OCCASIONAL PAPER

Women, rape and violence in South Africa
Two preliminary studies

COMMUNITY LAW CENTRE
University of the Western Cape

Women, rape and violence in South Africa

Two preliminary studies

Kathryn Ross

COMMUNITY LAW CENTRE
University of the Western Cape

Published by Community Law Centre
University of the Western Cape
Private Bag X17
Bellville 7535

1993

CONTENTS

Introduction by Brigitte Mabandla 5

An examination of South African rape law 7

Battered women: an invisible issue 23

Notes 37

Introduction

The papers offered here are preliminary studies to highlight the inadequacy of the law in protecting women against rape and battering, two of the most prevalent forms of violence against women in South Africa.

It is hoped that these studies by Kathryn Ross will contribute to work done by feminists and others engaged in the struggle against violence. The phenomenon of violence against women is common in many societies, but is more serious in societies based on gross inequalities and discrimination. Accordingly, the international community is seized with programmes to combat violence against women. Through the development of feminist theory, violence against women has been identified as a manifestation of women's social standing. Margaret Schuler[1] observes that on the international scene 'the convergence of development, human rights and feminist praxis produce the framework for discovering the nature, forms, extent and pernicious effects of violence against women'.

Following the identification of violence as an obstacle to the equality of men and women in society, and to the improved quality of life for women, strategies to combat violence have been initiated in many countries. In Malaysia, India, Pakistan and Bolivia, activist women engage in awareness programmes. They lobby government institutions to provide services for the victims of violence. In many such countries, shelters have been established for these victims. They have also proposed law reform to protect women against violence.

In Malaysia, for example, the following legal reforms to the criminal procedure and evidence law have taken place:[2]

- mandatory jail sentence of five years for convicted rapists;
- age for statutory rape revised from 14 – 16 years;
- maximum jail term for sexual molestation increased from two years to ten years;
- similar penalties when penetration has occurred into any orifice of the body;
- cross-examination of victim's past sexual history not allowed except in relation to the accused;

- abortions may be performed on rape victims whose pregnancies threaten the mental and physical health. (In the past, abortions were not given unless life of the mother was threatened.)

Brazil is experimenting with the establishment of women's police stations. Police in these institutions are trained to be sensitive to victims of violence.

Chile is experimenting with an interdisciplinary approach to the violence. The objective is to study the problem from a holistic perspective. In essence, what they are involved in is primarily research.

Sudan is concerned primarily with eradicating clitorodectomy ('female circumcision'), which is seen by women activists as an act of violence. The challenge facing these women is to deconstruct culture, as the practice emanates from custom.

Zimbabwe is experimenting with educational programmes for police to sensitise them to the prevalent practice of violence against women in that society.

At the international level, the Division for the Advancement of Women (United Nations) organised an international conference on violence in April 1992. The International Labour Organisation has done extensive studies on the impact of sexual harassment of women in the workplace. This indicates the seriousness with which violence is viewed internationally.

As South Africa charts the way forward to a democratic, non-racial and non-sexist society, we need to take up the issue seriously.

In my view, this matter should be placed on the national political agenda as a factor that is key to the process of creating a just society. The new state must establish institutions, policies and laws which protect women against violence.

—Brigitte S Mabandla

An examination of South African rape law

INTRODUCTION

South Africa has the highest instance of rape when compared to other countries. Approximately 15 000 cases of rape are reported in South Africa each year. Since experts estimate that only one in 20 women reports rape to the police, an accurate estimate would amount to 300 000 cases of rape annually. Breaking down these figures, they show that some 400 women are raped daily – which amounts to one rape every three minutes.[1]

Myths about rape pervade society. These myths include:

- Women fantasise about being raped.
- Women say 'no' when they really mean 'yes'.
- Women secretly enjoy rape.
- Women are really responsible for rape because they dress and behave provocatively.
- Rape is not really an act of violence, it is just rough sex.
- Women often consent to sexual relations with a man and then later claim that it was rape.[2]

These rape stereotypes are entrenched in the legal system.[3] However, rape is a crime of violence. It is also a crime of power exerted by men against women. Feminists see rape as an 'inevitable part of the entire social matrix which denigrates women – psychologically, physically, economically and politically'.[4] Rape is 'the major agency in the social control and domination of women'; it is 'a symptom of the universal war against women. It is a conscious process of intimidation by which all men keep all women in a state of fear'.[5]

The problem of rape has received increasing attention in South Africa. Many studies have been made by South Africans, particularly from a legal perspective.[6] The present study analyses rape law in the context of rape as a crime of power. It examines the myths about rape, the pervasiveness of the myths in the

law, and the extent to which those who have an impact on the law ascribe to these myths.

The study focuses, in large part, on the South African Law Commission report on 'Women and Sexual Offences in South Africa'. The report was requested by the Minister of Justice in Parliament in response to the growing concern about rape in South African society. The Law Commission is an influential authority on legal issues for the present government. Consequently, reports from the Law Commission provide a proxy for the views of legislators in South Africa. Although many expected that the report would consist of a 'comprehensive re-evaluation of the treatment of women in the criminal justice system',[7] the report instead adopted a conservative attitude which reeks of myths and stereotypes about rape.

This study draws on the work of feminists from South Africa and elsewhere to rebut the conclusions made by the Law Commission, and to expose the inherent partriarchial attitudes pervading its report.

HISTORY OF RAPE LAW

The crime of rape in many ancient societies developed from women occupying the legal status of men's chattel.[8] Women fell under the power of men after a man paid a bride price for a woman. The crime of rape emerged to protect a man's proprietary interest in a woman.[9] Originally rape punished men for violating a patriarch's control over a woman 'either by taking her out of his control or having sexual intercourse with her without his agreement.... The victim herself had no claim, as she personally was not perceived to be the injured party. The wrong suffered by the guardian consisted in the reduced bride-price which a defiled, that is non-virgin, daughter could command on marriage.'[11]

English Law developed in the Middle Ages to recognise rape as a violation against a woman.[12] Still, the violation only protected women who fitted into stereotypical notions of 'proper', virginal women who were 'ravished' by men.[13]

The historical underpinnings of rape reflect the case that rape laws have helped to maintain man's control over women. Indeed, these philosophies remain entrenched in the modern rape law in South Africa.

GENERAL OVERVIEW OF THE CRIME OF RAPE

Rape is defined in South Africa as unlawful sexual intercourse with a woman without her consent. The essential elements are:

a) *mens rea*;

b) unlawfulness;

c) sexual intercourse with a woman;

d) without consent.

Mens Rea

Intent must extend to every element of the crime. The state of mind is judged from the perspective of the male, therefore the court analyses the male's *perception* of consent, as opposed to the woman's actual consent.[15] If he generally believes that the woman consents, even though this belief may be unreasonable, he lacks '*mens rea*'.[16] The element of '*mens rea*' usually arises on the question of intent. The man must foresee the possibility that the woman will not consent, and proceed with the intercourse for the act to be rape.[17]

Unlawfulness

The sexual intercourse must be unlawful in nature. Thus, the law provides that a man is immune from a charge of raping his wife under the theory that upon marriage a wife gives her irrevocable consent to intercourse.[18] This immunity falls under heavy criticism as will be analysed below.

Previously the law ascribed to an irrebutable presumption that a boy under the age of 14 is incapable of sexual intercourse and therefore rape.[19] However, experience proved this assumption to be incorrect, and the law repealed the immunity.[20]

Sexual intercourse with a woman

The law only applies between a man and a woman. Thus, a man cannot be guilty of raping a man or boy, etc. Moreover, the act applies only to penetration of the male penis into the female's vagina. There must only be penetration, it is not necessary to have an emission of semen.[21] Acts of forceful oral sex or sodomy are not considered rape. These acts are criminalised under indecent assault.

Without consent

If a woman consents to the act, there is no rape. As stated above, the consent element is defined by the male's *perception* of consent, as opposed to the female's actual consent. The law has accepted that a manifestation of resistance can take many forms. Physical resistance, where the female is over-powered by the male, is the most obvious form of non-consent. Also, when a women *submits* to intercourse through intimidation or fear, she has not legally consented.[22]

South Africa provides an irrebuttable presumption that a girl under the age of 12 is incapable of consenting to sexual intercourse.[23] However, this does not mean that a male is automatically guilty of rape, as he may lack the requisite '*mens rea*' for conviction.[24]

Consent can also be vitiated by fraud, duress,[25] when the female is asleep and when the female suffers from a mental defect.[26] Likewise, consent is not established when the female is intoxicated,[27] and when she changes her mind.

CHANGING THE DEFINITION OF RAPE

The present definition of rape has been criticised extensively.[28] First, the definition ignores the fact that physical violations besides the sexual penetration by a male are equally traumatic for a rape survivor.[29] Moreover, by limiting the definition of rape to sexual intercourse, the crime adopts the ethos of a crime of sex. However, the overriding perception of rape by rape survivors is not that of a sexual experience but of a violent, life-threatening attack.[30] Deeply rooted in the present definition of rape is a dominant male perspective of male/female sexuality:

> Male sexuality is linked to aggression, forcefulness and initiative, and female sexuality is constructed as passive and receptive. The sexual 'scripts' for normal sexuality cast men in the role of predators and women for the role of victims. The basic elements of rape are thus already present in normal intercourse. On this view rape is not the polar opposite of normal sex, but an extreme form of it. Its deviance lies in its extremeness, not in its 'otherness'. The dominant reality of rape, as encoded into language of the law, is that of a sexual experience for both the assailant and the victim. This 'reality' is a male reality.[31]

Thus, the law presents rape as a crime of a man who has taken his aggressive role in sex too far.[32]

By sexualising rape, the law invalidates the alternative view of rape as an act of violence.[33] The distinction between rape and indecent assault further sexualises the crime by acknowledging that sexual acts, outside of 'normal' intercourse, fall under the violent category of assault. This distinction segregates rape into a sexual sphere.

As an alternative, the law should meld together rape and indecent assault into the crime of 'sexual assault'.[34] This would shift the emphasis from the sexual nature of rape and concentrate on the violent nature of the crime. Perhaps there exists the possibility of a danger in neutering the statute insofar as, by

including both men and women in the same crime of 'sexual assault', society may ignore the fact that rape is primarily an act of aggression against women. However, as long as rape is defined as an act of sex, the violent nature of the crime will be marginalised and/or ignored. Consequently, as rape law stands, the proper emphasis of the crime is already neglected. Changing the definition of the crime can, arguably, only improve the presently misdirected perception of the crime.

Canada, Australia, New Zealand and many American states have replaced rape laws with sexual assault.[35] For example, Canada and the US state of Michigan implement the offence of sexual assault at varying degrees of severity. Central to the formulation of a sexual assault law is the shift in emphasis off the victim's 'consent' to the defendant's *coercion*.[36] The level of coercion by the defendant determines the degree of severity of the crime. By examining the level of coercion, the imbalance of power which inherently exists between the sexes, be it physical, emotional, economic, or organisational, comes into question, and the behaviour of the defendant faces primary scrutiny.

Under a definition which emphasises coercion and an imbalance of power, more subtle forms of sexual violence against women would also be considered rape. For example, case law suggests that, with a shift in emphasis to the defendant's coercion, a person could institute criminal proceeding of rape when the employer has used sex as a condition of employment.[37] In *R v. McCoy*,[38] the general manager of an airline inflicted six cuts from a light cane on an airline hostess who had broken certain regulations. The airline hostess desperately needed the income from her job, and consequently opted for the manager's personal punishment over dismissal. The court was satisfied that an assault had occurred since the woman suffered 'bodily harm due to the caning' and 'felt degraded and humiliated'.[39] The defence could raise the complainant's alleged consent as a defence where the onus lies on the prosecution to negative it. Here, the court found that the power the manager maintained over the hostess vitiated her consent to the beating, since the consent was the result of the coercive relationship. Arguably, under a new definition of rape, an employer who abuses his power relationship through forced sex, like assault, would also face prosecution. The essential elements of the crime would be satisfied in that the coercion would be present. To rebut the defence of consent, forensic evidence such as semen and indications of forced sex could be used.

At present, rape is the only crime where the victim's behaviour is scrutinised.[40] In robbery, assault, theft or extortion, consent plays no part in the definition of the crime. Rather, it can be raised only as a defense to rebut the *prima facia* unlawfulness of the act.[41] Proving a negative, such as 'non-consent'

is manifestly difficult. The law has developed no universal test for 'non-consent'. Consequently, the law lacks clarity and 'courts and legislators have tried to manipulate evidence and other rules around undefined issues, usually guided by questionable assumptions about rape complainants and rapists'.[42]

The South African Law Commission unequivocally rejected any change in the present definition of rape. Instead it subscribes to positions which maintain the traditional view of the crime as an act of sex. The Law Commission states that rape is a 'distinct sexual crime and is definitely to be distinguished from unnatural sexual intercourse'.[43] However, preserving a dichotomy between 'natural' and 'unnatural' sex fails to explain why anal or oral penetration are characterised as less grave than vaginal penetration.[44] Different legal interests are protected with regard to different orifices, disregarding the fact that any coerced sex is 'unnatural'.[45] Instead of acknowledging that all forms of coerced sex are equally traumatic, the Law Commission prefers to maintain traditional Western (Christian) sexual morality, based primarily on male-defined attitudes and standards.[46]

It deserves mention that although women's organisations, such as Rape Crisis, are best placed to understand the complexities of rape by virtue of their constant contact with rape victims, the Law Commission discounts these organisations' opinions. In fact, throughout its report, the Law Commission marginalised the opinions of these women's organisations and instead adopted the opinions of male contributors or primarily male organisations. To support its rejection of women's organisations, the Commission referred to them as 'radical feminists' out of touch with the mainstream. Arguably, this attitude indicates the Commission's bias against women who challenge the *status quo*.[47]

Moreover, the Law Commission discounts the contributions of feminists from abroad, particularly the United States. The Commission presents a history of rape reform in the United States as a 'symbolic means to obtain equal rights for women', where the women were 'not so much concerned with law reform on the grounds of real and identified means'.[48] It perceived the campaign against rape as a by-product of the US women's movement's need for an issue after winning the abortion battle in *Roe v. Wade*.

By misconstruing women's motives in their struggle for protection under the law, the Commission completely discounts the link between the disempowerment of women and violence against women, *viz* rape. It ignores the position that women can achieve equal status only when they enjoy freedom from the terrorism of rape. Instead the Commission would rather believe that women randomly pick struggles to further a vindictive political agenda.

THE CAUTIONARY RULE

Cautionary rules are rules of practice applied from the bench which serve as an aid to evidence in sexual offences. The rule requires that the court exercise additional caution when assessing the credibility of a rape survivor when her testimony is not corroborated.[49] In practice the rule permits the court to exercise a high level of discretion. In many instances, the cautionary rule results in courts resorting to imaginative excuses for a woman's complaint based on stereotypes about women. These excuses extend to courts indulging in 'amateur psychology'.[50] Ultimately, the cautionary rule results in acquittal in cases where, if the rule were not exercised, the evidence would lead to a conviction.[51]

The Commission rejected proposals for abolishing the cautionary rule in response to complaints that the rule discriminates against women and subjects the rape survivor to a double victimisation. Instead, it upheld the rule on the grounds that:

> Experience has shown that it is dangerous to rely on the uncorroborated evidence of the complainant in such circumstances.... [A] complaint could be motivated by an emotional reaction or spite, an innocent man might be falsely accused because of his wealth, the complainant might be forced by circumstances to admit that she had intercourse and then represent willing intercourse as rape.[52]

This justification rests on stereotypical notions of a vindictive female. In fact, rape survivors are not likely to fabricate a story of rape both because of the trauma a rape survivor must endure when she reports a crime, and the stigma which is attached to rape. 'A US study found that the incidence of false reports for rape is exactly the same as that for other felonies – about two per cent.'[53]

However, rather than give credence to the fact that women experience apprehension about filing a complaint, the Law Commission speaks in generalities, stating that the 'possibility of false complaints – which is also generally acknowledged – is too great to leave the accused without protection against it (the cautionary rule)'.[54] 'Generally acknowledged' by whom? Again, the Law Commission elects to adhere to a male-defined *status quo*'s acceptance of entrenched sexist stereotypes rather than to acknowledge the reality surrounding rape.

RAPE IN MARRIAGE

As in many jurisdictions, South African law provides men with immunity from raping their wives. Although case law has diluted the 'rape in marriage'

immunity to allow for prosecution of assault in reference to the injuries sustained by a woman when her husband forces intercourse,[55] a man may rape his wife without fear of prosecution. In order for the immunity to be removed the parties must be judicially separated. Also, a husband who assists someone else to rape his wife may be convicted – as a *socius* – of rape.[56]

Men formally maintained total control over their wives. Under Roman-Dutch law women were subjected to the guardianship of their husbands.[57] A husband's 'power over his wife's person was limited only to the extent that he was expected to refrain from beating or ill-treating her'.[58]

The rationale behind the modern rape-in-marriage immunity rests in patriarchal beliefs stemming from women's historical position as men's property. The law presumes that once a wife enters into a marriage she gives her husband irrevocable consent to sex.[59] Thus, the law assumes men possess their wives for the purpose of sex.

As an anomaly to the conservatism of the rest of the report, the Law Commission recommended that the rape-in-marriage immunity be repealed, and proposed bold legislation which would criminalise marital rape.[60] It is difficult to assess why the Commission adopted the position it did. Perhaps the fact that recommendations to change the existing law were made by many contributors, as opposed to just women's groups, gave the argument credibility in the eyes of the Commission.

However, in 1987 a joint committee of Parliament rejected the Law Commission's draft bill and refused to criminalise rape in marriage. Instead, the committee replaced the draft with a provision which makes marital rape an aggregating circumstance on a conviction for assault. The provision was made part of South African Law in 1989.[61] The rationale for rejecting the rape-in-marriage provision rang of traditional stereotypical notions about women and their role in marriage. It was feared that women would take revenge on their husbands by complaining of rape. However, this fear is inconsistent with the fact that should a women seek to avenge herself against her husband, she still has the option of charging him with assault or sodomy.[62] Other 'old prejudices' were also revived: 'criminalising rape in marriage will increase the already high divorce rate; it is not appropriate to use criminal law in the family'; '[i]t is indeed in conflict with the marriage vows and the essence of marriage'; evidentiary problems will make proof of the offence very difficult; prosecuting authorities will be inundated with complaints; the 'intimate and unique' nature of marriage makes it unacceptable to commit husbands of an offence so serious that it may attract the death penalty.[63] Concerns about preserving the sanctity of marriage and an increasing divorce rate ignore the fact that if a marriage has degenerated

to the point where a man rapes his wife, the marriage has probably already failed.

The passage of the 1989 assault law signified a step backwards for women's rights with regard to rape. Judges must now follow the codified law, making any progress through judicial interpretation impossible. Thus, Parliament entrenched women's subordinate position, as men are free to exert their power over their wives through rape.

OBTAINING AN ABORTION AFTER RAPE

Abortion is illegal in South Africa. (For the purpose of this study, the analysis of abortion only extends to rape survivors who wish to procure an abortion after becoming pregnant as a result of rape.) In order to obtain a legal abortion after rape a series of procedures must be followed:

- Two medical practitioners must 'interrogate' a rape survivor and certify in writing that they believe the pregnancy to be a result of rape.
- A magistrate must certify that a complaint was laid, and, after an examination of police documents and 'interrogation' of the rape survivor, the magistrate must determine after a balance of probabilities that a rape occurred.
- The abortion may be procured only at a State-controlled institution.
- The medical practitioner in charge of the institution where abortion is procured must authorise it on application.[64]

The extensive procedure required of the rape survivor further humiliates the woman, subjecting her to a double victimisation. Consequently, many rape survivors resort to the danger of 'backstreet' abortions.

The Law Commission adopted the position of the arguments against reform, which claimed that the high use of backstreet abortions was 'unfounded'.[65] However, reports indicate that as many as 42 000 to 200 000 women resort to back-street abortions each year.[66] The Law Commission cites a figure of less than 40 lawful abortions procured in 1982 as an indication of the lack of severity of the problem.[67] However, Rape Crisis estimates that at least ten percent of all rape survivors become pregnant as a result of rape. In 1984, 16 000 rapes were reported by the police which means that approximately 1 600 woman became pregnant as a result of rape. Only 40 legal abortions on the grounds of rape were procured in 1984 as well.[68] The huge disparity between the number of legal

abortions procured and the probable number of pregnancies resulting from rape, reveals that the present procedure is failing miserably.

The Law Commission further discounts the position of Rape Crisis and 'other women's organisations', that the procedure is humiliating. Instead, the Commission speculates that 'interrogations' by a magistrate provide 'support' for a rape survivor.[69] However, those who counsel rape survivors comment that questions about details of the rape traumatise a rape survivor. Rape Crisis, which deals directly with women who apply for abortions, commented that the notion that magistrates provide support is utterly absurd in that magistrates often treat the victim with scepticism. Likewise, Black Sash notes that, for Black women living in the townships, the process for obtaining an abortion is intimidating and humiliating. The interrogations are extensive and often in English. Consequently, language barriers usually exist, making the psychological profiles and details about the rape, needed for a legal abortion, impossible to obtain. Moreover, the police are seen by many Black women as unapproachable. Since a women must also file a complaint with the police before she is able to obtain a legal abortion, her apprehension towards the police also precludes the possibility of a legal abortion. In addition, the procedure which requires a series of gynaecological examinations is also traumatic for rape survivors, especially where the doctors are strangers, appointed by the State, and usually male.

'Denying women control over their own fertility is one of the many mechanisms for social control of women, the aim of which is to keep women dependent on men.'[70] Rape survivors must have free and easy access to an abortion as a matter of course, as one of the many steps necessary to reduce the negative manifestations of violence against women. Rape survivors, or those who deal directly with rape survivors, are in the best position to determine what procedures will and will not be traumatic. Rather than discount the positions of these people, the Law Commission should have looked to them as the best-informed authority on the subject.

DATE RAPE

Although official statistics need compilation, Rape Crisis (Cape Town) commented that the majority of the women who seek rape counselling know their assailants. Date rape is defined as 'forced sex between people who know one another, even if only casually'.[71] The phenomenon of date rape challenges the accepted notions about the perverted, sex-crazed rapist. Consent surfaces as the central issue which distinguishes date rape from sex. Consequently, myths about

rape are more prevalent in a date rape scenario as the woman's behaviour faces a higher level of scrutiny.

In the university setting, the issue of date rape has become a topic of great concern. Indifference to the phenomenon by campus administrators and the police has sparked moves for increased awareness on the topic and demands for more protection.[72] A committee at the University of Cape Town produced an extensive report on sexual harassment on campus in response to the growing concern. The report revealed that inherently sexist relationships between students fostered an atmosphere conducive to violence against women. The casual attitude adopted in response to complaints of date rape in effect sanctions the crime.

Women face blame for sexual violence perpetrated against them. For example, at Rand Afrikaans University the administration responded to a date rape complaint by commenting that '[a]lthough rape is something terrible that has to be rejected, it remains the lady's duty to make herself safe'. It went on to appeal to 'all ladies' to amend their behaviour, including the wearing of provocative clothing.[73]

In 1987 at the University of the Western Cape (UWC), two reported rapes and one attempted rape were committed at one of the men's hostels at the University.[74] The Joint Hostel Committee responded by holding a 'People's Court' open to the public. The court proved humiliating and hostile to the rape survivors. Several women who were dissatisfied with the proceedings approached the administration to persuade them to expel the students. The Joint Hostel Committee responded with anger to the women's appeal to the administration and the women's demands. At a University which is strongly committed to the democratic movement, activists viewed the women as separatist and divisive, suggesting that feminism had no place within the South African struggle.[75] Ultimately, the students were not expelled. One of the rapists completed his degree while the proper punishment for the rape was under consideration; the other was suspended from the hostel, not the University, for one year.[76]

A study at UWC revealed that women live with the spectre of rape as part of their daily lives.[77] Women fear walking to their hostels from the library and visiting the men's hostels. Some women live in fear at the women's hostels, 'because men walk in the corridors at all hours of the night'.[78] The University has responded to such findings with increased fervency. At the UWC Disciplinary Court, rape cases are now handled with compassion and sensitivity. A Sexual Harassment Committee has been formed, with the objective of combat-

ting violence against women. Moreover, there is an increased awareness with regard to women's issues on campus.

The fact that the South African Law Commission failed to address the issue of 'date rape' serves as further evidence of the Commission's adoption of stereotypical beliefs about rape. Presumably, 'date rape' did not receive the attention of the Commission because the Commission fails to see it as an issue. Especially given the conservative tone of the report, one might conclude that the Commission subscribes to notions that rape only occurs in dark alleys, between strangers. The oversight of 'date rape' means ignoring most instances of the crime.

POLICE PROCEDURE

The low percentage of reported rapes has been attributed, in part, to the manner in which the police handle the woman who lodges a complaint. Although the police overtly recognise the trauma a rape survivor endures, and police investigators receive instruction to be 'sympathetic', police still subscribe to myths which surround rape.[79] These myths are manifested by treating rape victims with suspicion, and women find themselves having to prove that they have been raped.[80]

Dianne Hubbard notes that because of police contacts with rape survivors, they do not suffer from many of the misconceptions about the crime. Still, the police subscribe to the myth that rape is 'an uncontrollable act of sexual gratification perpetuated by abnormal perverts'.[81] Thus, the police do not see rape as a violent act of power perpetrated by a large cross-section of society. The police also often subscribe to the myth that women are prone to lay false complaints of rape.[82] They claim that women will use rape as a cover for prostitution. However, it was found among convicted rapists that prostitution was often used as a defence. Consequently, this rationale can be traced, in part, to the rapists themselves.

Many investigating officers often participate in the initial interview with a rape survivor.[83] This interview brings out many intimate and humiliating details about the rape.[84] Interviews conducted by different interviewers, many of whom are male, adds to the rape survivor's sense of violation. Intimate details become public knowledge, which further humiliates her. Further, as part of police procedure, women must touch the alleged rapist during an identification parade. The use of physical 'direct contact' during identification is an extremely traumatic process. Rape terrorises a woman. To force such contact only brings back the terror from the rape.

The South African Law Commission examined all of the above procedures. It justified each procedure with little substantiated explanation. For example, the Commission justifies the need to maintain the present identification process as 'necessary in order to conduct his [the defendant's] defence properly'.[85] The Commission failed to even address the possibility of using one-way mirrors, a practice employed in countries such as the United States. Moreover, the possibility of special rape squads in metropolitan areas is discounted as desirable but 'not practicable', without further explanation.[86] Again, rather than prioritise the minimalisation of the rape survivor's trauma, the Commission discounts this trauma in favour of the perceived effectiveness of the current procedure.

The Law Commission goes so far as to praise the South African Police for increased sensitivity in the area of rape. In response to incidents which are 'not handled according to theory', the Commission notes that '[s]uch things are bound to happen in any big organisation'.[87] Indeed, the 'these things happen' attitude symbolises the indifference that the Commission feels toward a rape survivor's trauma. If those in position of authority regarded rape as a serious crime of violence, any indiscretion would be at best unacceptable, or at the very least, not brushed aside as if mistakes do not have a serious affect on a victim.

It should also be noted that the dominant perception of the role of the police among many sectors of South African society is one of 'collusion, inaction and corruption'.[88] The police are suspected of employing sexual violence as a form of torture against detainees. Women complain of police sexually harassing them in the course of their duties.[89] Any organisation which employs such tactics must be treatedwith scepticism when it argues that it seeks to protect women against violence.

RECOMMENDATIONS

1. The Bill of Rights

Laws reflect the attitude and morals of a society. Accordingly, any Bill of Rights for a democratic South Africa must include a provision on women's rights. Since equality can never be achieved as long as women are oppressed, a gender clause in a Bill of Rights must articulate an individual's right to physical integrity.

Article 7, the Gender Clause, of the ANC's proposed Bill of Rights provides that, '[t]he law shall provide remedies for sexual harassment, abuse and violence'.[90] Such a clause is definitely an advancement for women. In the

context of a Bill of Rights the clause may be overly specific, where a clause broadly protecting a woman's physical integrity and equal position in the workplace may be more appropriate. Still, the condemnation and prohibition of violence against women, as articulated in the above clause, should be included in a women's charter or in a statement of intent.

2. Governing laws

As stated throughout this paper, laws which embrace sexist stereotypes and myths about rape and rape survivors must be amended. The South African Law Commission Report on Women and Sexual Offences epitomises how the law can be used to perpetuate such stereotypes. Instead of discounting the views of women's organisations, legislative authorities should turn to these bodies. Women's organisations which deal with rape survivors are in the best position to understand how best to reduce the rape survivor's trauma and how to rid society of the crime. The law should be particularly sensitive to Black women's organisations, as Black women have been consistently marginalised under the law.

Legislation must be adopted which properly portrays rape as a violent crime. Additionally, legislation must also ensure certain standards of conduct in the handling of rape charges and the rape investigation.

3. Procedural reform

The acceptance of procedure which increases the trauma of the rape survivor illustrates the need to have police stations staffed with those sensitive to the issues surrounding rape. Since investigation by women officers decreases the rape survivor's humiliation and trauma, affirmative action policies which centre on increasing women's representation in the police force are essential. Presumably, a less male-dominant body would decrease a rape survivor's mistrust of the police force, thus increasing the likelihood of reporting the crime.

Specially trained Rape Squads in police stations, used in Canada, some parts of the United States and Australia should be implemented throughout South Africa. Such units would be staffed by trained experts on rape who would be equipped to deal with rape survivors.[91] The unit could include medical practitioners who specialise in collecting evidence on rape. Medical experts must also understand the nuances of Rape Trauma Syndrome so that they can properly evaluate the mental disposition of rape survivors. Opinion evidence on Rape Trauma Syndrome is admissible in courts in the United States to discount stereotypes and myths held by the trier of fact. Such evidence must be admissible in South African courts for the same purpose.

CONCLUSION

The present laws and attitudes of the South Africa Law Commission serve as an example of how patriarchal attitudes, when present in the law, can actually perpetuate violence against women. This perpetuation occurs by entrenching existing male power structures over women and allowing stereotypes about the rape victim to infiltrate the law. As rape is a crime of power of men over women, preserving the power structure in fact preserves the crime.

In order for there to be a legitimately democratic 'new' South Africa, women's equality must be placed on the agenda. There can be no equality, in the true sense of the word, when women – over 50% of the population – face the fear of violence on a daily basis. Such fear restricts a women's thoughts, movements and ultimately her opportunities in society. Thus, as society dismantles apartheid, it must destroy laws and attitudes which oppress women with the same fervour as as it destroys laws which oppress all people of society.

Battered women: an invisible issue

INTRODUCTION

Only recently has the plight of battered women been a topic of wide concern. In the last decade the issue has received much attention in the United States and Britain. However, in South Africa, battery is only beginning to be studied. Of the studies done, the issue has received scant attention in the field of law.

This paper addresses the issue of battered women in South Africa from a legal perspective. The study first explains the phenomenon of battery, exposing myths and realities. It then focuses on existing barriers in the criminal justice system which battered women must face. An analysis of the existing barriers provides the foundation for proposals for reforms in the criminal justice system. Since studies from abroad indicate that the problem and patterns of battery are universal this paper will often rely on research and theories developed from elsewhere, particularly the United States, and link the studies to the situation in South Africa.

A PROBLEM ROOTED IN PATRIARCHY

Law in South Africa developed from both Roman-Dutch and English law. Historically, under these systems, a husband maintained a 'right' to beat his wife.[1] Women occupied the status as a man's chattel under the law, a status that allowed men to do with their wives what they wished.[2] Until recently, a married women was considered a minor under South African law.[3] Additionally, today under customary law in South Africa, a married African woman maintains perpetual minority status, where she is under the guardianship of her husband, father, uncle, brothers and male cousins.[4]

A social ideology of male dominance will manifest itself in battery, even though the law is reformed to forbid such behaviour. Although violence against women is now illegal in many countries, the incidence of wife battering has not abated because 'most ideologies and social arrangements which formed the underpinnings of violence still exist and are inextricably intertwined in our

present legal, religious, political and economic practices. Wives may no longer be the 'legitimate' victims of marital violence, but in social terms they are the 'appropriate' victims'.[5] Adherence to patriarchy, the ideology of male supremacy,[6] serves as an important factor in spouse abuse,[7] in that violence against women remains a means for men to exert their supremacy over women.

THE SEVERITY OF THE PROBLEM

Evidence of domestic violence is chilling. A 1982 Federal Bureau of Investigation (FBI) crime report in the United States found that 30% of female homicide victims were killed by husbands or boyfriends.[8] It is estimated that over half of those who admit to a killing are men who have killed their female partners.[9]

The physical abuse battered women endure extends beyond bruises. Battered women experience kicking, choking to the point of losing consciousness, twisted and broken arms, burns from irons, cigarettes and scalding liquids, forced violent sexual acts, and throwing.[10] Battering often happens during pregnancy. Most battering happen in the home, at night, and on the weekend.[11]

THE BATTERED WOMAN

A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological abuse by a man in order to coerce her to do something he wants her to do without any concern for her rights, and with the intention of causing pain, suffering, humiliation and physical injury.[12] Although battering occurs more frequently between husbands and wives (a marriage licence has been referred to as a 'hitting licence'[13]), battered women include women in 'any form of intimate relationships with men'.[14] Thus, the term 'battered women' is used instead of 'battered wives' to emphasise the importance to examine the crime beyond marital status. States in the United States recognise the need to view the problem as one which exists outside of marriage, criminalising the battering of a 'domiciled companion'.[15]

The battered woman does not provoke the violence. In fact, she does everything to appease her batterer. Lenore Walker, an American expert on battered women, has identified a cycle of violence which occurs in a battering relationship. The battering takes place in three cycles.[16] Phase one of the battering is the 'tension building stage during which the battering male engages in minor battering incidents and verbal abuse while the woman, beset with fear, attempts to be as placating and passive as possible in order to avoid more serious violence.'[17]

Phase two produces the 'acute battering incident'. At some point during phase one, the tension between the battered woman and the batterer becomes intolerable and serious violence results. Provocation is random and can come in any form. Sometimes a woman's anger will provoke a serious outburst. Other times, complacent behaviour will trigger a more violent attack.[18]

The third phase of the batterer's behaviour is characterised by extreme contrition and loving behaviour on the part of the battering male. The batterer will promise to stop the behaviour and refrain from further violence. However, the contrition and affection will eventually fade and the cycle will start anew.[19]

Battered women have often faced accusations of masochism for remaining in the battering relationship.[20] It is widely believed that women must enjoy the brutal beatings they receive, or else they would leave.[21] Walker disputes the masochism theory. She explains that, as a by-product of the cycle of violence, women develop 'learned helplessness'.[22] When a woman repeatedly becomes a victim of violence her energy is drained and her self-esteem lowered.[23] Women see any voluntary responses as futile and develop a mentality of helplessness. Financial dependency and responsibility for children furthers the feeling of helplessness. Moreover, 'being a married women increases the risk of learned helplessness when sex roles and stereotyping are taught.... [S]ociety encourages passivity and dependency'.[24]

Battering occurs in all classes, from the economically disadvantaged, to the rich, to professional classes.[25] The myth that battering is a lower-class phenomenon is perpetuated by the fact that lower-income women seek the help of public social welfare agencies. These agencies keep public records on which studies are frequently based. Upper-class women will often turn to private services.[26] The issue of battered women must be regarded as a *societal* issue which transcends class and race.

THE BATTERER

Existing studies reveal that batterers have common characteristics, frequently coming from violent backgrounds. A history of violence in the family is common among batterers.[27] Violence in the culture at large also fuels family violence.[28] There is a much higher instance of arrest and conviction among batterers as compared to non-batterers.[29] Battering is more likely to occur in unemployed men, as compared to employed men.[30] A profession or history related to the police or military also reflects a higher incidence of violence.[31] Batterers uniformly subscribe to patriarchal assumptions about male supremacy and traditional sex roles in the family. Other common characteristics of batterers

include: low self-esteem; pathological jealousy; severe stress reactions during which they drink and batter in order to cope; the use of sex as an act of aggression; a lack of belief that violent behaviour should have negative consequences.[32]

THE PROBLEM IN SOUTH AFRICA

Although there is an absence of conclusive studies done on battered women in South Africa, Rape Crisis estimates that one in every six women is assaulted by her male partner.[33] This is a conservative estimate considering that most cases of battering go unreported. 'Every week an average of four women are forced to flee from their homes, because their lives are being endangered by their male partners.'[34] The National Institute for the Prevention of Crime and the Rehabilitation of Offenders (NICRO) reports that a survey of districts of Wynberg, Cape Town, Athlone and Bellville in September of 1988 indicated that 423 cases of domestic violence were reported over a period of one month.[35] Police admit that women daily lay complaints of assault by their husbands.[36] Courts are packed with interdict applications by battered women against their batterers. The Legal Aid Office in Athlone estimated that at least one battered women comes to it for help almost every day. Again, it is important to keep in mind that for every action taken publicly by battered women, there are many more women who endure their plight privately.[37]

These findings are not surprising given the nature of South African society. The acceptance of patriarchy and the belief in male supremacy over women, which underlie battering, remain very prevalent in South Africa.[38] The militaristic nature of the apartheid system, and South Africa's high crime rate, create a violent atmosphere in society which also tends to bolster battery.[39] Additionally, a society which segregates its population on the basis of race lowers the self-esteem and sense of self-worth among the oppressed groups. For one who values the traditional characteristics of masculinity, the lowered sense of self-worth emasculates men. Oppressed men will attempt to assert their power and masculinity by attempting to control their wives or domestic partners through battering.

A study made of migrant labour hostels in the Western Cape reveals how the South African migrant labour system has compounded patriarchal relationships between men and women. As an outcome of a deliberate policy to discourage the urbanisation of Africans, migrant labourers were housed in single-sex barrack-like accommodation often referred to as 'hostels' while their families maintain a home in rural communities.[40] All registered bed-holders in

Reflecting the insensitivity of the Supreme Court, a senior Supreme Court staff member commented that if a woman has been beaten for months, it is difficult to see the requisite urgency needed for an interdict application.[59] The staff member also said that often interdicts are refused in order to place a sanction against lawyers whom the judges feel have taken too long in drawing up the orders. Thus the Supreme Court issues policy decisions against lawyers at the expense of battered women. Often judges will only grudgingly grant the order, questioning the battered woman's assertions and subjecting her to further humiliation.

Those who represent battered women note that there is a growing sentiment among judges that lawyers or advocates petition for interdicts, not because of the woman's danger but for the profit involved. Consequently, the court may grant an interdict, but refuse to grant legal aid to pay for the court costs and lawyers. As a result, lawyers are increasingly hesitant to petition for interdicts.[60] Lawyers and advocates further note that the judges fail to follow a consistent standard for issuing interdicts. Judges maintain complete discretion over whether to grant an interdict order. Those representing battered women complain that judges will often refuse to grant interdicts on a Friday afternoon, delaying the matter until after the weekend because of the inconvenience involved in granting an interdict at the end of the week. Delaying the order for a weekend places the battered woman in great danger of retaliation because husbands must be informed of the application. One Cape Town advocate commented to the author that she sent a brutally battered woman home to face more beatings over the weekend because she feared that the interdict application might be rejected. If a consistent policy were in place, this advocate could have given the battered woman a definitive answer, perhaps saving her from a weekend of beatings.[61]

There is a strong indication that cases of assault and murder against wives or domestic partners receive treatment in court different from cases of 'normal' assault or murder. Men who murder or assault their wives receive relatively lenient treatment by the criminal justice system. Wildfire, an organisation which researches violence against women, noted that often cases of men murdering their domestic partners are pled down to lesser offences giving the murder a much lighter sentence.[62] It is next to impossible to find reported cases involving a man assaulting or murdering his domestic partner in the South Africa Law Reports. Records at Rape Crisis indicate that many of these cases exist; however, they remain buried in the records of Magistrate's Courts or the Supreme Court, hidden from public access.

State v. Arnold 1985 (3) 256 (c), a case involving a husband who murdered his wife which is in the Law Reports, documents the reluctance of judges to prosecute men who murder their wives. In Arnold, the husband admitted to killing his wife and offered the defence of criminal incapacity due to severe emotional distress. Judge Burger, in writing the opinion, offered a litany of excuses why the husband suffered from such distress. He described how the accused suffered from an unsettled past and was in need of 'the understanding and love of a wife'.[63] The accused apparently found this desperately needed love in the deceased. Judge Burger describes how the accused was so obsessed with his wife that he was distracted from his job of many years and forced to resign. He then opened a business so that he could work with his wife. The marriage 'deteriorated' after the deceased's mother-in-law moved in. Judge Burger describes how the mother-in-law brought out the 'black' side of the deceased. This side represented the deceased's 'interest in men, her desire to be admired ... and desire to be a striptease artist... [T]he black side would surface when she would wear no brassiere and display her charms.'[64] The 'white' side of the deceased 'represented the best in her... she wanted to be a lady and looked to the accused for his guidance to that end'.[65]

Ultimately, Judge Burger concluded that the 'black side' drove the accused to a state beyond criminal capacity. This state surfaced when the accused shot his wife while she purportedly bared her breasts to the accused, bending over in a loose shirt, while in the process of leaving him.

The *Arnold* opinion is discussed at length to demonstrate the blatant sexism and bias in the Judge's attitude; an attitude which is said to be typical of many judges. The judge quickly adhered to the stereotypical attitude that 'loose' women will drive a man to violence. The opinion was one-sided in that Judge Burger implicitly embraced the husband's version of why his wife left him, and why the deceased refused to tell her husband where she was staying. The judge was ignorant of the fact that the very characteristics of the husband, which the judge used to mitigate the killing, are typical of battering men: dominance, excessive jealousy, possessiveness, an unsettled youth. In fact, in the opinion, Judge Burger describes how the accused hit his wife across the face with a newspaper when she used verbally abusive language in front of the accused's son.[66] However, rather than condemn the assault or question the accused's propensity for violence, the judge sanctioned the assault as necessary in order to protect the son from profanity. Judge Burger used this incident to argue that the wife's hysterical reaction to the assault demonstrated her instability.

Compare *S v. Campher* 1987 (1) SA 940, a case of a battered wife who killed her battering husband. The accused in *Campher* used a similar defence as in

Arnold, criminal incapacity by way of an 'irresistible impulse'. The defence argued that 'the severe physical and emotional cruelty inflicted on the accused by the deceased had finally collapsed the accused's ability to resist the compulsion to destroy the 'monster' who was tormenting her.'[67] The majority refused to accept the defence offered, arguing the need to establish mental illness. The majority viewed the accused as sane because her capacity for self-control had returned immediately after the killing.[68]

The propensity of High Court judges to accept a defence of criminal incapacity for a man driven to kill because of insane jealousy, but to reject the same defence for a woman who kills the 'monster' of a husband who subjected her to beatings and mental abuse, reflects the insensitivity and sexism of those who hold positions which adjudicate justice. This bias, compounded with extremely high court costs, prevents battered women from finding protection through the courts.

3. Community response

Given police and judicial indifference, a woman's only hope for outside support comes from her community or peers. However, the apartheid regime has limited women's options for help. 'Apartheid legislation has reduced the potential for informal help.' The Group Areas Act 'disrupted many formally cohesive ... communities and scattered their inhabitants into impersonal, ghetto-like townships'.[69] Sadly, even where community or peers are accessible, the victim of domestic violence very often finds little support. In fact, she is subjected to a second victimisation by the community because of the blame society places on battered women for their beating.[70] Members of the community adhere to the myth that the battered woman must have done something horrible to provoke the violence.[71] The study by van der Hoven of 25 Pretoria women documents the weak community response. Of the women who turned to family for support, in the majority of cases the family members were hostile or indifferent. 'The message conveyed was that she chose to marry her husband, and should therefore solve the problem herself.'[72] Family members typically ask a woman why she chose to stay in the relationship, assuming that she must enjoy the battering to continue with the relationship. The same study indicated that visits to the clergy resulted in advice that the wife bear with the husband and forgive her husband. Moreover, neighbours hesitate to get involved in a marital conflict.[74]

Thus, the battered woman is socialised to internalise her plight, resulting in her experiencing a high degree of self-blame and guilt.[75] 'The community response aggravates the battered woman's plight, increasing her sense of

isolation and helplessness.'[76] Possibly as a by-product of the guilt, battered women worry about the ramifications of going public on their batterers. Middle- and upper-class women worry about hurting their batterer's careers.[77] In South Africa, Rape Crisis counsellors commented that battered women married to, or involved with, men associated with the resistance movement feared that reporting the instance would hurt the resistance. Here the self-blame is particularly apparent. Rather than blaming the man for jeopardising the movement through his criminal actions, the battered woman blames herself or the political situation. Sadly, the community would also be more inclined to place the blame on the woman.

Apartheid legislation and the migrant labour system has torn apart families. 'There is no institution in South Africa which has been more violently affected by apartheid than the family.'[78] Thus, those feminists who call for heightened public intervention in the area of domestic violence are greeted with resistance. Communities repressed by the state, and whose domestic privacy has been violated by the state, are reluctant to accept any avenue for state interference in their lives. Moreover, there exists discord between black feminists and white, often middle-class, feminists. While white feminists may consider violence against women a straight-forward issue, black feminists may approach the problem from a different cultural context.[79] (For example, the goal for many black women in South Africa is physical survival. Debates about how to emancipate women in the home have little meaning when these women lack a functional home, where they live without a kitchen, clean water or nutritious food.[80]

NECESSARY PROTECTION

Indeed, the greatest change necessary to win the protection of battered women must come from societal attitudes. Society must regard the battering of women as criminally culpable, to be condemned by all. Of course, such a shift in the psyche of the general populace takes time and education. As a means of achieving this transformation, the laws of the state must reflect the condemnation of battery.

1. The Bill of Rights

Central to the formulation of a Bill of Rights in a new South Africa must be the empowerment of women. 'Any political philosophy which continues to locate women in the private realm of the family is disempowering.'[81] Therefore, laws which continue to relegate women to the private realm of the family, idolising

only the characteristics of motherhood, perpetuate the subjugation of women. Any protection of the family in a Bill of Rights must be careful not to sanctify the family so that it is beyond legal protection. The ANC's proposal for 'The right to home life' articulates the need for a balance between privacy and protection against violence by the state. Article 2 section (26) states:

> The privacy of the home shall be respected, save that reasonable steps shall be determined to prevent domestic violence or abuse.

Any call for 'reasonableness' leaves room for ambiguity. Ambiguities are often dangerous in that they can produce decisions contrary to legislative intent. Thus, 'reasonableness' in the context of protecting against domestic violence or abuse, must be clearly defined in a statement of intent or perhaps a women's charter. Criminal laws must set an explicit standard for reasonableness.

Similar standards must exist to enforce Article 2 section (29) of the 'Right to privacy' clause. The clause provides:

> No search or entry shall be permitted except for reasonable cause, as prescribed by law, and as would be acceptable in an open and democratic society.

Again, 'reasonable' leaves room for ambiguity. If the 'reasonable' in this clause is intended to refer to the protection against domestic violence in Article 2 section (26), then such an intent must be articulated in an accompanying document.

The expression 'open and democratic society' is overly vague in that it leaves too much room for differing interpretations. The clause keeps its meaning without such a qualification.

Article 7 section (4) of the 'Gender rights' provision states that 'The law shall provide remedies for sexual harassment, abuse and violence'. If the proposed Bill of Rights keeps a great deal of detail and its specificity, it must be consistently detailed throughout the document. The absence of detail in some sections, while detail exists in other sections, leaves room for judges to determine that any generalities are intended to exclude specific issues. Although Article 7 section (4) articulates a necessary protection for women's physical and mental tranquillity, the clause could go further by explicitly including 'domestic violence' as part of the protection offered. If the provision remains as it stands, there must be a clear statement of intent accompanying the clause which articulates the inclusion of domestic violence under the 'violence' protection.

2. Laws and procedure

a. Police protection

The police, as well as every other group responsible for the protection of women, should be educated about the myths and realities surrounding the plight of battered women. This will facilitate removing people's biases. 'The police must stop applying the formula: domestic violence = petty offence.... [B]attery is not a petty offence and the criminal justice system cannot be permitted to view it as such.'[82]

Rape Crisis, Cape Town, recommends a series of policies which will effect the protection of women. Such recommendations include establishing family violence as a priority response and making it the duty of the police to respond to every call for assistance. In addition, it must be the duty of the police to lay criminal charges against the batterer where there is battering, even if the complaint is withdrawn. The police should establish a 'Women's Protection Unit' for women who have been victimised by domestic violence or rape. This unit would offer assistance to battered women utilising a team consisting of a trained female doctor, a counsellor, an advocate and a social worker.[83] Since interdicts and peace orders have proven to be ineffective, there must be specially designed domestic violence protection orders so that when a woman seeks assistance from the police, she can receive immediate protection.[84] These orders must be strictly enforced by the police.

Recommendations from the United States Attorney General's Task Force on Domestic Violence include maintaining a current file of all protection orders and documenting violations of pre-trial release conditions so that there is evidence of a pattern or practice of abuse.[85]

b. Recommendations for prosecution

'Lawyers need to end their "hands-off" attitude to prosecutions' of batterers.[86] Prosecutors should organise special units to process family violence cases. Procedures must be in place which would give the victim the option to sign a formal complaint against an abuser, and to avoid testifying at a preliminary hearing. This would minimise the chances of possible retaliation against the battered woman by the batterer.[86]

c. Judiciary

i) Reforms in the current system.

Beyond the need to change judges' biases and inherent sexism in dealing with this area, judges should make protection orders available on an emergency basis with a clear procedure and standard of review in place. Moreover, the existing

use of interdicts is prohibitively expensive which, in effect, denies many women access to the courts. If domestic violence protection orders are not implemented, and the use of interdicts continues, women must receive legal aid to cover the costs of filing a complaint.

Expert witnesses should be allowed to testify in cases involving domestic violence. The expert clarifies the woman's position and exposes the existing stereotypes which so often work against the battered woman. Magistrates and judges must also be receptive to instances of previous battering to show a pattern or practice of beatings, rather than looking only to the last instance signed by the complainant.[88]

ii) Establishment of a Family Court

The South African Judiciary functions without a Family Court, although the South African Law Commission is presently investigating the possibility of establishing one. In 1978, the Law Commission investigated establishing a Family Court, but apparently came to the conclusion that a shortage of personnel and high costs made the Family Court impracticable.[89] At present the Divorce Court is the closest functioning body to a Family Court. However, the Divorce Court faces extreme criticism because of perceived inefficiency.[90] Either because of the cost of the Court, or extreme delays in divorce proceedings which often result in retaliation against the person who has filed for divorce, many opt against using the Divorce Court in cases of domestic violence. Unfortunately, the police will often refuse to intervene in domestic violence cases unless divorce proceedings have been inititated in the Divorce Court.[91]

A Family Court would arguably provide more protection to battered women. To begin, the court could be staffed with judges or magistrates who would address the issue of battery with sensitivity and understand the nuances of the phenomenon of battery. Additionally, a specialised court could operate more efficiently, decreasing delays in court dates and procedure, which would ultimately cut court costs.[92] In cases of battery, and other violent offences, the judge should have the power to impose criminal sanctions against a defendant, rather than treating all family matters as civil matters. Moreover, domiciled companions should also have access to the Family Court, even though these individuals fall outside of the traditional definition of 'the family'.[93]

3. Social services

Only two public shelters exist in the Cape Town area. These shelters are often the only place where battered women can find safety. Social workers stress the need for more shelters as a matter of the highest priority so that women have a safe haven while the state implements the more time-consuming reforms.

CONCLUSION

Ultimately, the plight of battered women must be perceived as a legal issue, deserving of criminal remedies. Unless and until the criminal justice system acknowledges battered women, their suffering will remain invisible and isolated.

Raising the consciousness of a majority of the population is a formidable task. Through a personal case study, I recently realised just how difficult raising the consciousness of the criminal justice system, and society as a whole, will be.

On February 26, 1992 I witnessed a man brutally beating his wife with a belt, in the middle of the road, in front of the Mowbray (Cape Town) police station. I alerted the police to the beating. They responded with apprehension, but finally, with my insistence, acted.

They brought the man and the woman into the police station and placed them *together* in the charge room, as if they were both criminals. The woman was visibly frightened.

When I offered to be a witness, they responded that this was not necessary, since the women would not lay a complaint. When I suggested that the police lay a charge based on witnesses, the officers responded with smirks, saying this was impossible. Upon pursuing the matter further, a police officer on duty stated that if they were to charge every man who assaulted his wife, they would do nothing else all day. One officer commented that charging such offences would 'increase the crime rate'. The matter was civil and private, outside the jurisdiction of the police. The police were hostile to my suggestions that they take initiative, stating that I should worry about my own country (the USA). The police also refused to let me give the woman the number of Rape Crisis. The police chief later described the incident as the difference between the 'first world' and the 'third world' in South Africa and that these were 'domestic affairs'. He further commented that the police will only intervene when the battering escalates to murder.

Even after weeks of researching this paper, it was only when I personally experienced the resistance from the police, the organisation charged with protecting the country's citizenry, that I fully appreciated the gravity of the problem battered women face in South Africa. Indeed, the incident made clear the need for stringent laws and procedures in place in a new, democratic South Africa. Such changes would protect against the inherent patriarchal attitudes of those in positions of power and reflect an ethos which condemns violence against women.

NOTES

Introduction

1 Schuler, M. 1992 Freedom From Violence. UNIFEM. p2

2 Ibid p115

An examination of South African Rape Law

1 'Women and Sexual Offences', South African Law Commission Report, April, 1985 at paragraph 1.6 (hereinafter SA Law Commission, 1985).

2 Dianne Hubbard, 'A Critical Discussion of the Law of Rape in Namibia', in Susan Bazilli (ed), *Putting Women on the Agenda*, 1991 Raven Press, Cape Town, at 135 (hereinafter Hubbard, 1991).

3 Hubbard, 1991 at 135.

4 A. E. van der Hoven, 'The Influence of Feminist Ideologies on the Development of Victimology' *Acta Criminologica* Vol 3 No 1 1990.

5 A. E. van der Hoven, 1990, citing Brownmiller in Eisenstein, H. 1984. *Contemporary Feminist Thought.* London: Unwin.

6 The South African Law Commission devoted an extensive study to sexual offences in South Africa in response to the increasing recognition of the problem of rape in South Africa. See Note 1. For a comprehensive analysis of rape law see Hubbard, 1991. See also Desirée Hansson, 'Working Against Violence Against Women', in Susan Bazilli (ed) *Putting Women on the Agenda* 1991 Raven Press, Cape Town (hereinafter Hansson, 1991); and Colleen Hall, 'Rape, The Politics of Definition', (1988) *South African Law Journal 105* (hereinafter Hall, 1988).

7 Felicity Kaganas and Christina Murray, 'Law Reform and the Family: The New South African Rape-in-Marriage Legislation', *Journal of Law and Society*, Volume 18, Number 3, Autumn 1991 (hereinafter Kaganas and Murray, 1991).

8 John Milton and Jonathan Burchell, *Principles of Criminal Law*, Juta, 1991, at 437, First Edition (hereinafter Milton, 1991).

9 Milton, 1991 at 437. 'In the Assyrian Code the rapist was obliged to marry the victim or to pay her father triple her standard bride-price... [T]he "wrong" to her father was the decrease in her value on the marriage market' (Hall, 1988 at 79). In Germanic tribal law the forcible abduction of females was the recognised method of entering lawful marriage (Milton, 1991 at 437).

10 Milton, 1991 at 437.

11 Hall, 1988 at 79.

12 See Milton, 1991 at 438; Hall, 1988 at 79. Under this system threat of physical force or coercion did not vitiate consent. A women had to sufficiently resist or protest. Roman-Dutch law followed this approach.

13 Milton, 1991 at 438.

14 P. M. A. Hunt, *South African Criminal Law and Procedure*, Volume II, Juta, 1990, at 435 (hereinafter Hunt, 1990).

15 Hunt, 1990 at 436 citing *R v. K* 1958 (3) SA 420 (AD); *R v. Z* 1960 (1) SA 739 AD; *R v. Mosago* 1935 AD 32; *R v. Swiggelaar* 1950 (1) PH H61 (AD).

16 Hunt, 1990 at 436.

17 Hunt, 1990 at 436.

18 Hunt, 1990 at 437; Milton, 1991.

19 Hunt, 1990 at 439; Milton, 1991 at 440.

20 See s 103 of the South African Law of Evidence and Criminal Procedure Act of 1987.

21 See s 44 of the Sexual Offences Act of 1956.

22 See *S v. Swiggelaar* 1950 (1) PH H61 (AD) at 110-111.

23 Hunt, 1990 at 443 citing *R v. Z* 1960 (1) SA 739 (AD) at 742, 744; *R v. Socout Ally* 1907 TS 336 at 338, 339; *R v. M* 1950 (4) SA 101 (T) at 102; *R v. S* 1951 (3) SA 209 (C); *R v. K* 1951 (4) SA 49 (O) at 52.

24 Hunt, 1990 at 443.

25 See *S v. Volschenk* 1968 (2) PH H283, where a policeman threatened a woman, whom he had arrested, with prosecution unless she submitted.

26 See s 15(a) of Act 23 of 1957.

27 See *R v. K* 1958 (3) SA 420.

28 Hansson, 1991; C. Hall, 1988 at 105.

29 Hubbard, 1991 at 142.

30 Hall, 1988 at 73.

31 Hall, 1988 at 72.

32 Hall, 1988 at 74.

33 Hall, 1988 at 74.

34 See discussion in Hubbard, 1991 at 148-150; Hansson, 1991 at 185-186.

35 Hansson, 1991 at 186.

36 Hubbard, 1991 at 149.

37 J. G. Mowatt, 'Sexual Harassment – Old Remedies for a New Wrong', (1987) *South African Law Journal* 439 at 443 (hereinafter Mowatt, 1987).

38 1953 (2) SA 4 (SR).

39 Mowatt, 1987 at 443, citing *R v. McCoy* at 9, 8 and 9.

40 Hall, 1988 at 74.

41 Hall, 1988 at 75.

42 Hall, 1988 at 75 citing Lucy Reed Harris, 'Towards a Consent Standard in the Law of Rape' (1975-6) *University of Chicago Law Review* at 613. For example, in *S v. Balhuber* 1987 (1) PH H22 (A), the judge relied on an entirely speculative rationale, fraught with stereotypes, to justify the defendant's acquittal. In other, 'non-sexual', crimes such speculation would not be permitted.

43 SA Law Commission at 2.16.

44 Hall, 1988 at 78.

45 Hall, 1988 at 79.

46 See Hall, 1988 for a discussion of the natural/unnatural distinction at 77-80.

47 See, for example, the Law Commission's adoption of the position of Rape Crisis organisations as 'anti-male' radical feminists, at 5.95-5.116.

48 SA Law Commission at 2.7.

49 Hansson, 1991 at 185; L. Hoffmann and D.T. Zefferett, *The South African Law of Evidence,* Butterworths, Fourth Edition, 1988 at 579.

50 Hubbard, 1991 at 155. See also *S v. F* 1989 (3) SA 847 (A): '[B]ecause of the manifold hidden motives that a complainant may have for laying a false sexual charge, a court may have to speculate on what could have inspired a false charge in the case before it (at 854G)-'. Cited in 1989 *Annual Survey of South African Law* 413.

51 See eg: *Rex v. W* (3) SA 772 (A) at 783.

52 S.A Law Commission at 3.55.

53 Hubbard, 1991 at 156 citing S. Brownmiller, *Against Our Will: Men Women and Rape,* Harmondsworth: Penguin, 1975.

54 SA Law Commission at 3.67.

55 See *S v. H* 1985 (2) 750.

56 Hunt, 1990 at 437-438.

57 Felicity Kaganas and Christina Murray, 'Rape in Marriage – Conjugal Right or Criminal Wrong?' (1983) *Acta Juricada* 125 at 126 (hereinafter Kaganas and Murray, 1983).

58 Kaganas and Murray, 1983 at 126.

59 *S v. H* 1985 (2) 750 at 753.

60 SA Law Commission, 1985 at paragraphs 2.41 – 2.43. See also Kaganas and Murray, 1991.

61 Kaganas and Murray, 1991 at 289.

62 Hunt, 1990 at 438.

63 Kaganas and Murray, 1991 at 289, citing *Hansard* 13 March 1989, cols. 2679-81.

64 SA Law Commission at 4.86.

65 SA Law Commission at 4.97.

66 See 'Backstreet Slaughter!', *The Weekend Argus*, Saturday Special, 1 Feb. 1992. See also Hansson, 1991 at 186.

67 SA Law Commission, 1985 at 4.84.

68 Hansson, 1991 at 186.

69 SA Law Commission at 4.99.

70 Hansson, 1991 at 187.

71 'Final Report: Committee of Enquiry into Sexual Harassment', study of sexual harassment on the University of Cape Town Campus, embargoed until 25 October

1991, at 25; citing M. Roark, 'Sexual Violence' in *Responding to Campus Violence*, Sherrill, J and Siegel, D (eds).

72 'Campus Rape Report', *Cosmopolitan*, March 1992.

73 *Cosmopolitan*, March 1992.

74 Collette Solomon, 1990, unpublished honours thesis, Department of Anthropology (hereinafter Solomon, 1990).

75 Solomon, 1990 at 2.

76 Solomon, 1990 at 3.

77 Solomon, 1990 at 47.

78 Solomon, 1990 at 48.

79 Hubbard, 1991 at 158.

80 J. R Lazarus, 'Reactions to Rape – the Need for a Social Context', *South Africa Medical Journal* 21 March 1981.

81 Hubbard, 1991 at 158.

82 Lieut-Col C. P. J. Serfontein, South African Police, 'Investigative Responsibility and Police Treatment of the Rape Victim', 9 *SACC* 1985 at 271 (hereinafter Serfontein, 1985).

83 SA Law Commission at 5.35.

84 Serfontein, 1985 at 271.

85 SA Law Commission at 5.35.

86 SA Law Commission at 5.37.

87 SA Law Commission at 5.36.

88 'ANC Women's League Representation at CODESA'.

89 See ANC Women's Alliance Memorandum, 1992; See also 'Violence in South Africa', Rape Crisis Manual, 1989.

90 Article 7 section 4 of 'A Bill of Rights for a New South Africa', A working document by the ANC Constitutional Committee.

91 SA Law Commission at 3.25

Battered women: an invisible issue

1 A. Crump, 'Wife Battering', 1987 *South Africa Journal of Criminal Law and Criminology* 231 (hereinafter, Crump, 1987).

2 Comment, 'The Battered Wife's Dilemma: To Kill or to be Killed', 32 *Hastings Law Journal* 895 (1981).

3 The Matrimonial Property Act of 1984 changed the law, allowing white women to hold majority status if married. The Marriage and Matrimonial Property Amendment Act, 3 of 1988 gave African women majority status. Neither of these provisions are retroactive.

4 J. Julyan, 'Women, Race and the Law', A. Rycroft (ed), *Race and the Law in South Africa*, Cape Town, Juta, 1987 at 140. Under the Natal Code a black woman is a

minor. Section 1 (1) of (KwaZulu) Act 6 of 1981 of the KwaZulu Code provides that majority is to be attained on marriage or on reaching the age of 21. See also A. Sachs, 'Judges and Gender' in *Protecting Human Rights in a New South Africa*, Cape Town: Oxford University Press, 1990 at 54 (hereinafter Sachs, 'Judges and Gender', 1990).

5 Crump, 1987 at 232.

6 Susan Bazilli, 'Introduction', Susan Bazilli (ed), *Putting Women on the Agenda*, Raven Press, 1991 (hereinafter Bazilli, 1991).

7 Lenore Walker, *The Battered Women's Syndrome*, 1984 Springfield, at 37 (hereinafter Walker, 1984).

8 Gayla Marolin et al, 'Wife Battering', Vincent B. Van Hasselt (ed), *Handbook on Family Violence*, 1988 Plenum Press, New York, at 90 (hereinafter Handbook, 1988).

9 Desiree Hansson, 'Working Against Violence Against Women: Recommendations from Rape Crisis (Cape Town)', in Susan Bazilli (ed), *Putting Women on the Agenda*, Raven Press, 1991 at 181 (hereinafter Hansson, 1991).

10 L. Walker, *The Battered Woman*, Harper and Row, 1979 at 79 (hereinafter Walker, 1979).

11 Walker, 1984 at 25.

12 Walker, 1979 at iv; A. E. van der Hoven, 'The Community's Attitude Towards Wife Battering', *ACTA Criminologica*, Vol. 2 No. 2, 1989 at 54 (hereinafter van der Hoven, 1989).

13 Van der Hoven, 1989 at 54.

14 Walker, 1979 at iv.

15 See, for example, CA Penal Code section 273.5.

16 Walker, 1979 at 56.

17 Walker, 1979 at 56-59.

18 Walker, 1979 at 59-65.

19 Walker, 1979 at 65-70.

20 Walker, 1979 at 86-94; Crump, 1987 at 236.

21 Walker, 1979 at 86-94; van der Hoven, 1989 at 56.

22 Walker, 1979 at 86-94.

23 Walker, 1979 at 87; Crump, 1987 at 237; van der Hoven, 1989 at 56.

24 Walker, 1984 at 86-87.

25 Crump, 1984 at 237; Walker, 1979 at 22; Rocco C. Cipparone, Jr., 'The Defense of Battered Women Who Kill', (1987) 135 *University of Pennsylvania Law Review* 427 at 427 (hereinafter Cipparone, 1987).

26 Co-ordinated Action for Battered Women (CABW), *Battering is a Crime: An Information Booklet for Battered Women*, Cape Town, 1990 at 4; Walker, 1979 at 21-22.

27 Walker, 1984 at 19; Handbook, 1988 at 98.

28 Handbook, 1988 at 98.

29 Walker, 1984, citing 'Violent Men or Violent Husbands? Background Factors and Situational correlates of Severity and Location of Violence' in D. Finkelhor et al (eds), *The Dark Side of Families*, Beverly Hills, CA: Sage, 1983.

30 Handbook, 1988 at 91.

31 Walker, 1984 at 29.

32 Walker, 1979 at 36.

33 Hansson, 1991 at 181.

34 Hansson, 1991 at 181.

35 Coordinated Action For Battered Women (CABW), unpublished information letter titled 'Battered Women and the Criminal Justice System.'

36 Ronnie Morris, 'Cost of Thrown-Out Wive's Applications Falls on Taxpayer', November 1991, *Cape Times* (hereinafter Morris, 1991 *Cape Times*).

37 Hansson, 1991 at 191.

38 Sachs, 'Judges and Gender', 1990 at 53.

39 See note 28 above.

40 Mamphela Ramphele and Emile Boonzaier, 'The Position of African Women: Race and Gender in South Africa', in *South African Keywords: The Use and Abuses of Political Concepts*, Emile Boonzaier and John Sharp (eds), David Philip, Cape Town and Johannesburg, 1988 (hereinafter, Ramphele and Boonzaier, 1988).

41 Ramphele and Boonzaier, 1988 at 157.

42 Ramphele and Boonzaier, 1988 at 157.

43 Ramphele and Boonzaier, 1988 at 157.

44 Ramphele and Boonzaier, 1988 at 158, 163.

45 Ramphele and Boonzaier, 1988 at 157.

46 Ramphele and Boonzaier, at 157-158.

47 Hansson, 1991 at 181 citing S. Sorour, 'Women on the Receiving End', *The Weekend Argus*, 1989.

48 Hansson, 1991.

49 Handbook, 1988 at 103.

50 Morris, November 1991, *Cape Times*.

51 Coordinated Action for Battered Women, 'A Plea for a New Approach', unpublished working paper.

52 Hansson, 1991 at 188.

53 Interview with Naomi Hill, Director, 'Coordinated Action for Battered Women', Cape Town, February 6, 1992.

54 Hansson, 1991 at 188.

55 Coordinated Action for Battered Women, 'A Plea for a New Approach', unpublished working paper.

56 Van der Hoven, 1989 at 55.

57 Morris, November 1991, *Cape Times*

58 Morris, November 1991, *Cape Times*

59 Conversation with David van der Ligen, Senior Supreme Court Staff Member.

60 The Athlone Legal Aid Office; Advocate at the Bar, Cape Town.

61 Conversation with Advocate at the Bar, Cape Town.

62 One buried case, *State v. DeJong*, illustrates how men receive more lenient treatment. In *DeJong*, a man who murdered his wife had his case reduced to culpable homicide. The Magistrate's Court heard the case. Fortunately, a backlash from the family and women's organisations pressured the court to give the accused of a maximum sentence, 7 years with a 2 year suspended sentence. The Magistrate commented, during sentencing, that the case should not have been pled down.

63 *Arnold* at 257.

64 *Arnold* at 260.

65 *Arnold* at 260.

66 *Arnold* at 258.

67 1987 *Annual Survey of South African Law* at 365.

68 1987 *Annual Survey of South African Law* at 365. Battered women who kill their batterers raise many issues with regard to how to define self-defence. Should self-defence be defined by an objective standard, which looks only at the circumstances at the time of the killing; or a subjective standard, which takes into account many surrounding circumstances and the physical differences between the two parties? For a discussion see Cipparone, 1987 at 427.

69 Naomi Hill, 'Battered Women's Experiences and Perceptions of Helping Agencies', unpublished thesis, University of Cape Town, January, 1987.

70 Van der Hoven, 1989 at 54.

71 Van der Hoven, 1989 at 54.

72 Van der Hoven, 1989 at 55.

73 Van der Hoven, 1989 at 56.

74 Van der Hoven, 1989 at 56.

75 Walker, 1979 at 33; A.H. van der Hoven, 1989 at 54.

76 Van der Hoven, 1989 at 54.

77 Walker, 1979 at 21-22.

78 Bazilli, 1991 at 10.

79 Jacklyn Cock, 'Putting Women on the Agenda', in Susan Bazilli (ed), *Putting Women on the Agenda*, Raven Press, Cape Town, 1991 at 29 (hereinafter Cock, 1991).

80 Cock, 1991 at 29.

81 Bazilli, 1991 at 10.

82 Christina Murray, 'Violence Against Women: Legal Activism', 1987 *South African Journal of Human Rights* 3 at 385 (hereinafter Murray, 1987).

83 Hansson, 1991 at 189.

84 Hansson, 1991 at 189; Handbook, 1988 at 106.

85 Handbook, 1988 at 106.

86 Murray, 1987 at 384.

87 Handbook,1988 at 106.

88 Murray, 1987 at 384; Hansson, 1991 at 190.

89 I. D. Schafer, 'Family Courts – Reconsideration Invited', 1983 *Acta Juridica*, Juta, 1984 at 191 (hereinafter Schafer, 1983).

90 For an evaluation of the Black Divorce Court see Sandra Burman, 'Roman Dutch Family Law for Africans: The Black Divorce Court in Action.' 1983 *Acta Juridica*, Juta, 1984 at 171. (hereinafter Burman, 1983).

91 Burman, 1983 at 177.

92 Attorneys who specialise in family law stress the need for a special branch of the judiciary for these reasons.

93 For a discussion of the establishment of the Family Court see Schafer, 1983. Although the study does not address the concept of the family court in the context of domestic violence, Schafer provides an overview of other practible applications of a Family Court.