Discrimination Against Women (CEDAW).

³² Case 11.837 (*Trinidad and Tobago*) (1998), Inter-Am. Comm. H.R., No. 92/98, *Annual Report of the Inter-American Commission on Human Rights: 1997-1998*, OEA/Ser.L/V/II.98/doc. 6 159.

³³ *Supra* note 6.

³⁴ *Supra* note 31 at 27.

³⁵ *Lovelace v. Canada*, Communication No. 24/197, U.N. Doc. A/36/40 (1981); U.N. Doc. CCPR/C/OP/1 at 83 (1985).

³⁶ *Ato del Alvellanal v. Peru*, Communication No. 202/1986, U.N. Doc. A/44/40 (1989).

³⁷ *Supra* note 11, art. 10.

³⁸ *Supra* note 11, art. 12.

³⁹ Economic and Social Council, Commission on the Status of Women, *Open-ended Working Group on the Elaboration of a Draft Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, 43th Sess., UN Doc E/CN.6/1999/WG/L.2 (10 March 1999).

⁴⁰ *Ibid.*, art. 8.

Outside the treaty regimes is the UN Special Rapporteur on Violence Against Women, who has facilitated norm enunciation both internationally and domestically. The UN Commission on Human Rights appointed Ms. Radhika Coomaraswamy, as Special Rapporteur on Violence Against Women, with a broad mandate to eliminate such violence and its causes, and to remedy its consequences by recommending ways and means at national, regional and international levels to eliminate gender violence. She works closely with committees established by human rights treaties and with commissions established under the *UN Charter*.⁴¹ The Special Rapporteur receives communications about alleged incidents of gender-specific violence against women that have not been effectively addressed through national legal systems. She then uses this information to initiate and conduct dialogue with governments about finding resolutions.⁴² Reports of the Special Rapporteur⁴³ show that such violence may be an offense by a state itself against a broad range of accepted rights expressed in international human rights treaties already binding on a state in question.⁴⁴

The increased use of existing forums and the creation of new forums for the interpretation and application of human rights of women are promising steps. Much more work is needed, however, to formulate the secondary rules of process necessary for the application of primary rules of the obligation to eliminate all forms of discrimination against women. One analyst has explained that "[a] rule ... is more likely to obligate if it is made within the procedural and institutional framework of an organized community than if it is strictly an ad hoc agreement between parties in the state of nature. The same rule is still more likely to obligate if it is made within the hierarchically structured procedural and constitutional framework of a sophisticated community rather than in a primitive community lacking such secondary rules about rules."⁴⁵

iii. What are the best strategies for internalization of women's rights into domestic laws, policies and practices and for sharing norms conducive to the protection of women's rights across national boundaries?⁴⁶

One might distinguish among social, political, and legal internalization. Social internalization occurs when a norm acquires so much public legitimacy that there is widespread general obedience to it. Political internalization occurs when political elites accept an international norm, and adopt it as a matter of government policy. Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three.⁴⁷ Scholars are increasingly addressing the

⁴¹ UN Doc. E/CN.4/1995/42 (22 November 1994).

⁴² UN Doc. E/CN.4/1997/47/Add. 4 (30 January 1997).

⁴³ See particularly country mission reports of the Special Rapporteur, *Report on the Mission to Brazil on the issue of domestic violence*, UN Doc E/CN.4/1997/47/Add. 2 (21 January 1997).

⁴⁴ *Velásquez Rodríguez Case (Honduras)* (1988), Inter-Am. Ct. H.R. (Ser. C), No. 4, *Annual Report of the Inter-American Court of Human Rights: 1988*, OEA/Ser.L/V/III.19/doc.13 (1988) 35; *X & Y v. The Netherlands* (1985), Eur. Ct. H.R. (Ser. A) 91.

⁴⁵ T.M. Franck, *Fairness in International Law and Institutions*, *supra* note 18 at 752.

⁴⁶ *Supra* note 20 at 2656.

⁴⁷ *Ibid.*

process of internalization through, for example, the *1988 Brazilian Constitution*,⁴⁸ the courts in Canada,⁴⁹ Chile,⁵⁰ and the United States⁵¹ and the applicability of human rights conventions in Argentina.⁵²

Another way to think about internalization is pulling down norms from international and regional levels into domestic systems to develop one's own domestic norms that are conducive to women's rights. One might also want to pull norms across from other national systems, particularly from those countries that share common cultural traditions, such as Hispanic, Francophone or Islamic. Another option might be to explore the enhancement of norms that exist within countries, such as those that are found in local laws and customs.

Social and political internalization is enhanced by the reporting mechanisms under different human rights regimes,⁵³ and legal internalization is facilitated by domestic courts adapting regional and international human right standards. The Inter-American Commission on Human Rights has issued a report on the status of women in the Americas,⁵⁴ and reports on human rights situations in specific countries now devote a chapter to the human rights of women. The Inter-American Commission's most recent report on Brazil covers the progress made with regard to women, identifies the ways in which the state is not meeting its obligations to protect the human rights of women, and finishes with a series of recommendations.⁵⁵ Article 5 of the *1988 Brazilian Constitution* establishes equality of all persons before the law and stipulates that wrongful discrimination is punishable.⁵⁶ The *Report* recommends the reform of certain provisions of the *Criminal Code*, such as those that allow for marriage between the perpetrator of violence and the victim to extinguish the prosecution of certain crimes.⁵⁷

The *Report* on Ecuador commends the government for reforming its *Civil Code* to replace the legal authority that men exercised over women (the *potestad marital*

⁴⁸ F. Piovesan, *Direitos Humanos E O Direito Constitucional Internacional* (Human Rights and International Constitutional Rights) (Brazil: Max Limonad, 3rd ed., 1997).

⁴⁹ A.F. Bayefsky, "International Human Rights Law in Canadian Courts" in B. Conforti & F. Francioni, eds., *Enforcing International Human Rights in Domestic Courts* (The Hague: Kluwer Law International, 1997) 295.

⁵⁰ F.O. Vicuña & F.O. Bauza, "The Implementation of the International Law of Human Rights by the Judiciary: New Trends in Light of the Chilean Experience" in Conforti & Francioni, *ibid.* at 135.

⁵¹ L. Henkin, "International Human Rights Standard in National Law: The Jurisprudence of the United States" in B. Conforti & F. Francioni, eds., *ibid.* at 189.

⁵² R.E. Vinuesa, "Direct Applicability of Human Rights Conventions within the Internal Legal Order: The Situation in Argentina" in B. Conforti & F. Francioni, eds., *ibid.* at 149.

⁵³ C. Medina, "The Role of Country Reports in the Inter-American System of Human Rights", (1997) 15 *Netherlands Quarterly of Human Rights* 457.

⁵⁴ OAS, Inter-American Commission on Human Rights, *Report on the Status of Women in the Americas*, OR OEA/Ser.L/V/II.100/Doc.17 (1988).

⁵⁵ OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Brazil*, OR OEA/Ser.L/V/II.97/Doc.29 (1997) at 129.

⁵⁶ *Ibid.* at 131.

⁵⁷ *Ibid.*

power) with the full juridical capacity of women in conditions equal to men.⁵⁸ It recommended, among other things, the reform of the *Criminal Code* provisions which refer to violation of the "honor" or "honesty" of the female victim as a condition of an offense. The *Report* explains that "the objective of the law is not the protection of the women's life or physical integrity; rather the law is functioning to regulate the sexuality of the woman as an expression of 'honesty, family honor and public morality.'"⁵⁹

The Inter-American Commission on Human Rights' *Report on the Situation of Human Rights in Haiti* under the Raoul Cedras Administration determined that rape and abuse of Haitian women were violations of their right to be free from torture and inhuman and degrading treatment, and of their right to liberty and security of the person.⁶⁰

All countries in the Americas, with the exception of the United States, have committed themselves to report regularly to Committee on the Elimination of Discrimination Against Women (CEDAW). States must report periodically on what they have done to eliminate violence against women. Enforcement of treaty obligations depends primarily on state action, but monitoring committees, like CEDAW, are mandated to be vigilant in their scrutiny of states' reports regarding discharge of their responsibilities. For this purpose, CEDAW receives alternative reports or comments on state performance submitted by national and international non-governmental organizations, which may incorporate significant findings of failures to prevent, remedy and punish violence against women.⁶¹

To assist countries in their reporting obligations, CEDAW for instance has developed a series of General Recommendations, such as the *General Recommendation 19 on Violence Against Women*,⁶² and, for example, the *General Recommendation 24 on Women and Health*.⁶³ These Recommendations develop the content and meaning of human rights relating to women, and are somewhat akin to regulations developed by administrative agencies under national statute law.

An increasingly important mechanism for developing state accountability for observance of human rights is the publication of Concluding Comments or Observations by treaty monitoring bodies on reports submitted by states. These Concluding Comments are developed by the treaty monitoring body after it has had the opportunity to dialogue with the reporting country. During the dialogue, there is an opportunity for questions and

⁵⁸ OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OR OEA/Ser.L/V/II.97/Doc.10 (1997) at 120.

⁵⁹ *Ibid.*

⁶⁰ OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Haiti*, OR OEA/Ser.L/V/II.88/Doc.10 (1995) at 93.

⁶¹ Latin American and Caribbean Committee for the Defense of Women's Rights, the Center for Reproductive Law and Policy & Estudio para la Defensa de los Derechos de la Mujer, *Women's Sexual and Reproductive Rights in Peru: A Shadow Report*, 1998.

⁶² United Nations, International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/Gen/1/rev.2 (March 1996).

⁶³ CEDAW/C/1999/I/WG.II/WP.2/rev.1 (February 1999).

answers. CEDAW, in its Concluding Comments on the *Report of Venezuela*, noted with concern:

the reduction of health budgets, the rise in the maternal mortality rate, the lack of and limited access to family-planning programmes (especially for teenagers), the lack of statistics on acquired immunodeficiency syndrome and women's limited access to public health services. In addition, legislation that criminalized abortion, even in cases of incest or rape, remain in force.⁶⁴

In its Concluding Observations on Peru, the Human Rights Committee, established by the *Political Covenant* to monitor state compliance with the Covenant, expressed its concern "that abortion gives rise to a criminal penalty even if a woman is pregnant as a result of rape and that clandestine abortions are the main cause of maternal mortality."⁶⁵ The Committee found that the criminal law subjected women to inhuman treatment contrary to Article 7 of the Covenant. The Committee recommended "that the necessary legal measures should be taken to ensure compliance with the obligations to respect and guarantee the rights recognized in the Covenant" and that "the provisions of the Civil and Penal Codes [of Peru] should be revised in the light of the obligations laid down in the Covenant", particularly Article 3 requiring that countries ensure respect of women's rights under the Covenant.⁶⁶

Reports, alternative reports, the dialogue between the reporting country and the treaty body and the Concluding Comments provide important means for normative elaboration at the international and regional levels. It remains to be seen the degree to which this process facilitates internalization at the domestic level. The *1996 Report on Peru* of the Human Rights Committee noted that the Peruvian government still had not brought its laws into compliance with the 1989 decision concerning Mrs. Ato del Alvellanal.⁶⁷ Moreover, other states parties to the *Political Covenant* are not moving to change their laws that are similar to those successfully challenged by Mrs. Ato del Alvellanal. As was explained above, Mrs. Maria Eugenia Morales de Sierra, for example, is challenging a similar law in Guatemala.⁶⁸

III. The Way Forward

Effective strategies to foster compliance with women's rights require a review to determine whether:

- laws are framed in a way that captures the subordination and discrimination that women face;

⁶⁴ *Concluding Observations of CEDAW, Venezuela, Report of the Committee on the Elimination of discrimination Against Women*, 16th Sess., UN Doc A/52/38 (1997) at paragraph 236.

⁶⁵ United Nations, *Concluding Observations of the Human Rights Committee, Peru*, CCPR/C/79/Add.72 (1996) at 15.

⁶⁶ *Ibid.* at 22.

⁶⁷ *Supra* note 65.

⁶⁸ *Supra* note 31.

- laws favourable to women are understood and implemented;
- the capacity exists to implement laws favourable to women; and
- the intention exists to implement favourable laws and to reform unfavourable laws.

In some countries, laws are generally not framed to cover many of the abuses that women face in the privacy of their homes. For example, Mexican criminal laws neither consider forcible intercourse within marriage as rape nor allow for punishment.⁶⁹

Studies are increasingly showing that laws favourable to women are not effectively implemented. For example, in Brazil, a study shows that there is widespread failure to prosecute wife murder, marital rape and domestic assault and battery.⁷⁰ Another example is in Mexico, where laws that permit abortion in cases of rape are usually not applied to the approximately one in five victims of rape who become pregnant as a consequence.⁷¹ Despite many criticisms of the lack of access to lawful abortion in such cases, Mexico has not established procedures to enable pregnant rape victims to obtain safe abortions, unlike some public hospitals in Rio de Janeiro.⁷² A review needs to identify whether standards are sufficiently developed to bind those responsible for their implementation. A review also needs to determine whether the exercise of the rights varies according to groups of persons, such as men or women, racial or age groups.

Key to fostering improved compliance is building the capacity to use national and international human rights law to prevent and remedy the pervasive abuses that women face.⁷³ A review must identify the administrative, technical or financial capacity to exercise rights to advance women's interests, including legal services to enforce obligations to observe the rights.⁷⁴ An assessment might usefully explore

⁶⁹ M.C. Acosta, "Overcoming the Discrimination of Women in Mexico: A Task for Sisyphus" in G. O'Donnell, J. Mendez & P. S. Pinheiro, eds., *The Rule of Law and the Underprivileged in Latin America* (Notre Dame (IN): University of Notre Dame Press, [forthcoming in 1999]).

⁷⁰ Human Rights Watch, *Criminal Injustice: Violence Against Women in Brazil* (New York: Human Rights Watch, 1991).

⁷¹ *Supra* note 69.

⁷² J. Pitanguy & L. Sarmento Garbayo, *Relatorio do Seminario a Implementacao do Aborto Legal no Servico Publico de Saude* (Report of a Seminar on the Implementation of Legal Abortion with the Public Health Service) (Rio de Janeiro: Cidadania, Estudo, Pesquisa, Informacao e Acao, 1995).

⁷³ C. Medina, "Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System" in *Human Rights of Women: National and International Perspectives*, R.J. Cook ed. (Philadelphia: University of Pennsylvania Press, 1994), also available in Spanish, C. Medina, "Hacia una manera mas efectiva de garantizar que los mujeres gozen de sus derechos humanos en el sistema interamericano, *Derechos Humanos de la Mujer: Perspectivas Nacionales e Internacionales*", (Bogota: PROFAMILIA, 1997).

⁷⁴ M.I. Plata, "Reproductive Rights as Human Rights: The Colombian Case" in *Human Rights of Woman: National and International Perspectives*, R.J. Cook ed. (Philadelphia: University of Pennsylvania Press, 1994), also available in Spanish, Maria Isabel Plata, *Derechos Reproductivos Como Derechos Humanos: el Caso Colombiano, Derechos Humanos de la Mujer: Perspectivas Nacionales e Internacionales* (Bogota: PROFAMILIA, 1997).

progress made and potential for future progress to remedy deficiencies in capacities to implement women's rights.

Intention might be objectively assessed by the actual measures governments take to improve women's status, and the proportion of their available financial resources they allocate for this purpose. The requisite intent might exist in some ministries, such as the health ministry, and not in others, such as the budget office. The intent of governments to devote their resources and time to advance women's rights will limit what they can devote to governmental priorities in other sectors, so that a rights agenda will always face competition within government from advocates of other causes governments want to support.

Methods to foster compliance with women's rights can be grouped into three categories:

- negative incentives in the form of penalties, sanctions and withdrawal of membership privileges;
- sunshine methods, such as monitoring, reporting, transparency and NGO participation; and
- positive methods, such as special funds for financial or technical assistance, access to technology or training programs.⁷⁵

The question then becomes, which methods work best under what set of circumstances?

These methods are based on models which generally can be characterized as a regulatory model or a social practice model, or a mixture of sanctions and rewards.⁷⁶ The regulatory model is described as an arrangement that emphasizes

behavioral prescriptions – principles, norms and rules – as essential elements of regimes, and directs attention to issues of implementation and compliance in assessing performance of regimes ... [T]he focus of the regulatory model is on the identification of factors that affect the extent to which the actual behavior conforms to the requirements of regulatory arrangements.⁷⁷

The sunshine and positive methods to foster compliance are based on the social practice model. This model suggests that "the fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public."⁷⁸ This approach considers programs "... that give rise to social practices which feature a wide

⁷⁵ O. Young, "Two Models of Effectiveness" (1997) 91 Am. Soc. Int'l L. Proc. 51.

⁷⁶ M.L. Friedland, ed., *Sanctions and Rewards in the Legal System: A Multidisciplinary Approach* (Toronto: University of Toronto Press, 1989).

⁷⁷ *Supra* note 75 at 57.

⁷⁸ A. Chayes & A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995) at 25.

range of integrative activities that stimulate the emergence of informal communities and trigger processes of social learning.”⁷⁹ This model directs attention to processes and practices that influence behavior more through engagement and discussion than through regulatory measures. A strategy might usefully be based on a diagnosis of the challenges of compliance with women’s rights, and de-emphasize disobedience of norms.

Negative incentives are usually invoked through the judicial system and require a high degree of legal capacity, and will obviously have restricted utility in situations where legal capacity is limited. The choice between sunshine methods, on the one hand, and positive methods on the other, or adoption of a mix of the two, will depend on the capacity and the intent of governments to comply.⁸⁰ For example, where there is genuine intent to comply, but limited capacity, positive methods might be more appropriate. Where there is capacity to comply, but the requisite political intent is lacking, sunshine methods might be more effective, particularly to engage non-governmental organizations to promote the priority of women’s rights. Where both capacity and intent are limited, a mixture of both methods might be useful.

As we celebrate the 50th anniversary of the *American Declaration of the Rights and Duties of Man*, we can observe that perhaps the greatest of its achievements is the potential it affords the Inter-American system to foster compliance with women’s rights. The Inter-American system has not achieved the objectives of the *Declaration*, but the system has awakened the Americas to its potential to require governments to eliminate all forms of discrimination against women. The challenge must be faced of improving mechanisms of accountability to foster compliance at domestic, regional and international levels, by legal, political, and other means.

⁷⁹ *Supra* note 75 at 52.

⁸⁰ E.B. Weiss, “National Compliance with International Environmental Agreements” (1997) 91 *Am. Soc. Int’l L. Proc.* 56 at 58.