CHAPTER SIX

THE LAW RELATING TO VIOLENCE AGAINST WOMEN IN NIGERIA AND SOUTH AFRICA

Virtuous is the girl who suffers and
dies without a sound

- Indian proverb

6.1 INTRODUCTION

This chapter consider violence against women in Nigeria and South Africa. Violence against women is very important as it affect the lives of women. This chapter looks at violence against women from both international and domestic perspectives. Violence against women has been described as the most universal of all crimes in the world and as a crime that is usually not punished.[1]

This chapter considers the role of international human rights law in addressing issues of violence. The UN Declaration on Violence Against Women is considered. Consideration is also given to the public/private divide in law and its effects on violence against women. Hitherto, violence against women is not regarded as a crime, as the general view is that the state should not be concerned with what goes on behind closed doors. International human rights law has been able to overcome the public/private divide in law as it affects violence against women as violence both private and public

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1 The Chairperson of the United Nations Women's Development fund while being interviewed on BBC News August 26, 2000.

are now punished. Private violence against women is now criminalised as can be seen from the criminalisation of domestic violence, marital rape and sexual harassment.

Some countries like Nigeria still consider violence against women, as a private matter with which the state should not concern itself. South Africa is one of the few countries in the world that have been able to overcome the public/private divide in law in this respect.

Domestic violence and rape are the only form of violence against women considered in this Chapter. Harmful traditional practices against women are considered elsewhere in the study.[2]

6.2 VIOLENCE AGAINST WOMEN IN INTERNATIONAL HUMAN RIGHTS LAW

The abuse of women by their male partners is among the most common and depressing forms of gender-based violence. Gender based violence encompasses all forms of violence that perpetuate and exploit the dichotomy between women and men in order to assure the subordination and inferiority of women and everything associated with the feminine.[3] Violence against women occurs both within the public and the private spheres, and is the most brutal manifestation of women's oppression. It violates a woman's right to bodily integrity and liberty, to be free from torture, inhuman and degrading treatment, and in its most acute form, it violates a woman's right to life.[4]

As a result of the global mobilisation of women, and international attention to certain ongoing atrocities, both official and private violence against women have begun to be recognised as a human rights concern.

Prior to now, the international human rights have failed to provide adequate protection for the human rights of women. As a male-constructed and male-defined body of law,

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2 Female genital mutilation for example has been considered in Chapter 5 above, and widowhood practices are considered in Chapter 8 below.

3 Copelon (1994) 116.

4 O'Hare (1999) 21 *Human Rights Quarterly* 364 at 368.

international human rights law suffers from a gender perspective masked by ostensibly neutral language. Consequently women have not derived the same benefits from human rights discourse as men despite the fact that women suffer numerous and egregious human rights violations.[5] Although there are many traditionally defined violations that affect women and men similarly, there are many that uniquely target women.

Gender specific forms of human rights violations include universal forms of violence such as rape, incest, domestic violence, sexual harassment, male child preference, early marriage, virginity tests, dowry deaths, sattee, honour killings, female infanticide, female genital mutilation, widowhood and enforced malnutrition.[6] Violence against women was only formally recognised by the international community as a human rights issue after unprecedented lobbying by women's groups at the Vienna World Conference in 1993.[7] The formal expression of this commitment can be found in the 1993 UN (DEVAW)[8] and the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará).[9] The Southern African Economic Community also has a Declaration on Gender and Development. An Addendum to the Declaration (The Prevention and Eradication of Violence Against Women and Children) was adopted to reaffirm the Community's commitment to the prevention and eradication of violence against women and children in the region.[10] These instruments have been widely welcomed as indicators of the shift within the human rights community toward recognition of the need to address those issues that deny women access to their human rights.

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5 Kois (1997). See generally Testimonies of the Global Tribunal on violations of Women's Human Rights (Centre for women's Global Leadership, September 1994.

6 See Preliminary Report submitted by the Special Rapporteur, Ms Radhika Coomaraswamy on *Violence Against Women – Its causes and consequences*, in accordance with Commission on Human Rights Resolution 1994/45, 22 November 1994, UN Doc E/CN/. 4/1995/42.

7 Vienna Declaration and Programme of Action, UN GAOR, World Conference on Human Rights, 48th session, 22d Plen mtg part 1, UN Doc.A/CONF.157/24 (1993).

8 Declaration on the Elimination of Violence Against Women, adopted 23 February 1994. GA Res 48/104, UN GAOR 48th session, Agenda item 111, UN Doc.A/Res/48/10p (1994).

9 Adopted 9 June 1994, OAS/Ser.L.V/11.92/doc.31 rev 3 (1994).

10 SADC Declaration on Gender and Development adopted at the SADC Summit held in Blantyre, Malawi on 8 September 1997. The Prevention and Eradication of Violence Against Women and Children Document was adopted as an Addendum to the Declaration on Gender and Development on 14 September 1998 at the SADC Summit held at Grand Baie, Mauritius.

The Vienna Conference not only marked an acceptance of the importance of asserting the indivisibility of human rights for women, but also of strengthening the enforcement mechanisms for protecting women's human rights.[11]

The violations of the human rights of women that result from violence emanate from a virtually universal history of power relations between men and women. These inequalities are rooted in a combination of social, economic, political, cultural and psychological conditions.[12] International human rights community has been slow to respond to women's oppression. At the heart of the problem is the exclusion of women's voices from the public world. Modern human rights law owes much to the legacy of national pressure for civil and political rights at the end of the 18th and early 19th centuries. As women struggled for access to the public world, men's voices are in the vanguard for political rights.[13] The emphasis on civil and political rights reflected man's desire to regulate his relationship to the state and to set the boundaries of permissible state interference in his life.[14] Male hegemony over public life and institutions meant that rights came to be defined by men.[15]

The reification of the family within international human rights instruments has erected a barrier for women by denying them claims on certain rights when such arise from violations occurring within the home.[16] This is because there is little or no consideration of the inequities implicit in the realm of many traditional family forms. Intimate violence remains on the margin, still considered different, less severe and less deserving of international condemnation and sanction than officially inflicted violence.[17] Intimate violence tends not to be viewed as violence. Seen as "personal", "private", a "domestic" or a "family matter", its goals and consequences are obscured and its use justified as chastisement or discipline.

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11 The theme of the Beijing World Conference in 1995 "Women's Rights are Human Rights" reaffirmed the need to frame human rights so as to make them inclusive of women's experiences and accessible through the development of effective procedures for enforcing those rights.

12 Thornton (1995) 28.

13 Thornton *op. cit.* 29.

14 Burrows (1986) 89.

15 Mahoney (1996) 124.

16 Thorton *op. cit.* 34.

> "But when stripped of privatisation, sexism and sentimentalism, gender-based violence is no less grave than other forms of inhumane and subordinating official violence, which have been prohibited by treaties and customary law and recognised by the international community as *jus cogens*, or peremptory norms that bind universally and can never be violated".[18]

6.2.1 Public / Private dichotomy in law and its effects on violence against women

Violence against women has been neglected for far too long due to what can be termed as the public and private divide in law. The contention is that what happens within the private sphere should not be the concern of law. The right to privacy has been expanded to include non-intervention on what goes on behind closed doors. It is important to consider the public/private divide in law in order to explain the root of oppression of women.

The public-private dichotomy is a gender construct that separates and ascribes value based on either the public or private "nature" of social structures. Traditionally, public structures are male structures, exuding power and legitimacy. Women however are banished to the private sphere an illegitimate an unprotected domain that leaves women powerless and vulnerable. Feminists have challenged the public-private dichotomy as a false construction. The family, the paradigm of the private sphere-guided, promoted, protected and sanctioned by a formal civil or religious authority or both is a political entity.[19]

As a community, we draw distinctions between the public and the private. We all feel concern about "interfering" with other peoples' business and we want our own privacy respected. The extent to which the public/private dichotomy has shaped the human rights edifice is manifest in the theory of state. Human rights law is concerned with regulating the exercise of public power, it follows that only the state can be held responsible for human rights abuses. Those abuses committed by private actors within the private sphere do not attract the attention and shame of the human rights

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17 Goldberg & Kelly (1993) *Harvard Human Rights Journal* 6 at 14.

18 Copelon *op cit.* 120.

19 Kois *op cit.* 98.

community. Of course, women operate across the public and private spheres and the boundaries of those worlds do not remain fixed, but the importance of the distinction in human rights law between public and private is that for many women the public sphere has scant significance to their lives.[20] The maintenance of this public/private dichotomy works "to muffle and often completely silence" the voices of women.[21] It is also an "artificial divide".[22] According to Catherine MacKinnon, "to act as if the state is all there is to power produces an exceptionally inadequate definition for human rights when so much of the second class status of women ... is done by men to women prior to express state involvement".[23]

The issue of violence demonstrates the problematic nature of the private/public dichotomy. The systematic rape and violence committed by state authorities on women during the armed conflict in the former Yugoslavia, the ill treatment and torture of women detainees in many states.[24] However, it should be noted that international human rights community now considers rape of women during war and armed conflicts as genocide.[25] Increasingly, human rights advocates have documented the use of rape as an official tool of repression in both times of war and in conditions of relative peace.[26] Public beatings of women in Afghanistan all bear testimony to the extent of state-sponsored violence against women. A 1988 survey showed that the police had raped 72% of women in custody in Pakistan.[27]

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20 Some commentators argue that it is unhelpful to challenge human rights law on the basis of the public/private dichotomy because it is essentially a Western construct that does not have the same meaning in other societies. See Engle (1992) 26 *New Eng L Rev* 1509 at 1520.

21 Charlesworth (1991) *American Journal of International Law* 613.

22 Peters & Wolper (1995) 164.

23 MacKinnon (1987) 48.

24 See Amnesty International "Women in the front line: Human rights violations against women" (1991).

25 See for example the International Criminal Tribunal for Rwanda.

26 See generally Seifert (1993); Stiglmayer (1994); Amnesty International "Bosnia-Herzegovina: Rape and sexual abuse by armed forces". As index EUR 63/01/93 (discussing the systematic use of rape as a method of "ethnic cleansing" in Bosnia-Herzegovina. Human Rights Watch (1993), Human Rights Watch (1993) (reporting that almost half of the Somali refugee women who reported being raped in Kenyan Refugee Camps had also been raped prior to becoming refugees).

27 See generally Human Rights Watch (1982).

Domestic violence serves as another example of a human rights abuse distinctively suffered by women.[28] Domestic violence is less visible, but more pervasive, it consists of intimate violence committed against women in the domestic sphere by their partners or other family members.[29] This form of violence embracing physical, sexual and psychological battering cuts across all races, cultures as well as all social and class divisions. Men and women both face the potential harms of torture and ill treatment as evidenced by human rights committed against them by the states or its agents.[30]

However, it is women who suffer mostly from torture and ill treatment within the home. In some countries this intimate violence is not a criminal act: rather it is perceived as an acceptable form of social control within the family.[31] Rape within marriage is still not recognised as a criminal act across the globe.[32] Dowry deaths, common in India is punishable under the law, yet do not attract the serious attention of law enforcement agents.[33] Even in countries where intimate violence against women is criminalised, evidence abounds of widespread failure by law enforcement agencies to prosecute offenders, thereby demonstrating and shaping societal attitudes around the issue. In many states, shelters have had their funding cut back or withdrawn[34] while some countries like Nigeria does not have shelter for abused women. Prostitution and the violence that accompanies the practice of prostitution are further manifestations of

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28 See Beasley (1993) 15 *Hum Rts Q* 36; Dobash & Dobash (1978) 2 *Victimology* 426. See also "Violence against women in the family" UN Doc ST/CSDHA/2 (United Nations No E.89.IV.5); Domestic violence: Report of the Secretary General UN Doc A/COMF.144/17.

29 Sen (1996) 54.

30 See *e.g.* ICCPR articles 6,7; American Convention on Human Rights articles 4, 5; Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) 1987. See also *Aydin v Turkey* 50 Eur Ct HR 1904-05 (1997 where the European Court of Human Rights held that the rape of a female detainee by an official of the state violated article 3 of the European Convention on Human Rights.

31 Howland (1997) 35 *Columbia Transnat'l L* 271 at 278. S. 55 Penal Code Cap 347 LFN 1990 operating in Northern Nigeria recognises the right of husbands to chastise their wives.

32 See European Parliament "Human Rights - Women's Rights" Summary of the Public hearing organised by the Committee on Women's Rights 26 – 27 June 1995. (Women's Rights Series Working Paper No W – 7 (1996).

33 Heise (1989) 12 *Response* 5.

34 *E.g.* UK statistics show that 30 000 women and children stay in refuges every year. However, some refuges receive no grant and 20% have no full-time staff and only 35% of refuge places that are deemed a minimum requirement in 1975 are in place in 1995.

human rights violations suffered disproportionately by women.[35] Prostitution, however, presents a particularly contentions human rights issues. There are myriad perspectives regarding the role of coercion, both physical and economic, in prostitution. Whether or not coercion is inherent in prostitution, it is clear that violence is an integral component of prostitution. Prostituted women suffer violence, including rape, physical abuse and exposure to sexually transmitted diseases from their customers, pimps and police. They also suffer marginalisation within society.[36]

Violence against women is entrenched through respective facets of life such as culture, economics, and the social fabric, and indirectly sanctioned through the mass media, education, families and other socialising agents. Through gender socialising women and men are taught their respective superiority and inferiority.[37]

The overall picture of women's human rights is, at best neglect, and at worst complicity on the part of the state and the international community for approaching intimate violence not as a political and human rights issue, but as a private matter – a social or a cultural practice, sporadic and individualistic in nature.[38] The delay by the international community in addressing the issue of violence against women should not be seen as neutrality,[39] but as the "touch stone" that illustrates the limitation of human rights for women.[40]

6.2.2 Declaration on the elimination of violence against women (DEVAW)

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35 The Convention on the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of others requires State Parties to protect all people from trafficking and the exploitation of prostitution GA Res 317 (W) UN) GAOR 1949.

36 See Reanda (1991) 13 *Human Rights Quarterly* 202.

37 "Connections" (1999) 2.

38 Goldberg & Kelly (1993) *Harvard Human Rights Journal* 195.

39 *E.g.* the international community has, in other circumstances, showed itself willing to regulate what had previously been viewed as sacrosanct private territory – the parental right to be free from interference in child-rearing – when in 1989 it adopted the Convention on the Right of the Child. Convention on the Right of the Child adopted November 1989, entered into force September 1990.

40 O'Hare *op cit*.

The adoption of CEDAW in 1979 constituted an important development in international human rights law.[41] CEDAW made important inroads in the conceptualisation of the human rights of women. For example, it was the first international instrument to particularise the influence of tradition and culture in defining gender roles and family values. However, the meek implementation and monitoring mechanisms of CEDAW renders it extremely susceptible to abuse and transgression. CEDAW has a major flaw. Nowhere does it specifically address violence against women. However, the Committee remedied this omission in 1992 when it adopted General Recommendation 19.[42]

General Recommendation 19 of the Committee[43] represents violence against women as a form of discrimination "that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men". States are reminded that full implementation of their obligations under CEDAW requires them "to take positive measures to eliminate all forms of violence against women. Recommendation 19 draws upon article 2(e) of CEDAW, which requires states to take measures to eliminate discrimination against women by any person. In addition, General Recommendation 19 seeks to attach responsibility to the states, not only for its own acts of violence against women, but also for those acts of violence against women committed by private persons where the state fails to act" with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

The Committee's initiative paved the way for a number of other developments at international level during the early 1990s. In 1991, the Sub-Commission on Discrimination and Minorities received the first report from the newly appointed Special Rapporteur on Traditional Practices Affecting the Health of Women and

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41 Although there are a number of earlier thematic treaties that protected specific rights of women such as the UN Convention on the Political Rights of Women, and the UN Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others, CEDAW was the first global treaty protecting the human rights of women. It made important inroads in the conceptualisation of the human rights for women. *E.g.*, it was the first international instrument to articulate the influence of tradition and culture in defining gender roles and family values.

42 See Recommendation 19 UN Doc CEDAW/C/1992/L.1/Add. 15 (1992).

43 *Supra*.

Children,[44] and in the same year an expert group convened at the request of the ECOSOC to prepare a Draft Declaration on Violence Against Women.[45] Almost at the same time, the Inter-American Commission prepared a draft Convention on women and violence.[46] In 1991, the Council of Europe added its voice to the global efforts to condemn violence against women at its First Conference on Physical and Sexual Violence against Women.[47]

However, it was pressure from NGOs that ensured that the issue of violence against women appeared on the agenda of the World Conference on Human Rights in Vienna in 1993.[48] The need for measures to eliminate gender-based violence found expression in the Vienna Declaration and Programme of Action. In pursuance of the Programme of Action, a Special Rapporteur on Violence Against Women was appointed in 1994 shortly after the General Assembly adopted the Declaration on the Elimination of Violence Against Women (DEVAW) in December 1993.[49]

For a number of reasons a declaration, rather than a treaty, was ultimately adopted. First, a fear of confusion between the scope of CEDAW and a new binding instrument on violence existed.[50] Secondly, a binding instrument might run the risk of limited

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44 Warzazi, HE Study on traditional practices affecting the health of women and children, Special Rapporteur on Traditional Practices Affecting the Health of Women and Children. UN Doc E/CN.4/Sub.2/1991/6 (1991).

45 See Report of the Expert Group Meeting on measures to Eradicate Violence Against Women, Vienna 11 – 15 November 19991, UN Doc. EGM/VAW/1991/1 (1991).

46 See Report on the results of the meeting of Experts to Consider the Viability of an Inter-American Convention on Women and Violence, OAS Doc. OEA/Ser.L/11.7.4, Clm/Doc.1/91 (1991).

47 First Conference of European Ministers on Physical and Sexual Violence Against Women, 15 March 1991. See Romany (1994) 85.

48 In particular, the Global Tribunal on Violations of Women's Human Rights organised by the Women's Global Leadership Group, was instrumental in placing the questions of Violence on the agenda for the World Conference.

49 Paragraph 40 of the Programme of Action called for the appointment of a Special Rapporteur on Violence. Radhika Coomaraswamy was appointed in pursuance to Commission on Human Rights Resolution 1994/95. See question of integrating the rights of women into the human rights mechanisms of the UN and the Elimination of violence against women UN, ESCOR, 50th session. Supp.No 4 at 140, UN Doc. E/1994/24 (1994).

50 See Fitzpatrick (1994) 537 – 38.

ratification.[51] Finally, there was concern about the expense of implementing a binding instrument.[52] The UN Declaration was followed shortly thereafter by the European Declaration of Strategies for the Elimination of Violence Against Women in Society.[53] The European Declaration, endorses a plan of action that embraces an examination of law enforcement issues, prevention and education measures as well as recommending full implementation of existing human rights standards that condemn violence against women in addition to a possible protocol to the European Convention on Human Rights on equality between men and women.

States are enjoined to condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States are required to pursue all appropriate means and without delay a policy of eliminating violence against women.[54]

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women was also adopted. It came into force in March 1995 after receiving the two necessary ratifications.[55] A protocol is being proposed to the African Charter to improve the human rights of women in Africa.[56] The Draft Protocol enjoins states parties to protect girls and women against all traditional and cultural practices harmful to women and also to protect girls and women against rape and all other sexual violence.[57]

Violence against women is now universally recognised as a human rights issue and all hands are on deck at both global and regional level to prevent all forms of violence against women.

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51 *Ibid.*

52 *Ibid.* See also Charlesworth & Chinkin *op.cit.* 402.

53 See Council of Europe Doc No. MEG.3(193) 22 (1993).

54 Article 4 DEVAW.

55 Ratified by Bolivia and Venezuela. As of January 1998, the Convention had been ratified by a total of twenty-seven states.

56 See also the Draft Protocol to the African Charter discussed in Chapter 2 above.

57 *Ibid.* article 5.

6.2.3 Types of violence

Violence against women come in a variety of ways, from domestic violence, to sexual assaults, rape, marital rape, female genital mutilation, incest, sexual harassment, honour killing amd dowry deaths. However, in this Chapter only domestic violence and rape (including marital rape) are be discussed.

Violence can be defined as "any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private".[58]

The scope of gender-based violence is fairly wide, encompassing violence against persons on the basis of their gender. Gender is about both men and women. It is more particularly about power relations between men and women. Gender-based violence therefore, covers those incidents in which one sex asserts power by using sexual or similar acts to achieve submissiveness and fear in another person and in the process commits an offence against the dignity or privacy of that person. Such behaviour is the result of the offender's strong desire to exercise power and control over his victim. Violence provides a very effective method of maintaining this control.

Most incidents of gender violence will be found within a home setting however, other forms can be found outside the nuclear family home. Abusers and violators tend to be those in position of power relative to their victims. Statistics showing that 99% of violators are men, while 96% of victims are women, reflects the real patriarchal power structure within contemporary society.[59] The reproductive and productive roles of women often place them at the bottom of the ladder in relation to power and decision making within the political, social, economic and cultural sphere of life. This situation results in the overburdening of women with family and domestic responsibility while giving them no resources or political norm to improve their standard of living.

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58 Article 1 DEVAW.

59 See generally Dobash & Dobash (1980).

Some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women in institutions or detention, female children, women with disabilities, elderly women and women in situations of armed conflict are especially vulnerable to violence.[60]

Domestic violence occurs when one partner, in a past or present relationship, uses violent or intimidating behaviour to control or dominate the other.[61] Domestic violence is an abuse of power always perpetrated by the more powerful member of a relationship against a less powerful member in order to gain control.

Domestic violence is found in all social classes, in all age groups and across all culture and communities. It occurs within marriage and *de facto* relationships, between family members, couples who are separated or divorced. Domestic violence is most often perpetuated by men against women and children. Domestic violence is not gender neutral. While in heterosexual relationships women sometimes fight back, in exceptional cases men are injured or killed, however, severe repeated domestic violence is overwhelmingly initiated by men and inflicted on women.[62] Domestic violence is a deliberate act. The great majority of men who are violent towards their partners are not violent towards "others" such as friends and work colleagues.

In developed and developing societies, studies indicate that between 20% and 67% of women have experienced violence in intimate heterosexual relationships.[63] The very prevalence of wife battering unmasks the prevailing concepts of normalcy and functionality.[64] The incidence of battering in lesbian relationships cautions however, against biological as well as gender essentialism. It defies stereotypical assumptions transposed from heterosexual relationships.[65]

Domestic violence against women is systemic and structural, a mechanism of patriarchal control of women that is built on male superiority and female inferiority, sex

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60 Preamble to DEVAW.

61 See generally Women's Refugee Movement Information Kit (Australia).

62 Copelon *op cit.* 125.

63 Copelon *op cit.* 126.

64 See generally Dobash & Dobash (1980).

65 See Robson (1990) 20 *Golden Gate Law Review* 567 – 91.

stereotyped roles and expectations and economic, social and political predominance of men and dependency of women.[66] In the final analysis, it is best to conclude that violence against wives is a function of the belief, fostered in all cultures that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.[67]

Through violence men seek both to deny and destroy the power of women. Through violence men seek and confirm, the devaluation and dehumanisation of women.[68] In spite of the modernisation of life, the basic patriarchal dynamic continues to express and replicate itself through violence in the private sphere. Indeed the fact that most studies of domestic violence come from Western societies, mainly the United Kingdom and the United States of America, where the traditional patriarchal arrangements are thought to have been most challenged by shifting economic, social, political and ideological conditions, attests to the extraordinary durability of patriarchy as well as to the importance of redressing gender-based violence in a multi-faceted way.[69]

(a) Physical abuse

This includes hitting, punching, slapping, biting, kicking, hair pulling, strangulation, the infliction of fractures or burns, throwing things and the use of weapons. Physical abuse tends to get worse over time, with attacks becoming more frequent and more savage.[70]

(b) Psychological and emotional abuse

Having to live in constant fear of physical violence is a form of psychological abuse. Other forms include being told repeatedly that you are not good enough, that you are a bad mother, that if you are a better person you would not get beaten, and regular accusations of being ugly, useless, dumb, stupid and/or incompetent. Psychological abuse can be likened to systematic brainwashing. As the women's self-esteem is eroded, so too is her ability to leave her violent partner. Emotional abuse often consists

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66 Copelon *op cit*. 130.

67 UN Report on violence against women in the family. UN sales No E89.1V.5 New York 1989.

68 See Staub (1990) 49 – 72.

69 UN Report *op. cit.*

70 Women's Refugee Movement Information Kit (Australia) 40.

of threats concerning access to the children: for example, "if you leave, you won't be able to see the children again".[71]

(c) Social abuse

The perpetrator of domestic violence can limit his partner's contact with family, friends and the wider community. He may lock her inside the house, monitor phone bills or disconnect the phone altogether. He may abuse the women's family and friends until they no longer visit, or seek to humiliate her in front of them.[72]

For women living in rural and isolated areas, geographic isolation and the lack of public transport are major barriers to escaping domestic violence. The use of private transport may also become impossible if the violent partner constantly monitor the car, checks the odometer and petrol gauge. Social abuse may also include alienating a woman from her cultural and religious beliefs. Her partner may destroy religious symbols, shrines and statutes, or forbid her to pray or worship in an effort to isolate her.[73]

(d) Financial abuse

The perpetrator may assume control over the couple's finances. Financial abuse may entail forbidding a woman to have a job or insisting that she hand over her entire pay packet. Most women are forced to stay in an abusive relationship because they lack the means for independent existence.[74]

Violence against women serves to entrench the socio-economic position of women and thus entrenches male dominance and female subservience, respectively. It feeds onto and maintains women's inferiority relative to men by physically, emotionally and economically controlling the dominated group (women).[75]

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71 Women's Refugee Movement Information Kit (Australia) *op. cit.* 42.

72 *Ibid.* 45.

73 *Ibid.* 47.

74 *Ibid.* 50.

75 *Ibid.* 51.

6.3 VIOLENCE AGAINST WOMEN IN NIGERIA

6.3.1 Introduction

Violence against women and girls is the most pervasive violation of universal human rights principles. Across classes, cultures and nationalities, women and girls suffer different forms of violence as part of their daily realities.[76] The plight of women in Nigeria is no different from what obtains in other parts of the world. Violence against women in Nigeria include domestic violence, incest, rape including marital rape, sexual harassment, female genital mutilation, male preference, and early marriages.

Female genital mutilation has been discussed earlier.[77] Sexual harassment of girls and women also occur in Nigeria. In fact sexual harassment has been cited as one of the reasons why female enrolment in schools in Northern Nigeria is low.[78] Parents and guardians cite sexual harassment as the reason why girls are not sent to school or withdrawn before they have the chance of completing their education.[79] However, this is not necessarily true. Parents in these areas are only trying to justify their practice of child marriages. Many girls attend schools in the Southern parts of Nigeria and are not withdrawn as a result of sexual harassment. Sexual harassment in schools has not reached such an alarming rate.

6.3.2 Domestic violence in Nigeria

Domestic violence may be defined as the use or abuse of power and authority by force or show of force with the intent of inflicting not only physical or psychological pain, but also humiliation and degradation in the family. Violence has always been an accepted form of assertion of authority and power in hierarchical stratified societies where some

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76 "A life free of violence: A campaign to eliminate violence against women and girls in Africa" (www.unifem.undp.org/afrcampl.htm) accessed on 10 November 1999.

77 See Chapter 5 above.

78 FAWE *op. cit.*

79 FAWE *op. cit.*

individuals have different degrees of power over others based on factors such as class, caste, gender and age.[80]

Under the Nigerian common law, physical battery of a woman is a crime as well as a tort. The domesticity of the circumstances of battery or the relationship between the parties is not legally recognised as an excuse or justification.[81] Nonetheless, battery of women, especially wives by their husbands, is a common feature in family lives in Nigeria.[82] It is still the law, in Nigeria, that a man can "reasonably chastise his wife".[83] But the question of determining what is reasonable chastisement probably depends more on the woman's capacity to bear the inhuman treatment without complaining than on the legality of interpretation by the Courts. The reason for this is that very few, if any, cases have ever been brought for such judicial exercise. It is not clear how much violence goes on between men and women who live together. However, evidence suggests that a very high degree of violence is common.[84] Even if the law allowing "reasonable chastisement" is to be removed today, it is doubtful whether it would have any drastic effect on the number of women victims of violence against women.

The universal acceptance of the public/private dichotomy, which renders peoples' homes and family life relatively immune from societal controls, interventions and sanctions, has helped to perpetuate violence against women.[85] Domestic violence is not criminalised in Nigeria.

Domestic violence is a reflection of the power relationship between husband and wife. The husband derives power from being the supposed provider and head of the family. The power includes coercive power, which is often manifested in physical and mental subjugation through violence. In many instances in Nigeria, while the husband may not be able to fulfill his commitments, he still draws power from a society, which holds men to be superior to women and women's dependency on men as "natural". The Yoruba

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80 See *Unequal rights op. cit.* 34.

81 *Unequal Rights op. cit.* 35.

82 Akande (1993) 6.

83 S 55 Penal code Cap 347 LFN 1990.

84 *Unequal Rights op. cit.;* Akande *op. cit.* 12; Atsenuwa *op. cit* 116.

85 See the early discussion on the public/private dichotomy and its effects on violence against women.

women of Western Nigeria have never really been dependent on men for their financial needs, yet men remain the ideologically constructed breadwinners of the family. In most African societies, the perpetual minority status of women is accepted. First, women are wards of their fathers and after marriage they become their husband's wards. There is no moral justification for the view that by consenting to marriage, a woman consents to reverting to the status of a minor. The provisions of law, which allows a defence to assault on grounds of reasonable chastisement, give the right only to parents and to those who stand in *loco parentis*.[86]

In Nigeria most men who kill their partners are never arrested nor charged with murder. The general sentiment is "who will take care of the children if the husband is jailed or sentenced to death". Due to this sentiment many men who murdered their wives are walking free.[87] Nigerian police are always reluctant to take action in domestic cases.[88] They rationalise their reluctance in terms of the sanctity of marriage. If a woman goes to the police station to report a case of domestic violence, more often than not the policeman on duty usually ask her what she has done before she was beaten up and would tell the woman that it is her fault that she is beaten and ask her to go back home and make peace with her husband.[89] The police also complain that there is always the problem of withdrawal of cases by battered women, after the police have gone into the trouble of arresting and preparing the case. The police and the Courts see success in terms of an arrest, charge, trial conviction and sentence, it is only then that their effort can be seen to be worthwhile.[90]

Most Nigerian women have been acculturated to believe that a woman is not complete without a man and that marriage and childbirth are her main sources of satisfaction.[91]

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86 This right has now been greatly curtailed. See for example the Convention on the Right of the Child. In all matters affecting a child the best interest of the child shall be a primary consideration. See article 3(1) CRC.

87 One of my motivation for majoring in women's rights was the incident I witnessed in November 1992, where a neighbour who beat his wife to death was neither arrested nor charged. In December 1992 another neighbour beat his wife to death. As in the earlier case, he was neither charged nor arrested.

88 Akande (1993) *op. cit.* 8

89 *Ibid.*

90 *Ibid.*

91 Akande *op cit.*

There is also the belief that an "unhappy" marriage is better than being single or divorced and because of this fallacy many women continued to stay in abusive relationships. Many of the women interviewed see marriage and child bearing as the ultimate achievement of a woman. Most women will not get support even from their own family unless and until the violence is patently unbearable even to the most unreasonable human being.[92] Many times the woman is made to believe that it is her own fault that she is being beaten and often after a long period of oppression she may be unable to cope with the pressures of making her own decisions and thus stays within the situation especially when there is also the threat that she might be deprived of her home and children.

Another prevalent form of violence in Nigeria is "acid pouring". Most jealous husbands and boyfriends pour acid on their wives and girlfriends with the primary purpose of disfiguring them.[93] Many of these women get third degree burns from acid incidents. In most cases in Nigeria, domestic violence only gets attention when it is fatal. In May 1990, a 28 year old pregnant woman was beaten to death by her husband.[94] There was also the case of a police corporal who shot both his pregnant wife and their two-year-old daughter, killing the daughter.[95] *The Vanguard Newspaper*[96] also reported the case of a 40-year-old farmer who beat his wife to a state of unconsciousness. The wife died six days later in a hospital as a result of injuries sustained during the beating.

In Nigeria the following reasons are given for wife battering provocation – caused among other things by a wife's stubbornness to her husband or in-laws, abuse of husbands, late preparation of meals, complaints about insufficient food allowances and denial of sex; lack of respect for the husband and in-laws; engagement in too many social activities outside the home; extra-marital affairs and lack of proper care of the home.

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92 *Ibid.* at 18.

93 See *The Banner* Vol. 1 No 7 1989 1 When a jealous 38 years old husband in Ughelli, Edo state poured acid on his wife and a neighbour in the course of a marital misunderstanding. There is also the case of a woman called "Charity" whose boyfriend poured acid on her because according to the man she has won a beauty contest and now wants to leave him. He said he did it to See who will now go out wit her now that she is no longer beautiful.

94 The *Vanguard Newspaper* Saturday May 19 1990.

95 *The Vanguard* 10 September 1990 34.

These reasons are poor attempts by men and society to justify their violence and discriminatory attitudes towards women. There are no standard criteria for adjudging provocation. The individual husband decides what constitutes provocation, just as the extent to which he can chastise her is left to him to decide. Most law enforcement agents always credit the husband with the virtue of being "reasonable" and as such did not beat the wife unduly. In Nigeria, husbands have been known to kill their wives for having the temerity to seek divorce.[97] In 1995, a man poured acid on his wife and one of his daughters rather than face the prospect of a divorce.[98]

Wife battering is a phenomenon, which arises out of misogynistic views of women and sustained on traditions of female subordination to males, especially preserved in marriage institutions.[99]

To combat domestic violence in Nigeria, the following is being suggested:

Firstly, the law allowing the reasonable chastisement of a wife by a husband should be repealed. Secondly, laws should be enacted criminalising domestic violence and such law must be enforced. Women should be educated that domestic violence is violence, and not one of the incidences of marriage to be tolerated. Women should be encouraged to report domestic violence the culture of silence and secrecy surrounding domestic violence must be broken. Women should be educated that it is better to get out of an abusive relationship. Finally, shelters should be built to give refuge to women who want to get out of abusive relationships but does not have the economic means to survive on their own.

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96 *The Vanguard* 20 December 1994 1.

97 See *Nigerian Tribune* Tuesday 2 May 1995. Where a man in Plateau state killed his wife for taking him to Court twice Seeking divorce.

98 See *Sunday Tribune* 5 May 1995. This was also given wide coverage by the National Television (Nigerian Television Authority – NTA) on Sunday 5 May 1995.

99 Saror (1992) 36.

6.3.3 Rape under Nigerian law

Rape is defined as "unlawful carnal knowledge of a woman or girl with or without her consent, or if the consent is obtained by force or by means of false and fraudulent misrepresentation as to the nature of the act or in the case of a married woman, by impersonating her husband". [100] Rape is punishable with life imprisonment with or without whipping.[101]

Before going further, there is a need for some clarifications as to the criminal law regime existing in Nigeria. There is the Criminal Code,[102] which operates in the Southern part of the country, and the Penal Code,[103] which operates in the Northern part of the country. The Penal Code is fashioned after the Sudanese Penal Code and it contains some Islamic law – Islam is the religion of the vast majority of people in Northern Nigeria. The Criminal Code operating in the Southern part of the Nigeria is based on the Indian Criminal Code. The desirability of two different criminal systems in the same country is outside the scope of this work.[104]

For an offence to constitute rape, there must be evidence of unlawful carnal knowledge. Unlawful carnal knowledge is defined as sexual intercourse otherwise than between husband and wife.[105] The offence of rape is complete upon proof of penetration, and even the slightest penetration will be sufficient, neither rupture of the hymen nor the emission of semen need be proved. There is an irrebuttable presumption that a boy under the age of 12 cannot commit rape in Nigeria. No evidence to the contrary would be admissible.

Rape is a sex-specific offence, which can only be committed by men on women. A number of folkloric accounts abound about rape, its victims and its perpetrators.[106] Popular among these folkloric accounts and myths are the following:[107]

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100 S.357 Criminal Code Cap 77 LFN 1990.

101 S.358 Criminal Code Cap 77 LFN 1990

102 Cap 347 LFN 1990.

103 Cap 347 LFN 1990.

104 See Okagbue (1990) (b).

105 S.6 Criminal Code Cap 77 LFN 1990.

106 Oyajobe (1990) 38.

- The rape victim had it coming. She precipitated it by conducting herself in an available manner (e.g. by her language, dressing, demeanour, and even physical presence at some place and time). She is said to have asked for it.

- The rapist is an unfortunate victim of a teasing female, therefore cannot be blamed.

- Women are compulsive liars, they cannot appreciate the truth and are no different from children who are unable to distinguish between truthful speaking and lying.

- Women secretly want to be raped. This is an attempt to excuse rape and blame the survivor. This also helps to reinforce stereotypes of passive female receptiveness to male sexual aggression. This also re-victimises and stigmatises the survivor.

- Women are neurotic and when they say no they mean yes and want the man to understand yes.

- Rape occurs between strangers in dark alleys. This is not true as statistics show that women are more likely to be raped by persons known to them than by strangers. Persons known to the survivor commit more than half of all reported rapes. Date or acquaintance rape is very common and women are often raped in their homes.

Research however shows that less than 5% of rapists can be classified as clinically insane. Rapists can rarely be distinguished from other men except that they disregard the pain they cause.[108]

By continuing to define rape in a sex-specific language, the law provides fertile ground for the persistence of the various myths about women and rape. The question maybe asked "why is there an offence of rape specifically designed to do a job that cannot be

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107 See (www.womensnet.org.za/pvaw/help/mythrape.html) accessed on 18 August 1999.

108 Availablel on the internet (www.womensnet.org.za) accessed on 8 June 1999.

done by the other offence of sexual assault against women?" It should be noted that the mental anguish suffered by the man who is anally or orally sexually attacked is not less (and may even be more given that these types of intercourse are not yet commonly accepted as normal) and it should be recognised that the men is just as entitled to protection against undesired invasion of his person sexually, even to every uttermost as women. There is no justification for designating rape to "protect" women. Traditionally, loss of virginity and pregnancy chances are and have been considerations which have weighed strongly in favour of criminalising rape as it is and imposing such grave penalty for its commission.[109] Agreed that a man cannot become pregnant or "lose his virginity" in the conventional sense, this would hardly be of comfort to the male victim of a sexual penetrating attack.[110]

There is need to dispense with the offence of rape as defined and enact another offence of sexual assault.[111] The approach of enacting a sex-neutral law to deal with sexual offences will help in dismantling the structure of the ill-conceived myths for then it will not be possible to categorise sexes and their attitudes.

Under the common law, the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife had given up herself in this kind unto her husband, which she cannot retract.[112] This common law position is adopted in Nigeria and a husband cannot rape his wife unless any of the following circumstances exist:[113] where a decree of divorce has been given;[114] where parties are living separately under a separation order of Court;[115] where a husband has given an undertaking to the Court not to return to his wife;[116]where one party has

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109 Oyajobe *op cit.*

110 See Scutt (1976).

111 See *e.g.* The Canadian Criminal Code 1986. The Michigan State Sexual Offences Act, 1974, dispenses with a criminal offence of rape and recognising a graduated offence of sexual assault enacted on a sex-neutral language.

112 Oyajobi *op cit.*

113 See Smith and Hogan (1996) and *Dunn v Dunn* (1948) 2 All ER 822.

114 *R v O'Brein* (1974) 3 All ER 663

115 *R v Clarke* (1949) All ER 448

116 *R v Steete* (1976) 65 Criminal Appeal Reports 22

filed papers to commence divorce proceedings;[117] where there has been a separation by agreement;[118] and where there is a Court order prohibiting molestation of wife.[119]

In virtually all the instances cited above, the marriage contract, though still legally subsisting, has its foundations weakened and is on the way to being dismantled hence there is sufficient reason for the law to come in and maintain sanity before the final untying of nuptial knots.

Evidence of previous sexual dealings of the prosecutrix[120] with other persons as well as the accused is allowed.[121] The rationale for such evidential rules of practice derives from one or more of the mythological conceptions of the woman and rape. Section 210 of the Evidence Act allows evidence to be given that the prosecutrix is of general immoral character. It is suggested that section 210 of the Evidence Act should be repealed, as it is evidently discriminatory of the prosecutrix as similar fact evidence of the accused is not usually admissible in evidence [122] unless it is relevant to the fact in issue.

Corroboration of prosecutrix evidence is not an express requirement of the law of rape in Nigeria. However, following the common law practice, Nigerian Courts have evolved the rule of practice of warning themselves on the dangers of convicting upon the uncorroborated evidence of the prosecutrix.[123] The common law rule is known as the "cautionary rule". Under this rule, the judge is to caution himself that it is not safe to convict an accused of rape on the uncorroborated testimony of the prosecutrix.[124]

The difficulties inherent in providing corroboration in rape cases (and in general, all sexual offences) are obvious. In most cases, these offences take place in private and it

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117 Michigan State Sexual Offences Act *op. cit.*

118 *R v Miller* (1954) 2 QB 282.

119 *Paton v British Pregnancy Advisory Trustees and Another* (1979) QB 276.

120 In Nigeria, when a rape victim appears in Court, she is referred to as a 'prosecutrix'.

121 S.210 Evidence Act Cap 112 LFN 1990.

122 *Makins v AG New South Wales* 1891 – 47 ALL ER 24.

123 *Sunmonu v Police* (1957) WRNLR 23

124 Aguda (1982) para 1780; *State v Ogwudiegwu & another* 1968 NMLR 113.

is unlikely to have any other witnesses apart from the parties themselves. Most jurisdictions have dispensed with the "cautionary rule" in cases of rape.[125]

Nigeria's law on rape is crying for amendments, firstly to re-define the offence of rape by making it gender neutral, to criminalise marital rape as in other jurisdictions,[126] to disallow evidence on the character of the prosecutrix and finally to abolish the "cautionary rule". As stated earlier, the "cautionary rule" is not part of the Nigerian law but Courts have followed this common law practice. Compensation should also be paid to rape victims and counseling should be provided for victims.

It is worthy of note, however, that the incidence of rape is very low in Nigeria, in spite of the obvious lapses in the law relating to rape. This may be due to the fact that rape is grossly underreported because usually rape victims are stigmatised, it is generally believed in Nigeria that only bad girls get raped so because of this victims suffered alone.[127] This culture of silence must be broken.

6.4 VIOLENCE AGAINST WOMEN IN SOUTH AFRICA

6.4.1 Introduction

Violence is endemic in South Africa. Since the first democratic election in April 1994, political crime has decreased significantly in South Africa, but has been replaced by an explosion of criminal violence that has turned South Africa into the world's most murderous country.[128] South Africa's murder rate (45 of every 100 000 people are murdered per year) is eight times that of New York City.[129]

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125 See *S v J* 1998 (2) SA 984 (SCA

126 *E.g.* South Africa.

127 Many of the people interviewed insisted that when a girl is rape it is her fault as she must have invited the rape.

128 McCarthy J (1998) Available on the internet (www.oak.conncoll.edu/jomicc/paper.html) accessed on 6 July 1999.

129 *Ibid.*

Crimes perpetuated against women are very common in South Africa. A woman is raped every six seconds and almost 200 armed robberies occur daily.[130] Over 200 car hijacking per week occur in Johannesburg alone and a large number of violent crimes go unreported.[131] An examination of police report in one police station in Johannesburg revealed the following:[132]

> Two women raped at gun point in a hair salon; a bank robbed by five armed men, an elderly woman robbed at gun point in her home; an unidentified dead body found in the street; two security guards robbed by armed gun men; two more security guards robbed; one police man shot dead; a man found murdered in his home; a couple robbed at fun point in their home; another man robbed at gun point; one dead body found in an alley; another dead body found in a park - Johannesburg daily police report

However, in this work only domestic violence and rape are discussed.

6.4.2 Domestic violence in South Africa

Section 12(1)(c) of the 1996 Constitution[133] provides for the right to freedom and security of the person "to be free from all forms of violence from either public or private sources". This provision aims at breaking the culture of silence around violence perpetuated in the homes, thereby breaking the myth of public and private dichotomy, which has made violence in the home immutable from public scrutiny.

Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. Domestic and family violence violates communities' safety, health, welfare and economies by billions and ... in social costs

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130 *Ibid.*

131 *Ibid.*

132 *Ibid.*

133 *Ibid.*

such as medical expenses, psychological problems, lost productivity and intergenerational violence.[134]

The history of domestic violence in South Africa is a record of cruelty, indifference and neglect, occasionally punctuated by flashes of legal and social reform. Domestic violence is noted in 2 000-year-old traditions inherited from Roman-Dutch law.[135]

Roman law governing domestic violence are introduced around the second and third centuries BC. These laws consolidated authority in husbands who became the sole heads of households, while wives (like slaves and children) are viewed as the necessary and inseparable possessions of their husbands. In effect, wives ceased to exist as legal individuals in their own right and became the property of their husbands.[136] This made husbands responsible for their wives' actions. The law of "reasonable chastisement" was introduced which granted husbands the right to physically punish their wives. This is not an irrelevant piece of history. The last remnants of a South African husband's right to administer "reasonable chastisement" finally disappeared in 1993,[137] while rape within marriage was only criminalised in 1993.[138]

The law, which deal with domestic violence before the new constitutional order, is the Prevention of Family Violence Act.[139] This Act has been criticised as not providing enough protection to victims of violence.[140]

Section 1(2) of the Prevention of Family Violence Act defined "party to a marriage" as "including a man and a woman who are or are married to each other according to any law or custom and also a man and woman who ordinarily live or lived together as husband and wife, although not married to each other."

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134 National Council of Juvenile and Family Law Judges (USA) quoted in the South African Law Commission Discussion Paper to (Project 100) on Domestic Violence.

135 Vetten (1999) Available on the internet (www.wits.ac.za/CSVR/artlawl.htm).accessed on 8 July 1999.

136 *Ibid.*

137 Prevention of Family Violence Act 133 of 1993.

138 *Ibid.*

139 Act 133 of 1993.

The Prevention of Family Violence Act was replaced in 1998 by the Domestic Violence Act. [141] Section 1 of the Domestic Violence Act[142] adopted a much wider definition of domestic relationship. It defines "domestic relationship" as follows:

> Domestic relation means a relationship between a complainant and a respondent in any of the following ways:
>
> (a) they are or are married to each other, including marriage according to any law, custom or religion;
> (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or are not, married to each other, or are not able to be married to each other;
> (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
> (d) they are family members related by consanguinity, affinity or adoption;
> (e) they are or are in an engagement, dating or customary relationship, including an actual or procured romantic, intimate or sexual relationship of any duration; or
> (f) they share or recently shared the same residence.

The 1998 Act, which covers every imaginable relationship and protection against violence, extends to parties in homosexual relationship in line with section 9(3) of the Constitution.[143]

"Domestic violence" is defined in section 1 of the 1998 Act to mean the following:

> (a) physical abuse
> (b) sexual abuse
> (c) emotional, verbal and psychological abuse
> (d) economic abuse
> (e) intimidation
> (f) harassment
> (g) stalking
> (h) damage to property
> (I) entry into the complainant's residence without consent, where the parties do not share the same residence, or

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140 See the South African Law Commission Discussion Paper (Project 100) on Domestic Violence.

141 Act 133 of 1993.

142 Act 116 of 1998

143 Act 108 of 1996, which prohibits discrimination on the basis of sexual orientation among other, prohibited grounds.

(j) any other controlling or abusive behaviour towards a complainant.

The Act goes on to define the various forms of domestic violence, economic abuse, emotional, verbal and psychological abuse.

" Economic abuse" is defined to include

(a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities of the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence;

(b) the unreasonable disposal of household effects or other property in which the complainant has an interest.

It will therefore amount to domestic violence for a party to withdraw financial assistance to his/her partner for instance to refuse to give housekeeping allowance, refuse to pay rent or withholding the school fees of children will also constitute an economic abuse.

"Emotional, verbal and psychological abuse" means a pattern of degrading or humiliating conduct towards a complainant, including:

(a) repeated insults, ridicule or name calling;

(b) repeated threat to cause emotional pain; or

(c) the repeated exhibition of obsessive possessiveness or jealousy,

which is such as to constitute a serious invasion of the complainants privacy liberty

In spite of the enactment of both the Prevention of Family Violence Act[144] and Domestic Violence Act,[145] women in South Africa continue to suffer violence in the hands of their partners. In one pathetic case, a pregnant woman was stabbed in the uterus by her boyfriend after the woman had obtained a restraining interdict against the man as a result of continued strife. The woman was operated on and miraculously both her life and that of the baby are saved.[146] A nurse at the Groote Schuur Hospital, Cape Town, Sister Phillipa Grigorova, stated that in her nine years of working in the labour ward she had never seen anything like this story of tragedy and hope. She stated further that, "it

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144 Act 133 of 1993.

145 Act 116 of 1998.

is a miracle that both mother and child survived after the knife went through the uterus".[147]

The South African Parliament is presently considering the high incidence of violence in South Africa. At the Parliamentary hearing on violence, members of Parliament highlighted the high rate of crime. A member noted that South Africa is the only country in the world where a baby is born with a bullet in his hipbone.[148] It was also noted that a baby was born with stab wounds after a pregnant woman was stabbed by her boyfriend and the baby had to receive five stitches.

The Parliament also noted the role of police officers in domestic violence. It was stated that 1 out of 3 men who murdered their partners are police officers. The house noted the latest incidence in which a police Inspector shot his wife, his mistress, son and daughter and later killed himself with his service pistol.

It is impossible to compile all cases of violence generally in South Africa and those perpetuated against women in particular. It would take another thesis to catalogue the high incidence of violence in South Africa, from armed robbery to rape, incest and assaults.

6.4.3 Rape under South African law

South Africa has some of the highest rape statistics in the world.[149] According to the South African Police Services (SAPS) there have been 12 716 reported cases of rape between January and March 1998.[150] The rape situation is very serious in South Africa and that only one in twenty rape are reported to the police.[151] On the basis of this estimate, it is calculated that one rape occurs every 83 seconds.[152] The SAPS has recently presented an even bleaker picture and have suggested that one rape occurs

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146 "Baby born after mom was stabbed in uterus" *The Star* 13 August 1999.

147 *Ibid.* 12.

148 Parliamentary Debate of Thursday May 18, 2000 (Contribution by a member of the New National Party)

149 (www.wits.ac.za/csvr/artrapem.htm) accessed on 13 August 1999.

150 (www.saps.co.za/8_crimeinfo/298/rape.htm) accessed on 27 October 1999.

151 *Ibid.*

every 35 seconds and that for every rape reported to them about 35 go unreported, given a total figure of approximately one million rapes a year.[153]

However, South African President, Thabo Mbeki has questioned these statistics. According to the president, the figures are highly exaggerated.[154] It is submitted that even if the statistics are exaggerated, the incidence of rape is still high in South Africa and the President's statement could be misconstrued as giving tacit approval for rape. Presently a moratorium has been placed on rape statistics.

Various explanations have been offered to explain the high incidence of rape in South Africa. Sociological explanations locate the roots of rape in female and female roles in South Africa. South Africa is traditionally a male dominated and patriarchal society. Women hold limited power and authority and are frequently exploited. This position re-affirms the public/private dichotomy, which relegates women to the private sphere.

South Africa's history of apartheid has also been blamed for the high incidence of rape. The Centre for the Study of Violence and Reconciliation cited a "culture of violence" which has dominated South Africa history as being responsible for the high incidence of rape. According to Robertson:[155]

> A "culture of violence" has dominated South African society for years. Our current levels of criminal and political violence have its roots in apartheid and political struggle. The ongoing struggle and transition has left many men with a sense of powerlessness and perceived emasculation. Studies suggest that the majority of perpetrators of violence are male and the victims are frequently women and children. This may represent a displacement of aggression in which men of all races feel able to reassert their power and dominance against the perceived "weaker" individuals in society. In this context, rape is an assertion of power and aggression in an attempt to reassert the rapist's masculinity.

The criminal justice system has also been blamed for the high incidence of rape. Rape has one of the lowest conviction rates of all serious crimes in South Africa. A member

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152 *Ibid.*

153 "Huge jump in number of reported rapes" *Sunday Times* 8 May 1994.

154 See "Mbeki slams rape figures" *The Citizen* 29 October 1999.

155 Robertson An overview of rape in South Africa" Centre for the Study of Violence and Reconciliation.

of Parliament has put the conviction rate of rape as one in 500.[156] Offenders frequently evade arrest and conviction and continue to intimidate their victims and the victims' family. Rape offenders get easy bail and most arrested rapists are on bail for committing rape.[157] In 1997 a man accused of raping a seven-year old girl was granted bail and he later murdered the little girl while he was on bail.[158] Women also withdraw or fail to report cases of rape, as they fear intimidation by the perpetrator, as there are no adequate witness protection services.

Sentencing in rape cases tend to be lenient thereby creating the impression that rape is not a serious crime.[159] A minimum sentence has now being fixed for the offence of rape[160] It is hoped that this will help in reducing the high incidence of rape.
In South Africa rape is defined as "intentional unlawful sexual intercourse with a woman without her consent".[161] Under the South African common law it was not unlawful for a man to force his wife to have intercourse with him. This is said be because by marrying, the wife has irrevocably consents to afford the husband the marital privileges.

The common law rule that a husband cannot rape his wife has fortunately been changed in South Africa. The Prevention of Family Violence Act[162] makes rape in marriage illegal throughout South Africa.

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156 Parliamentary Debate on Violence Against Women in South Africa held on 26 October 1999.

157 See *S v Stong* 1997 (2) SACR 497 (O).

158 *S v Stong* 1997 (2) SACR 497 (O.

159 For example in *S v A* 1994 (1) SACR 602 (A) the Appelate division set aside a 7 years imprisonment for rape on the ground that the magistrate focussed only on retribution , and that the rape was aimed not so much at violence but sexual gratification, and that the complainant suffered no psychological harm. The sentence of 7 years imprisonment was set aside and replaced with correctional supervision.

160 Criminal Law Amendment Act 1997. For constitutionality of minimum sentences See the following Van Zyl Smith (1999) *SAJHR* 270; Skeen (1998) *SAJCJ* 242; Reddi,(1998) *SAJCJ 150;* Reddi (1994) *SAJCJ* 406; Davis (1994) *Annual Survey of South African Law* 733; Lambrechts (2000) *Acta criminological* Vol 13 Issue 1, 31-39; Hubbard (1994), *Acta juridical* 228-255.

161 Hunt (1982) 433.

162 133 of 1993.

Under the Roman law and the English law[163] a boy under the age of 14 is irrebuttably presumed incapable of sexual intercourse and therefore rape. This presumption of law is unrealistic when it is borne in mind that the slightest penetration suffices for rape. Stephen expressed the view in his Digest Chapter 271 that the reason for the rule was not incapacity to have intercourse but to procreate, ... which "was regarded as the principal injury involved in rape".[164] This explanation may be historically valid; it is scarcely acceptable today. The rule that boys under 14 years are incapable of rape has been repealed in 1987 by statute.[165] It is now the law in South Africa that in criminal proceedings in which the question arises whether a boy under the age of 14 years has had sexual intercourse with a female, no presumption or rule of law to the effect that the boy was incapable of sexual intercourse with the female will be entertained.[166] A boy under the age of 14 who assists an older person to commit rape is a *socius* to rape and may accordingly be convicted of rape.[167]

Another essential element is that there must be penetration.[168] It suffices if the male organ is in the slightest degree within the female body; thus entry into the labia is sufficient. It is not necessary in the case of a virgin that the hymen should be ruptured[169] and the emission of semen is not necessary. If there is no penetration the offence of rape is not committed.

Under the common law of South Africa, a man cannot be raped and a woman cannot commit rape.[170] This rule creates a problem as it makes the offence of rape gender specific thereby violating the constitutionally provision on non-discrimination.[171]

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163 Hale IPC 630, *R v Brimilon* (1840) 2 Mood, *R v Groombridge* (1836) 7 CP 582, *R v Waite* (1892) 2 QB 600 (CCR), Williams Criminal law Chapter 270 at 821, Smith & Hogan 907.

164 Stephen Digest Chapter 271.

165 S. 1 Law of Evidence and Criminal Procedure Act (Amendment Act) 1987 No 103 of 1987.

166 Milton (1988) 1 *SACJ* 123.

167 *R v M* 1950 (4) SA 101 (T), *R v Jackelson* 1920 AD 486, *R v Ram and Ram* (1983) 17 COX CC 609.

168 *R v Theron* 1924 EDL *R v V* 1960 (1) SA 117 (T), *R v E* 1960 (2) SA 691 (TC) at 692 Cf *R v Giles* 1926 WLD 211.

169 *R v Russen* (1777) 1 East, *R v Hughes* (1841) 9 CP 752, *S v K* 1972 (2) SA 898 (AD) at 900.

170 This is because rape is traditionally regarded as a crime perpetrated upon women.

171 See S 9 Final Constitution Act 108 of 1996, See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6.

Forced anal or oral sex is not considered rape nor is penetration with an object or a body part other than the penis. These are considered as "indecent assault", which carries a lower penalty than rape. Violent sexual crimes between people of the same sex are not recognised as rape.

It is suggested that the offence of rape be made gender neutral thereby criminalising all non-consensual intercourse whether between male/female, female/male, female/female and male/male.

In South Africa, there is an irrebutably presumption that a girl under the age of 12 years is incapable of consenting to sexual intercourse,[172] thereby making it a statutory offence to have sex with any girl under the age of 12. This fiction of law is justified on grounds of public policy.

Under the common law rule corroboration is not mandatory but the cautionary rule applies. This is a rule of common law whereby the judge directs himself of the danger of convicting an accused of the offence of rape without corroboration. By "corroboration" is meant evidence other than that of the complainant, which tends to show the accused's guilt.[173]

In *S v J*[174] the Supreme Court of Appeal stated that:[175]

> The cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In the South African system of law, the burden is on the state to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

The Supreme Court adopted the guidelines formulated by the English Court of Appeal in *R v Makanjuola*, *R v Easton*[176] that:

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172 *R v Z* 1960 (1) SA 739 (AD at 742. Cf *R v Socont Ally* 1907 TS 336 at 339, *R v M* 1950 (4) SA 101 (T)

173 *R v W* 1949 (3) SA 772 (AD) at 780-2, *R v D* 1951 (4) SA 450 (AD) at 457-7.

174 *S v J* 1998 (2) SA 984.

175 At 987 E-F.

> in some cases, it may be appropriate for the judge to warn the fury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because a witness is alleged to be an accomplice. There will be need to be an evidential basis for suggesting that the evidence of the witness may be unreliable.

The Supreme Court of Appeal approved the decision in *S v D and Another,*[177] which abolished the cautionary rule in sexual offences in Namibia. The Supreme Court overruled the decision in *S v Snyman*[178] that approved the use of cautionary rule in sexual offences.

It is now the law in South Africa that the cautionary rule as a general rule no longer applies to sexual offences, but the evidence in a particular case might call for a cautionary approach.[179]

The South African Courts are responding to the high incidence of rape in the society by ensuring that rapists do not go unpunished, and stiffer punishment is now being imposed. In *S v Chapman*[180] the Court stated as follows:

> Rape is a very serious offence, it is humiliating, degrading and brutal invasion of privacy, dignity and person of victims. The rights to dignity, privacy and integrity of person are basic to the ethos of the Constitution. Women in South Africa are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the street, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquility of their homes without the fear, the apprehension and insecurity which constantly diminish the quality and enjoyment of their lives. The Courts are under a duty to send a clear message to the accused and other potential rapists and to the community to protect the equality, dignity and freedom of all women…".

Courts in South Africa are now treating the offence of rape with the seriousness that it deserves. Conviction rates are now higher sending a clear message to would-be rapists that the Courts would no longer tolerate the offence of rape. Higher sentences are now

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176 *R v Makanjuola, R v Easton* (1995) 3 All ER 730 CA.

177 *S v D and Another* 1992 (1) SA 513 (Nm) (1992) (1) SACR 143).

178 *S v Snyman* 1968 (2) SA 582 (A

179 *S v M* 2000 (1) SACR 484 (W) at 486.

180 *S v Chapman* 1997 (3) SA 341 (SCA).

imposed on conviction for rape. A magistrate court in Kimberley sentenced two men accused of raping a young girl to life imprisonment.[181]

6.5 A COMPARISON OF VIOLENCE AGAINST WOMEN IN NIGERIA AND SOUTH AFRICA

Women in both Nigeria and South Africa suffer enormous abuse. Women in the two countries suffer from the legal fiction of public and private dichotomy, separating violence committed within the family from violence committed in public. South Africa to a large extent has been able to overcome the public/private dichotomy in this respect. Violence against women in South Africa far outweighs those of Nigeria. This could be due to the fact that violence are reported more in South Africa and the society acknowledges domestic violence as a problem and are trying to find solutions.

South Africa is dealing decisively with the issue of domestic violence. In 1993, the Prevention of Family Violence Act[182] was enacted. When it transpired that the Act did not cover all forms of family violence, the South African Law Commission proposed some amendments. The Domestic Violence Act[183] was enacted. This Act extended the definition of parties to include couples that are not married, those in homosexual relationship and divorced people. Legislative intervention has been used to remedy the lacuna in the law, thereby giving better protection to women.

In Nigeria, however, domestic violence is not specifically dealt with through legislation. The law affecting domestic violence is to be found in the general law of assault. In Nigeria, most perpetrators of domestic violence "get away with it" because of lacunae in the law. There is a need for Nigeria to emulate South Africa by enacting a law to deal with domestic violence. This law must provide for the issuance of interdicts and assistance should be given to women requiring shelter. There is the need to lift the veil of public/private dichotomy to ensure that perpetrators of domestic violence are not shielded by making violence behind closed doors a crime.

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181 Reported in the 7.00 p.m news of e-tv on Wednesday, 1 November 2000.

182 Act 133 of 1993.

183 Act 116 of 1998.

The law relating to rape in Nigeria and South Africa are similar. Both jurisdictions defined rape in a gender specific term, that is as an offence that can only be committed against females. It is suggested that the definition of rape in both jurisdictions should be widened to include all sexual assaults whether between male/female, female/male, male/male or female/female.

Both jurisdictions have the crime of statutory rape. In Nigeria, a girl of 13 years or less is deemed to be incapable of consenting to sexual intercourse. In South Africa, a girl of 12 years or less cannot consent to sexual intercourse. The position in both jurisdictions is similar and this is commendable as it is against public policy for children to be violated.

Under the Nigerian law, a boy of 12 is irrebutably presumed as not capable of committing the offence of rape.[184] Under the South African common law, there is an irrebutable presumption that a boy of 14 years or less is incapable of having sexual intercourse. The common law position has now been changed in South Africa. A boy of 14 years can now be convicted of rape.[185]

In Nigeria a boy of 12 years or less is still presumed to be incapable of committing rape. This law should be changed as we are now living in a technological age and a boy of 12 is well capable of knowing much about sex and so be capable of having sex.

In both jurisdictions, rape is defined as "unlawful carnal knowledge of a woman". In Nigeria, following the common law position, a husband cannot be found quilty of having raped his wife. The crime of marital rape is not recognised in Nigeria as the wife is deemed to have given irrevocable sexual privilege to the husband on marriage. On the other hand, marital rape is now recognised as a crime in South Africa.

Domestic violence is sanctioned by the Penal Code, operating in Northern Nigeria. Section 55 of the Code allows husbands to "reasonably chastise their wives, provided no grievous bodily harm is caused". Grievous bodily harm is defined as loss of hearing,

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184 S. 357 Criminal Code.

185 S. 1 Law of Evidence and the Criminal Procedure Act (Amendment Act) 103 of 1987.

sight or limb. This section of the penal code should be repealed. Legislation should also be enacted to criminalise domestic violence and marital rape.

The common law requirement of corroboration has been abolished in South Africa as a general rule, though the fact of a particular case may call for a cautionary approach. Nigeria should also abolish the requirement of corroboration in rape cases.