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A critical overview of intra-familial violence and enforcement procedures

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OPSOMMING

'n Kritiese Oorsig van Huishoudelike Geweld en Strafmaatreëls

Persepsies wat betref huishoudelike geweld tipeer dikwels die vrou en kind as die slagoffers en die man as die geweldenaar. Mites en vooroordele geskep deur geslagstipering word bespreek met spesifieke verwysing na die klem wat in die Suid-Afrikaanse Grondwet geplaas word op die behoefte in ons samelewing om gelykheid en onpartydigheid in alle aspekte van die daaglikse lewe daar te stel. Die historiese, ekonomiese en sielkundige redes vir die eeue-oue onderdrukking van vroue word bespreek, asook statistiek in verband met die toename van gerapporteerde gevalle van huishoudelike geweld teenoor die manlike geslag. Sosialisering vanuit beide die feministiese en patriargale oogpunt word beskou as hindernisse wat mans sielkundig daarvan weerhou om sodanige geweld óf aan hulself te erken óf aan die gemeenskap te openbaar. Die houding van die gemeenskap en regering word aan die hand van ontoereikende bestaande wetgewing en instellings, wat nie daarop gerig is om huishoudelike geweld teenoor mans vanuit 'n praktiese oogpunt te hanteer nie, oorweeg. Probleme wat staatsinstellings ondervind om hierdie uiters sensitiewe vorm van geweld in verhoudings wat nie noodwendig beëindig word nie, te hanteer, word ook in ag geneem en ondersoek. Aan die hand van hierdie kritiese analise stel die skrywers verskeie maatreëls voor wat regeringsinstellings behoort te tref, nie net om die praktiese hantering van huishoudelike geweld vanuit 'n regs-oogpunt te verbeter nie, maar ook om gemeenskapsbewustheid van alle aspekte van die probleem te verhoog en sodanig geykte persepsies te verander.

1 Introduction

In this article, we look at the issue of domestic violence in its various forms. In the first part the writers look at how courts, the legislature and academics have tried to define domestic violence. The authors argue that the definitions currently in use are not inclusive, and as a result excluded other acts which constitute domestic violence. The second part looks at issues such as why domestic violence occurs at all. The authors analyse society's attitude, particularly in South Africa, towards this problem. The third part of this article looks at domestic violence from a feminist and male perspective. The latter argues that although men and women are equally at risk to this form of abuse, the law tends to put more emphasis on the protection of women than that of men. It is argued further that this emphasis has a tendency to discriminate against men. The fourth part of

this article concentrates on the government's involvement in trying to curb this problem. The authors argue that instruments currently in use, namely, the Prevention of Family Violence Act 1993 and the current Bill on Domestic Violence, are inadequate. Sentencing options are also fraught with difficulties. The writers conclude this part by conceding that, although sentencing options currently in use are insufficient, these remedies reflect an attempt by the government to take positive and meaningful steps towards the eradication of domestic violence. The last part of this article looks at measures that can be undertaken by the justice system and community at large in curbing this problem. The authors also discuss international conventions such as the Convention on the Elimination of Discrimination Against Women (CEDAW). South Africa has ratified the latter.

Before the enactment of the Prevention of Family Violence Act in 1993, there was no law in South Africa especially "designed" to protect women or men in abusive relationships. Victims of domestic violence had to look to the criminal law. Under the criminal law specific offences such as assault and rape provided some of the criminal law remedies available to the victims. As is shown later, these remedies were inappropriate to those many victims who did not want their partners to be treated like common law criminals. Fortunately, due to various feminist movements especially towards the late eighties, the government had no choice but to address the problem of domestic violence. It did this by passing the Prevention of Family Violence Act 133 of 1993. The Act represents an attempt by the state to provide some specific legal protection against domestic violence, marital rape and the ill treatment of children. The Domestic Violence Bill attempts to be inclusive in its definitions.

2 Definitions

Section 1(iii) of the Domestic Violence Bill defines a "domestic relationship" as a relationship between parties married to each other, including persons married in terms of custom or any law. It has included parties (whether of the same or the opposite sex) who are cohabiting. An important addition to this bill is that it has included couples who are not necessarily staying together and parties of the same sex. The section has also provided protection to parties who are or were in a dating relationship. Section 1(iii)(g) also refers to persons who share or shared the same household. It can be inferred from this that the Act also protects parties who stay together under one roof but are not necessarily in a dating relationship.

The Prevention of Family Violence Act 133 of 1993, only made provision for persons who were married to each other or who lived together as husband and wife. The Domestic Violence Bill has extended the scope of persons who fall under it.

In section 1(iv) "domestic violence" includes:

- physical abuse or threat of physical abuse;
- sexual abuse or threat of sexual abuse;

- intimidation;
- harassment; or
- destruction of property.

The authors note that emotional abuse has not been included in the definition. It is submitted that although emotional abuse is difficult to prove, this does not justify its exclusion.

Section 1(2)(a) and (b) have included some important provisions.

Section 1(2)(a) has made provision for single acts which may in appropriate circumstances amount to domestic violence; and sub-section (b) provides for a number of acts that form part of a pattern of behaviour which may amount to domestic violence, even though some or all of those acts when viewed in isolation, may appear to be minor or trivial. The section addresses some of the concerns raised by some academics and the police. The dilemma faced by the police is that domestic violence is often an on-going offence and difficult to fit into specific crimes such as assault or culpable homicide.

3 A Feminist Approach to Domestic Violence

Women have for a long time been shown to be more vulnerable to domestic violence than their male counterparts. This is due to a number of historical, cultural and economic variables. Violence against women was treated by the Roman-Dutch authorities. Although there was a dispute between these authorities whether or not a husband could chastise his wife, the contention is that¹ the majority of the writers did acknowledge the fact that the husband could chastise an erring or delinquent wife. The husband's right to chastise his spouse was widely accepted by the courts until Steyn J in the case of *S v Mdindela*² asserted that "a husband has no longer the right to administer even a moderate corporal correction to an erring wife".

Despite this decision such practice continued. Various states sanction or tolerate violence against women in one form or another. For example, in India, violence against women is in the form of bridal burnings. In Brazil, violence against women is not treated as an offence. In Turkey, women are compelled to undergo virginity examinations. Although there are laws prohibiting such activities these states do not take active steps to put a halt to these practices.

The above clearly show that violence is part of a historical process and that it is not natural or born of biological determinism. Men have always been regarded as heads of the family, and women have always played a subservient role to that of their spouses. This dichotomy in family relationships has led to stereotyped roles of men and women. Men are superior to women economically, socially and otherwise. Women have, from

1 Olmesdahl "The Family Heads Power To Inflict Punishment" 1982-1984 *Natal LR* 99 104.

2 1972 SA 322 (O).

time immemorial, been denied economic power and independence. Denying women economic independence is a major cause of violence against them because it prolongs their vulnerability and dependence.³ Usually economic systems which value profits do so at the expense of women; hence the female contribution in the economic sphere has been devalued, with the result that women have become increasingly dependent on their partners for economic support.

The prevalence of ideologies which justify the subordinate position of women is another cause of violence directed against them. The construction of femininity in these ideologies often requires women to be passive and submissive, to accept violence as part of a woman's estate.⁴ Such ideologies also link a woman's identity and self-esteem to her relationship with her father or husband.

Doctrines of privacy and the concept of the sanctity of the family are other causes for violence against women to persist.⁵ In the past, the state and the law intervened with regard to violence in the home only when violence became a public nuisance. Otherwise, the doctrine of privacy allowed for violence to continue unabated. Fortunately, due to recent legislation on the prevention of family violence, the law has increasingly reached into the privacy of the home.

4 Reasons for Domestic Violence

Davis⁶ asserts that in the women-centred perspective, violence against women is a major social problem that is deeply rooted in sexism and the powerlessness of women. She argues that violence is caused by a host of social factors including the patriarchal social system, concerned with preserving the family even at the expense of its more vulnerable members, and the ongoing socialisation that causes women to be economically dependent on men.⁷

Domestic violence is associated with drug and alcohol abuse. This association has been criticised by feminists who assert that some abusive men use neither drugs nor alcohol. Instead they argue that violence is learned behaviour. Like any form of abuse, if a man sees his mother continually abused, he might grow up thinking that abuse is an acceptable way of treating women.⁸

Some men abuse their partners because they have been provoked by them. In some cases men are provoked by their wives' independence. It is

3 Coomaraswamy Preliminary Report submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences; In Accordance with Commission on Human Rights *Resolution 1994/45*. (Commission on Human Rights (UN)).

4 *Idem* 15

5 *Idem* 17

6 Davis "The Problem of Wife Abuse: The Interrelationship of Social Policy and Social Work Practice" 1992 (1) *Social Work* 15-16.

7 *Ibid.*

8 Bennett "Substance Abuse and the Domestic Assault of Women" 1995 *Social Work* 760-766.

sometimes argued that most men who abuse their wives or women partners do not act purposively, but impulsively.⁹ The response to this assertion is that an alleged loss of control does not exonerate violent acts; moreover, battering whether or not premeditated, is seen as purposeful behaviour.¹⁰

Men seek to deny and destroy the power of women through violence. They seek to confirm the devaluation and dehumanisation of women. Most women lack economic means and support systems to find and to provide for themselves and their children; this helplessness on their part encourages men to be abusive.¹¹

Social and economic factors such as unemployment, low wages and inadequate housing also cause domestic violence. Economic dependence is seen as a major reason for women to stay in abusive relationships. This is sometimes related to lack of education and social pressure, especially in the African family. Some feminists argue that the practice of paying *lobola* has been used to coerce women to stay in abusive relationships; and prevents them from leaving their abusive spouses. Women are expected to stay married to their husbands. Some stay in these relationships hoping that the situation might change for the better or fear that leaving will elicit deadly rage from the husband.¹² In most cases, victims (mothers/wives) endure the violence and stay in these relationships for the sake of their children. The process of battering often produces extreme states of dependency, dread and results in the women finding it difficult to leave their abusive spouses.¹³

Many battered women develop what is called the Battered Woman Syndrome (BWS), which emerges when they have been the victims of repetitive physical and psychological abuse. In most battering relationships, the overt violence is not constant; it often occurs in cycles with peaks of violence and periods of calm. In general, however, the abuse is usually an ongoing experience which increases in intensity throughout the duration of the relationship.¹⁴ Deborah Smith,¹⁵ quoting Walker, identifies three critical stages:

- the tension building phase; characterised by periodic minor incidents of abuse;
- the acute battering phase; characterised by an overt violent assault or series of assaults;
- the loving-contrite phase; characterised by an expression of remorse and apologetic behaviour by the batterer toward the victim.

9 Copelon *Human Rights of Women: National & International Perspectives* (1994) 128.

10 *Ibid.*

11 *Supra* fn 3.

12 *Supra* fn 9 125.

13 *Ibid.*

14 *We Won't be Beaten- A Guide to the Prevention of Family Violence Act* National Institute for Public Interest Law and Research (1996) 9.

15 "Battered Woman Syndrome; Hazards and Implications" 1995 *The Social Worker* 15-17.

This cycle helps to explain “how battered women become victimized, how they fall into learned helplessness behaviour, and why they attempt to escape”.¹⁶

Smith¹⁷ asserts that the first argument in support of BWS can be termed explanatory, since BWS can help to explain how the cycle of violence is perpetuated. Discussing the cycle and history of abuse can aid the lay person in understanding “why the battered woman felt fear in a situation that would not appear threatening to a reasonable person seeing only the immediate circumstances”¹⁸

She is also of the view that the BWS concept can help dispel the myths believed by the average person. She states that the psychological damage caused by battering may be beyond the understanding of the average court. It is therefore essential to have an expert present this evidence at the trial. She avers that this testimony is needed to dispel stereotypical myths of abused women.¹⁹

Smith argues that the problem with relying on the BWS is that it assumes that the court holds misconceptions of battered women, and that expert testimony can change these views.²⁰ She alleges that, on the contrary, some research²¹ suggests that the court (judges, prosecutors and defense counsel) does in fact hold stereotypical myths of abused women. She states that research conducted by Ewing and Aubrey found that when subjects are given hypothetical scenarios of an abused woman’s situation, a clear majority (63,7%) subscribe to the belief that the abused woman can leave the abuser.²² This view is also held by a number of people in this country.

Smith avers that a second reason to avoid the use of the concept of BWS is the “oppression” argument. This argument states that the use of expert testimony on BWS explicitly suggests that the voice of an expert is preferred to that of the victim. It might be easily assumed that the expert can provide scientific validation of the abusive experience. She asserts that this scientific approach to BWS further oppresses the abused woman and has the danger of quantifying and/or objectifying personal experiences. She concludes by stating that without being allowed to speak for themselves, the healing process for these women cannot be completed. A more serious danger of using BWS is that it has the potential to “obscure reality” Focussing on the psychological syndrome might obscure the social and political dimensions of woman abuse. Hence, it might serve to individualise and ignore the social context: that we live in a society which accepts and allows violence against women.²³

16 *Idem* 16.

17 *Ibid.*

18 *Ibid.*

19 *Idem* 17

20 *Ibid.*

21 Eg that the abused woman asked for it, or that a professional can explain why abused women display certain characteristics or stay in abusive relationships.

22 *Ibid.*

23 *Ibid.*

Violence is also difficult to detect. The brutality of domestic violence is often denied – the batterers don't identify it, and the women try to hide it.²⁴

5 A Male Approach to Domestic Violence

When it comes to male sexual, physical or emotional abuse one is tempted to wonder whether these forms of abuse do indeed exist or whether their existence is a myth. This scepticism is due to the dearth of research on issues relating to male abuse. The question is whether lack of research is due to lack of interest in male abuse or to the fact that male abuse does not exist at all.

Is the lack of interest a result of the much held popular view that we live in a male dominated world? Throughout the world, statutes and the literature is about female abuse, (including sexual and physical) wife battering, battered wife syndrome, child abuse, etcetera. There are few if any statutes which deal specifically with male abuse or which seek to protect men from abuse. In South Africa we have statutes and proclamations which deal with domestic violence and child abuse. These laws seem to place a lot of emphasis on the protection of women. This has resulted in stereotyping and a number of myths and misconceptions concerning sexual abuse. These myths have in turn led to detection problems and underreporting of abuse by both victims and health professionals. There is a plethora of laws designed to protect women from all kinds of abuse; the argument is that women need the law's protection because of their weakness. Some writers have commented that society is more sensitised to girls being the victims because of the perceptions of boys as strong and girls as weak and that the victim status and role are reserved for females.

On the other hand, males are not permitted to express vulnerability and helplessness.²⁵ We need to decide on whether we are to continue this trend or whether we are going to adapt to changes and apply these laws equitably and impartially to all people irrespective of gender or sex. Emphasising the need for equality and impartiality before the law to all human races, Kriegler J²⁶ argued that equality is our Constitution's focus and organising principle. Although the judge conceded that our society currently exhibits deeply entrenched patterns of inequality, he was nevertheless of the view that courts and policy makers should be careful not to perpetuate the distinctions of the past based on gender type-casting.²⁷

24 Copelon fn 9 *supra* 127.

25 Freeman-Longo "The Impact of Sexual Victimization on Males" 1986 *Child Abuse and Neglect* 411–414.

26 *The President of the Republic of South Africa & The Minister of Correctional Services v Hugo* case 11/96 (CC).

27 The facts in brief were that women prisoners with children under the age of 12 were granted remission of their sentences by the President, whereas their male counterparts were not. Kriegler J in his dissenting judgment stated that although the pardon was issued in good faith, it was nevertheless, inconsistent with the prohibition against gender or sex discrimination contained in s (2)(ii) of the Bill of Rights and was therefore unfair and invalid.

6 Abuse Defined

Some researchers attempt to define abuse as “[t]he intentional infliction of physical injury or emotional harm”,²⁸ while *The Collins English Dictionary* defines abuse as “to use incorrectly or to mistreat”

The American Humane Association²⁹ found that sexual abuse reports have risen over the years and that the proportion of male victims reported has increased. Finkelhor³⁰ surveyed 796 college students and obtained a sexual abuse victimisation rate of 9% for male and 19% for females.

Female sexual perpetration is probably misestimated because definitions of sexual perpetration are geared towards describing male perpetrators. Data on prevalence of male and female child victims might be skewed. The typical example of these definitions are rape³¹ and seduction. The definitions and the general belief are that women cannot commit these wrongful acts. One cannot help but wonder whether this belief is based on moral or biological grounds!

Allen³² commented on the increasing recognition of female perpetrators of sexual abuse. If one assumes that sexual abuse perpetrators of either sex act consistently with sex role stereotypes, it may be the case that female perpetrators perform sexual abuse in a more “female” manner, that is, in a less goal-directed, violent or overtly genital manner. Examples of this might include seductiveness, caressing and fondling as opposed to acts of penetration, violence and clearly orgasmic activities.

7 Detection Problems Associated with Male Victims

Most organisations have significant cultural barriers to the recognition of male victims. Organisations identifying themselves as feminist or as having a feminist ideology are readily able to identify and support females oppressed in a world controlled by males but may have difficulty in recognising the adolescent or youth adult male victim of sexual abuse, especially if that abuse is perpetrated by a female, or if the male victim is sex role stereotyped and not “feminist”. Male victims of sexual abuse can be silenced by the gender stereotyping of both patriarchy and feminism. Socialisation is also to blame. It is difficult for a man to regard himself as a victim of abuse. It can take a long time for a man to realise or appreciate the fact that he is/was a victim of sexual abuse.

28 Dimmock “Myths about Male Victims” in *The Treatment of Male Sexual Victims* (1990).

29 Finkelhor and Russell “Women as Perpetrators: Review of the Evidence” in Finkelhor (ed) *Child Sexual Abuse: Man Sexual Abuse: New Theory and Research* (1984) 172.

30 Finkelhor *Sexually Victimized Children* (1979) 171–187.

31 Rape consists in a male having unlawful and intentional sexual intercourse with a female without her consent. The offence is based on the absence of valid consent on the part of the female. No mention is made of a female having sexual intercourse with a male without the latter’s consent. There are numerous cases of women having intercourse with young males without their consent. The reason might be that there is usually lack of force in these cases. The reality is that these acts fall within the definition of sexual misconduct.

32 Allen *Women as Perpetrators of Sexual Abuse: Recognition Barriers* (1990) 108–125.

When boys realise that something sexual has happened to them that was confusing or inappropriate, there are no clear avenues for clarifying their confusion. Rape Crisis Centres and other institutions are generally staffed by and identified as resources for women. Advertisements in the form of awareness programs and literature in these institutions prevent male victims from coming forward.

Dimmock³³ asserts that mental health service providers suffer from a lack of awareness of male victimization. As a result of cultural gender stereotyping, a number of myths concerning sexual and other forms of abuse have led to their lack of recognition and therefore, underreporting by both victims and health professionals.

8 Government and Community Perceptions About Male Abuse

It is commonly but incorrectly perceived by many that men, because of their physical constitution, are not susceptible to abuse. The allegation is that it happens so rarely that one can hardly find a man having been physically assaulted by a woman. In cases where men are physically abused by women, they keep quiet about such incidents since they view it as taboo.

Cosiorek and Bara³⁴ categorise several myths about male sexual abuse victims:

- (1) *You cannot force males to have sex against their will* In the case of children and adolescent males, as with young females, the majority of sexual abuse is perpetrated by family members, known persons in authority, relatives or friends. The victim is tricked or manipulated by someone whom they trusted. The experience most often results in a feeling of confusion. With older teens and young adults, sexual abuse is threatened by someone who has power and authority in that context.
- (2) *If a male has an erection and ejaculation, he consented* Male children can experience erections in a variety of situations. In cases of abuse, the male adolescent may ejaculate; this is confusing to the victim. Some hold the view that if an unwilling male ejaculates or has an erection, this can be interpreted as consent on his part.
- (3) *All males who sexually abuse boys are homosexuals* A number of research studies show that the vast majority of sexual abuse against boys is perpetrated by heterosexual identified males or females. Groth and Birnbaum³⁵ say that this myth equates sexual abuse with sexual orientation, and sexual abuse with sexuality. Such myths are no longer tolerated in regard to female sexual victims but continue as regards males.

33 Dimmock "Myths about Male Victims" in *The Treatment of Male Sexual Victims* (1990).

34 Cosiorek and Bara *Male Sexual Abuse: A Trilogy of Intervention Strategies* (1994) 131.

35 Groth and Birnbaum *Adult Sexual Orientation and Attraction to Underage Persons* (1978).

- (4) *If abused by a male, the abuse occurred because the boy is gay or acted gay* This myth causes considerable anguish and confusion for boys.
- (5) *If abused by a male, the male victim will become gay* Some correctional research suggests that male victims of sexual abuse are twice as likely to engage in same-sex behaviour.
- (6) *If forced or tricked by a female into being sexual, the boy should consider himself lucky* Although many adolescents initially have a difficult time perceiving this situation as abusive, there is no evidence that the gender of the perpetrator eliminates or diminishes the effects of the abuse.
- (7) *If a boy is sexually abused, he will become an offender* This is sometimes called the “vampire syndrome” which holds that once abused, a boy will become an abuser. This myth is often an explanation of why men become sex offenders.
- (8) *Boys are less hurt by sexual abuse than girls* This myth reflects gender stereotyping that boys are stronger, tougher and not as emotionally vulnerable as girls. This sexist stereotyping has been propagated by some feminists. This implies that if boys are abused it will not affect them as much.
- (9) *Boys can protect themselves from sexual abuse* This myth seems to view sexual abuse as a correlate to physical assault, whereby tough boys should be able to defend themselves physically; that means boys are expected to defend themselves and their manhood.
- (10) *Males are initiators of sex or of abuse, they got what they were looking for* This implies that males are initiators or aggressors of sexual encounters. In reality, males are as vulnerable as females to seduction by manipulation or force.

9 Sexual Abuse by Female Offenders

As indicated above, most of the literature on sex offenders describe males as offenders and females as victims. *Justice and Justice* (1979) indicate that a number of researchers have raised the possibility of a greater amount of female abuse on males.

They suggest that the lower rate of female perpetrators is due to female abuse assuming a different form and mimicking child care through activities such as exposure, fondling and sexualized physical interactions. Finkelhor and Russell³⁶ viewed the clinical literature and reported that approximately 24% of all male victims and females act alone or with a male partner. The authors identified the following types of female sex offenders:

- (1) *The exploration/molestation type* This occurs once or a few times and involves fondling the victim.

36 Finkelhor and Russell 180–187.

- (2) *The predisposed/severe abuse history type* This is an adult female with a severe sexual and physical abuse history, who commonly experience substance abuse, depression and personality disorders.
- (3) *The teacher/lover type* The teacher or lover type is an adult female, and victims are usually teenage males (age 11-16), who may be the perpetrator's own child, stepson, child's friend, neighbour, student or friend.
- (4) *The male coerced type* The male coerced type is usually an adolescent or adult female intimidated or threatened into the abusive behaviour by a boyfriend or husband, who generally initiates the abuse prior to the female's involvement.

As indicated above, the issue of male abuse is not taken seriously. Usually research concentrates on sexual abuse, and not on other forms of abuse such a domestic violence, and psychological (emotional) and economic abuse. There is a total disregard of the other forms of abuse that men are in practice subjected to. Most women love to play with male emotions either wittingly or unwittingly.

A serious dilemma is usually faced by victims of abuse when the matter is brought before the courts. In practice, a victim of intra-familial abuse (especially domestic violence) might desperately wish for the abuse to stop. Unfortunately, avenues that are available to victims are fraught with difficulties.

10 Options Available to Victims of Violence

10 1 Criminal Law

Some academics³⁷ are of the view that the criminal law is unable to grapple with the issue of domestic violence. One of the reasons for this inadequacy is that nearly all the acts which fall under the rubric of domestic violence constitute specific crimes, and as such are liable to prosecution in the ordinary courts. Offenders are usually charged with crimes such as assault, rape, indecent assault and murder.³⁸ The guilty offender may be fined, imprisoned or given a suspended sentence.

The problem with domestic violence is that it is an on-going offence, which may take place over a long period of time. It becomes increasingly difficult to fit this phenomenon into the compass of crimes such as assault, culpable homicide or rape. Usually the latter crimes involve a single act. The victim is usually able to prove its occurrence by either the calling of witnesses or by relying on physical evidence. The dilemma faced by victims of domestic violence is that, since it is an on-going offence, the victim might at the time of reporting not bear any physical signs to show that she/he has been abused. Moreover, since the offence generally happens or occurs in private, there are usually no witnesses to corroborate

37 Middleton "A Critical Evaluation of Legal Procedures to Prevent Family Violence" 1991 *SACJ* 4 2 3.

38 *Ibid.*

the victim's story. Under these circumstances, the court might not have a choice but to find the offender not guilty of the crime. In view of the uniqueness of this crime, it is rare for the victim to consequently report each event when it occurs. The victim in practice only seeks help when the cumulative effect of the series of assaults have become unbearable.³⁹

As indicated above, the paradox is that although the victim may approach the courts for help, she/he might still wish the relationship to continue. The problem is exacerbated by the criminal law because the offenders/perpetrators, if found guilty, are treated as common law criminals. A victim of family violence can hardly be said to be seeking the same kind of justice as a person who is assaulted by a stranger in the street.⁴⁰ The adversarial nature of the proceedings puts the victim in an awkward position. Here both parties are subject to grueling cross-examination, which has as its main purpose to show that one of the parties is lying. The procedures followed in criminal courts do not take into account the fact that parties may thereafter not only have to live together,⁴¹ but might still be in love.

Middleton states that things said and done in a criminal court room are not only indelibly inscribed on the record of the court, but also in the hearts and minds of the litigants.⁴² The criminal law cannot adequately address a situation where a potential victim, due to her intimate knowledge of the accused, has a strong suspicion that violence within the home is imminent. He further notes that, apart from securing an order to bind the parties over to keep the peace (a remedy which he regards as cumbersome and effectual within the family context), there is generally very little that the police can do unless or until the offender has committed some or other unlawful act, by which time it might be too late.⁴³

Research findings⁴⁴ indicate that domestic violence is commonly related to alcoholism, the use of drugs or psychological problems. Hence, sentencing options such as imprisonment or the imposition of a fine seem inappropriate.

10 2 The Prevention of Family Violence Act 1993

The Prevention of Family Violence Act came into effect on 1 December 1993. The prevalence of domestic violence and the inadequacy of the criminal law resulted in the government taking positive steps to curb this problem. For the first time in South Africa, a law was enacted to deal squarely with this vexed problem. The state finally realised that the problems of domestic violence could no longer be swept under the carpet, or explained away as matters of a private or domestic nature.

39 Middleton 4.

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

43 *Idem* 6.

44 Bennett "Substance Abuse and the Domestic Assault of Women" 1995 *Social Work* 760-764.

This legislation has provided women, men and children with a legal remedy. We are nevertheless of the view that South Africa needs something more than law reform. The latter needs to be coupled with ideological and cultural changes.

One should briefly look at the omissions in the Act which tend to dilute its effectiveness. The Act's first shortcoming is that it seems to apply to parties who are legally married, either by civil rites or custom, and to those who, although not married, live together as man and wife. The obvious defect here is that it has effectively excluded homosexual/lesbian lovers, and couples who might not necessarily be staying together. The latter is also very important. The prevalence of violence among the latter group is always highlighted in newspaper articles. There is no doubt that girl/boy-friend violence is on the increase.

Section 2(1) of the Act empowers the magistrate or judge concerned to grant an interdict against the offending party. The offender shall, if the application is successful, be prevented from entering the matrimonial home or from performing any act specified in the Act. It appears from the Act itself that the judge or magistrate is not obliged to grant the interdict on application, and that the decision to grant or refuse the interdict is discretionary. Jagwanth⁴⁵ argues that it is not clear from the Act on what basis the application may be refused, and that the discretionary nature of the interdict does not take into account the fact that the presiding officer may be influenced by patriarchal or feminist myths.

Jagwanth⁴⁶ asserts that the problem of domestic violence can be effectively dealt with only if police attitudes towards this issue undergo a paradigm shift. To date, the police still regard it as a private or domestic dispute, and hence are either reluctant to interfere or do not treat the complaint as serious or deserving of thorough investigation. She states that the police avoid interfering in cases involving violence by arguing that their duty is to enforce the law and not to direct normative behaviour. They therefore argue that they may be blamed for interfering in private matters if they get involved in household disputes.⁴⁷ There is no doubt that a change in police attitudes is crucial. As will be shown below, change can occur if police officers undergo special training. Such training should, among other things, emphasise the importance of protecting men and women who are caught in abusive relationships.

10 3 The Domestic Violence Bill

The bill was introduced by the Minister of Justice to address some of the shortcomings in the Prevention of Family Violence Act 1993. The bill has, unlike the Act, included homosexual and lesbian couples in the category of people to be protected as well as parties who are or were in an engagement or dating relationship. The bill has, unfortunately, not included

45 Jagwanth "The Prevention of Family Violence Act 1993: A Feminist Critique" 1995 *SACJ* 1 2.

46 *Idem* 3.

47 *Ibid.*

emotional abuse in its definition of domestic violence. The reason, one might be led to conclude, is that it is practically impossible to prove that a party was/is a victim of emotional abuse. The authors are of the view that this difficulty does not justify its exclusion.

The bill also recognises the fact that a single act may amount to domestic violence, and that a number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial. This is an important addition. In most cases, violence was reported only when the victim could no longer hide it, that is, where she/he had to go to hospital for treatment, or in a worst case scenario, after the victim had been fatally abused. The bill obliges some categories of professionals to report any suspicion of violence against children, but does not make any mention of lovers in abusive relationships. The writers assert that mandatory reporting should also be extended to domestic violence cases. It is common for parties to withdraw or hide the fact that they are victims of abuse. Once a professional *bona fide* suspects that a person is a victim of abuse, she/he should report this to the relevant authorities. The latter might be social workers or the police. If a suspicion is reported in good faith, the professional should be protected from litigation.

Section 12 of the bill provides that proceedings under the Domestic Violence Act must be held in camera. The authors concede that this provision is appropriate where victims are young children, but assert that where the parties involved are adults, proceedings should be held in open court. It is important for the public to be informed about domestic violence issues and to appreciate that it is wrongful behaviour. It is therefore in the public interest that such proceedings should be held in open court.

10 4 International Conventions

After the constitutional changes of 1994, South Africa joined the international community of civilized nations and undertook to change its laws accordingly. It proceeded by ratifying the Convention on the Elimination of Discrimination Against Women (CEDAW).

This convention regards gender based violence as discrimination. In its definition of discrimination, the convention has included gender based violence, that is, violence which is directed against a woman because she is a woman, or which affects women disproportionately.

Under article 2 and 3, states are to take all appropriate measures to overcome discrimination in all fields. States have a duty to ensure that laws against family violence, abuse, rape and sexual assault and other gender based violence give adequate protection to all women. It further states that appropriate protective and support services should be provided for victims. Gender sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the convention.

In terms of the convention, states are mandated to identify both the nature and the extent of attitudes, custom and practices which perpetuate violence against women, as well as the kind of violence which results.

They have to report both the measures undertaken to overcome violence and the effect of such measures.

State members are required to encourage the compilation of statistics and research on the extent, causes and effects of gender-based violence, and on the effectiveness of measures to prevent and deal with violence.

State members are also required to introduce education and public information programs to help eliminate prejudices which hinder women's equality. It can be argued in favour of the South African government that it has already taken positive steps in this regard. This is evidenced by the fact that South Africa has already passed the Prevention of Family Violence Act and the Bill on Domestic Violence. We are nevertheless of the view that it still needs to embark on public information programs which will reach people in rural areas. These projects will succeed if help from traditional chiefs is sought. The latter will have to be trained on these issues.

11 Recommendations

We recommend that the government should adopt the following measures to curb and to finally eradicate the problem of domestic violence:

- Police powers should be defined clearly. They should know their powers and limitations thereupon in advance. The police should be educated about domestic violence, and be sensitised about violence.
- Statements from victims should be tape-recorded. These tapes can later play an important role where for instance the victim later refuses to testify. Mandatory arrests should occur where there is a *prima facie* case.
- The government should provide shelter for victims. They should whenever necessary, be provided with tangible services to support themselves and their dependants. They will obviously need temporary emergency shelter and emotional support. People who are battered do not need "treatment"; they need a continuum of services specifically designed to enable them to choose whether or not to stay with their abusers.
- The government needs to set up a special domestic violence court, with trained personnel in this area of the law.
- The definition of inter-familial violence has to be extended, and domestic violence cases should be held in open court.
- Community awareness programs need to be put in place. This can be done through the media, folklore stories, plays and workshops. Chiefs can play an important role in this regard.
- Counseling should be mandatory for offenders, sessions should be attended regularly, and there should be follow-ups.
- A need to change societal attitudes and stereotyped roles for men and women is crucial. The problem is not to be addressed by changing individuals; it is to be addressed through changing the environment that allows it to flourish.

12 Conclusion

We are of the view that the emphasis is still on protecting women. The government and feminist groups need to undergo a paradigm shift. The fact that men are also victims of abuse has to be acknowledged, and the problem addressed. The fact that most cases deal with abuse of women does not in itself justify their exclusion. There is a dire need for gender-neutral programs.

There is a need to dispel myths. We cannot address past prejudices by discriminating against men. It is crucial to the advancement of our country that people should be treated equally and enjoy equal protection under the law. The government has a duty to introduce long-term programs aimed at changing society's attitudes and biases.

We acknowledge that the government has through its laws taken positive steps to deal with the problem. However, the government has to appreciate the fact that men are also victims of abuse, hence emphasis should be on gender-neutral programs or solutions.