

CULTURAL MARRIAGE PRACTICES AND DOMESTIC VIOLENCE AGAINST WOMEN: TEARS OR TRIUMPH FOR WOMEN IN SOUTH AFRICA AND INDIA?

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SUMMARY

This article examines the prevalence of domestic violence against women in South Africa and India and identifies the legal measures that exist for the protection from domestic violence in both countries. The article further investigates the notion that the cultural marriage practices of *lobola* in South Africa and dowry in India, because of having mutated into unbridled consumerism, undermine women's autonomy and contribute to gender-based violence. A brief examination is also conducted of the health and economic consequences of domestic violence against women. The article concludes with the recommendation that those cultural practices that undermine the autonomy of women and contribute to domestic violence be eradicated.

1 INTRODUCTION

During the World Conference on Human Rights¹ two important issues were emphasised: first, the universality of human rights, described as "the common language of all humanity"² and secondly, the importance of including and stressing the particular nature of women's human rights. Successive United Nations conferences and regional meetings have invariably found that issues critical to the future well-being of the world's population such as resource development, the pursuit of peace and the improvement of basic human rights such as health and education are all closely linked to an enhancement in the status of women.³ In essence, this

¹ The World Conference on Human Rights, the Vienna Declaration and Programme of Action, June 1993.

² Boutros-Ghali, erstwhile Secretary-General of the United Nations Opening Statement to the World Conference on Human Rights.

³ Justice Cartwright DBE, paper presented at the Justice Sunanda Bhandare Memorial Lecture 1 November 1999, New Delhi, India 4.

means that the rate of development of emerging nations, like South Africa and India for instance, is intrinsically linked to the treatment of the women in these countries.

The human rights of women have long been a concern of the United Nations. The General Assembly's adoption of the Universal Declaration of Human Rights in 1948 heralded an acknowledgment by the United Nations that the principle of equality for men and women is a basic human right. However, it quickly became apparent thereafter that simply because women are part of humanity did not guarantee that their rights would be acknowledged and their dignity as equal human beings affirmed and protected.⁴ It was this understanding that led to the development of the Convention on the Elimination of All Forms of Discrimination Against Women,⁵ which both South Africa and India have ratified. Consequently, both countries have had to put into place various legal measures aimed at ending discrimination against, and protecting and promoting the rights of women. However, despite these legal guarantees, women in both countries face extreme levels of social discrimination that most clearly manifests itself in the high incidence of violence in the domestic environment. This begs the question – why are women in these countries still being violated despite the legal provisions that exist for their protection? A large part of the answer, it is submitted, lies in various cultural practices, primary amongst which are the marriage practices of lobola in South Africa and dowry in India, which, in their current forms, have contributed to the perpetuation of patriarchy and the commoditisation of women in these countries.

2 THE PREVALENCE OF DOMESTIC VIOLENCE IN SOUTH AFRICA AND INDIA

Domestic violence is pervasive in South Africa where, as in India, cultural values and norms serve to reinforce and condone abusive practices against women. Studies in South Africa have found violence in relationships to be so prevalent that men and women often accept coercive and sometimes violent sex as “normal”.⁶ However, official statistics on the incidence of domestic violence are not available as presently there is no crime called “domestic violence” in South Africa. But, according to the Department of Justice, one out of every four South African women is a victim of domestic violence.⁷

Nevertheless, recent surveys have revealed the following results: A study on the prevalence of domestic violence conducted in three provinces found that 26.8% of women in the Eastern Cape; 28.4% of women in Mpumalanga

⁴ Justice Cartwright DBE, paper presented at the Justice Sunanda Bhandare Memorial Lecture 1 November 1999, New Delhi, India 6.

⁵ The Convention was adopted by the General Assembly of the United Nations in 1979.

⁶ “South Africa Case Study” in *Women's Activism in Constitutional and Democratic Reform 3* <http://www.adhoc25.org/gpage2.html>. Research cited in this case study found that in urban Gauteng, 27% women and 31% men agreed that forcing someone you know to have sex with you is never seen as sexual violence.

⁷ Cited in Day “South African Women Mobilize Against Domestic Abuse” 1 <http://journalism.berkeley.edu/projects/southafrica/news/abuseprinterfriendly.html>.

and 19.1% of women in Northern Province had been physically abused by a current or erstwhile partner.⁸ The same study revealed that emotional and financial abuse affected 51.4% of the women in the Eastern Cape; 50% in Mpumalanga and 39.6% in Northern Province.⁹ A study of 1 394 men in Cape Town revealed that approximately 44% admitted to abusing their female partners.¹⁰ Research conducted in the Gauteng province revealed that at least one woman is killed by her male partner every six days.¹¹

Although statistical evidence on the actual prevalence of domestic violence in India is scant, the available studies indicate that the physical abuse of Indian women is high, ranging from 22% to 60% of the women surveyed.¹² Records of the National Crimes Record Bureau, Ministry of Home Affairs, Government of India reveal a 71.5% increase in cases of torture and dowry deaths during the period 1991 to 1995.¹³ In another study conducted in five districts of the state of Uttar Pradesh, 18 to 45% of the married men surveyed admitted to having physically abused their wives.¹⁴

Several complex and inter-connected social and cultural factors have made women especially vulnerable to violence in the home. All of these factors are manifestations of historically unequal power relations between men and women. Socio-economic forces, the family institution where power relations are enforced, fear of and control over female sexuality, belief in the inherent superiority of males, and legislation and cultural sanctions that have traditionally denied women an independent legal and social status are all factors that manifest disparate male/female power dynamics.¹⁵ Many cultures tolerate, if not condone, a certain degree of violence against women. In these cultures, men are seen as having a right to physically chastise their partners, as they deem appropriate. Remarkably, even women often view a certain level of physical abuse to be justified under certain circumstances.¹⁶ In most instances, this justification of domestic violence

⁸ Cited in "Gender-based Violence and Women's Health" in Report by the Centre for the Study of Violence and Reconciliation 3 <http://www.csvr.org.za/gender/pages/health.htm>.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Rao "Wife-beating in Rural South India: A Qualitative and Econometric Analysis" 1997 44(8) *Social Science and Medicine* 1169-1180; and Mahajan "Instigators of Wife Battering" in Sood (ed) *Violence Against Women* (1990) 44.

¹³ "Domestic Violence in India: A Summary Report of Three Studies" 2 <http://www.hsph.harvard.edu/grhf-asia/forums/dv/articles/dvindia.html>. The increase in cases of torture and dowry deaths during the period mentioned may also be attributable to an increase in reporting.

¹⁴ *Ibid.*

¹⁵ "Domestic Violence Against Women and Girls" June 2000 (6) *UNICEF Innocenti Digest* 7.

¹⁶ In Egypt for example, 80% of rural women surveyed said that beatings were common and often justified particularly if the woman refused to have sex with her partner. In a study in Ghana, almost 50% of all women and 43% of men surveyed felt that a man was justified in beating his wife if she used a family-planning method without his consent. Cited in "Widespread Violence Against Women in Africa Documented" 2 http://www.afrol.com/Categories/Women/wom003_violence_unfpa.htm.

stems from a distorted view of the roles and responsibilities of men and women in relationships.¹⁷

The social construction of the divide between public and private underlies the hidden nature of domestic violence against women as legal jurisprudence has historically considered the realm of the home to be within the control and authority of the male head of the household.¹⁸

History offers us examples of women leaders who have enjoyed more power than men did. However, history also suggests that in most societies, women have been accorded a lower status than have men. In the West, for instance, William Blackstone's eighteenth century codification of the English common law asserted that a husband had the right to physically "chastise" his errant wife provided that the stick was no bigger than his thumb.¹⁹ This rule was upheld by an appellate court in North Carolina as recently as in 1867.²⁰ In India, the notion of the inferior status of women has been shaped by *The Laws of Manu*, written some 2000 years ago, which provides the following: "By a girl or boy, a young woman or by a woman of advanced years, nothing must be done even in her own dwelling place, according to her own pleasure".²¹ Manu's laws also declared that "A woman belongs to her father when she is born, to her husband when she is married and to her son after she is widowed".²² Until the advent of democracy in South Africa in 1994, the societal belief in this country of the inferior status of women was reflected in the law that applied to black women. Under the provisions of the Black Administration Act,²³ a woman married under customary law was deemed a minor and her husband, her legal guardian.

Both South Africa and India have constitutions that rate amongst the most progressive in the world. Both constitutions entrench the equality of men and women and outlaw discrimination based on amongst other things, sex, gender and marital status. Yet, the constitutional guarantee of the equality of women has not operated to ameliorate the violence in the lives of women in these two countries in any significant way. Both countries have therefore been obliged, by their ratification of the Women's Convention which is discussed below, and their adoption of other international human rights instruments,²⁴ to pass specific pieces of legislation directed primarily at preventing and eradicating violence against women.

¹⁷ Studies, worldwide, have revealed that certain common types of behaviours such as not obeying the husband, refusing sex, not having a meal ready on time, failing to properly care for the children or home, questioning the man about money or girlfriends, or going out without the man's permission, can all trigger violent episodes in the home. See for instance http://www.afrol.com/Categories/Women/wom003_violence_unfpa.htm.

¹⁸ Bowman and Kuenyehia "Domestic Violence" 2003 *Women and Law in Sub-Saharan Africa* 450 460.

¹⁹ Strauss "Wife Beating (1629-1934)" in Kadish (ed) *Encyclopaedia Crime and Justice* (1983) 89.

²⁰ *Ibid.*

²¹ Chapter 4 of *The Laws of Manu* 300 AD.

²² *Ibid.*

²³ 1927.

²⁴ Those instruments dealing specifically with the issue of violence are: The Declaration on the Elimination of Violence Against Women (Violence Declaration) UN DOC A/Res/48/104

3 THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN²⁵

The Women's Convention, often described as an international bill of rights for women, defines discrimination against women and sets up an agenda for national action to end such discrimination. In general terms, the Convention is a comprehensive charter that promotes and protects the human rights of women.²⁶ While many states do not acknowledge the contribution that women make to the economy, to the family and to society, the Convention emphasises that discrimination in any one of these areas of human life will hamper economic growth and prosperity and will adversely affect society in general.

Despite the Convention's failure to explicitly mention violence against women, it may be argued that at least six articles of the Convention indirectly cover this issue.²⁷ Nevertheless, following on the demands of gender activists, the Committee on the Elimination of Discrimination Against Women (CEDAW) adopted a general recommendation and comments that indicate how states should interpret the Convention to take cognisance of violence against women.²⁸ The recommendation and comments also indicate the nature of states' obligations in this regard. Under the provisions of General Recommendation 19, the general prohibition of gender discrimination includes gender-based violence that refers to violence that is directed at a woman because she is a woman or that affects women disproportionately.²⁹ Such violence includes "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty".³⁰ Specific mention is made of domestic violence, which includes "battering, rape, other forms of sexual assault, and mental and other forms of violence, which are perpetrated by traditional attitudes".³¹

(1994) and The Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing Declaration of Action UN Doc A/Conf.177/20 (1995) both of which were adopted by India and South Africa.

²⁵ Hereafter "the Women's Convention" or "the Convention".

²⁶ Article 1 of the Convention provides as follows: "For the purpose of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and woman, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

²⁷ Fitzpatrick "The Use of International Human Rights Norms to Combat Violence Against Women" in Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 532. The Articles referred to are 2, 3, 6, 11, 12 and 16.

²⁸ General Recommendation 19, UN GAOR Committee on the Elimination of Discrimination Against Women 1, UN Doc CEDAW/C/1992/L 1/Add.15 (1992).

²⁹ General Recommendation 19, UN GAOR Committee on the Elimination of Discrimination Against Women par 7, UN Doc CEDAW/C/1992/L 1/Add.15 (1992).

³⁰ *Ibid.*

³¹ General Recommendation 19, UN GAOR Committee on the Elimination of Discrimination Against Women par 23, UN Doc CEDAW/C/1992/L 1/Add.15 (1992).

Notably, General Recommendation 19 also endorses what is now almost routinely accepted, that violence against women constitutes a violation of women's human rights irrespective of whether the perpetrators are state officials or private individuals.³² The Recommendation accordingly makes provision for states to be held responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.³³ CEDAW has also construed the Women's Convention to mean that states, in meeting their duties under the Convention, "must take all measures necessary to provide effective protection to women, including comprehensive legal, preventive, and other necessary measures".³⁴

South Africa ratified the Convention without reservation in December 1995 whilst India's ratification, with reservations, occurred in 1993. Both states are consequently bound to fulfil the obligations created under the Convention.

4 THE LEGAL RESPONSE TO DOMESTIC VIOLENCE

4.1 South Africa

Violence against women in South Africa violates a number of provisions of the South African Constitution's Bill of Rights. These include: the rights to: equality,³⁵ human dignity,³⁶ life;³⁷ freedom from public and private violence, and security;³⁸ not to be subjected to slavery, servitude and forced labour;³⁹ privacy;⁴⁰ freedom of association;⁴¹ freedom of movement and residence;⁴² access health care, food, water and social security;⁴³ and have access to the courts.⁴⁴

The constitutional recognition of the right to freedom from violence, and other kindred provisions, have imposed on the state the need to translate its obligations into policy. Apart from its obligations under the Constitution, the international human rights instruments mentioned also require state intervention in the form of the implementation of wide-ranging measures to

³² Combrinck "Positive State Duties to Protect Women from Violence: Recent South African Developments" 1998 20(3) *Human Rights Quarterly* 666 673.

³³ General Recommendation 19, UN GAOR Committee on the Elimination of Discrimination Against Women 10, UN Doc CEDAW/C/1992/L 1/Add.15 (1992).

³⁴ Combrinck 1998 20(3) *Human Rights Quarterly* 674.

³⁵ S 9 of the Constitution of the Republic of South Africa Act, 1996 (hereinafter "the Constitution").

³⁶ S 10 of the Constitution.

³⁷ S 11 of the Constitution.

³⁸ S 12 of the Constitution.

³⁹ S 13 of the Constitution.

⁴⁰ S 14 of the Constitution.

⁴¹ S 18 of the Constitution.

⁴² S 21 of the Constitution.

⁴³ S 27 of the Constitution.

⁴⁴ S 34 of the Constitution.

address the issue of violence against women. The ineptness of the common law remedies in dealing with violence against women is legendary. Therefore, a simple reliance by the state on the common law remedies would not be enough to meet these obligations. This need for legal reform has therefore led the South African parliament to promulgate a series of Acts orientated at improving the position of women under the law. Only those Acts that deal directly with domestic violence are discussed.

The Prevention of Family Violence Act,⁴⁵ passed in 1993, explicitly prohibits domestic violence and provides various remedies to the victims of domestic violence. The most innovative aspect of this Act is that it makes provision for the conviction of a man of the rape of his wife, something that the current common law crime of rape does not permit. The importance of this piece of legislation to a country that has one of the highest incidences of rape as well as the highest number of HIV/AIDS sufferers in the world, cannot be overemphasised. Despite the protections offered by the Act, it remained deficient in some ways. First, the ambit of its protection applied to only certain types of relationships. Women who were abused by a male relative other than a husband or boyfriend were precluded from seeking protection under the Act as were women who did not share a common residence with their sexual partners. Furthermore, the Act did not define the range of abuses for which a woman could obtain an interdict. Instead, individual magistrates were left with the discretion of deciding whether a particular form of abuse fell within the Act's broadly-worded terms.⁴⁶ The Act's failure to define "abuse" therefore meant that the possibility existed that women who were emotionally and economically abused would not qualify for protection. Other deficiencies included the sometimes long delays originating in the sheriff's office in serving the abuser with the interdict, and the fact that the sheriffs' jurisdictions were limited to serving the interdicts in certain stated areas only.

Thus, the Family Violence Act, although well-intentioned, failed to reach the objectives of its preamble. It was therefore augmented by the Domestic Violence Act.⁴⁷ This Act has been hailed as groundbreaking in a number of aspects. Unlike its predecessor, which applied only to married couples, the Domestic Violence Act includes a comprehensive definition of domestic violence and covers any kind of domestic arrangement, including dating relationships and unrelated persons sharing a common residence. Under the Act, an abuse survivor can lay a charge of assault against her abuser and obtain, free of charge, an order from a Magistrate's Court that prohibits the abuser from assaulting or threatening the survivor and from coming to her home or workplace. Court proceedings are held in camera. If the abuser violates the interdict, the abuse survivor is able to contact the police and

⁴⁵ 133 of 1993. This Act was passed prior to South Africa's ratification of the Women's Convention.

⁴⁶ S 2(1) of the Prevention of Family Violence Act 133 of 1993.

⁴⁷ 116 of 1998.

have the abuser arrested. The Act also sets out the powers and duties of the police and social workers in instances of domestic violence.⁴⁸

The Domestic Violence Act is an unequivocal manifestation of the objective of the legislature towards ensuring that the state executes its constitutional duty and international commitment to eradicate violence against women. However, the continued under-resourcing of courts and police stations combined with police ineffectiveness and judicial insensitivity have diminished the effective implementation of the Act. The Act has also been undermined by the perceptions of influential persons like the National Commissioner of Police, Jackie Selebi, who in 2001 was quoted as saying that the Act was not practical or implementable and was “made for a country like Sweden, not South Africa”.⁴⁹

4 2 India

The fountainhead of legal policy in India is the Indian Constitution.⁵⁰ A number of articles in the Indian Constitution relate directly to women. These include the rights: to equality;⁵¹ not to be discriminated against;⁵² to equality of opportunity;⁵³ to an adequate means of livelihood and to equal pay for equal work and health;⁵⁴ and to just and human conditions of work and to maternity relief.⁵⁵

Arising from these constitutional guarantees and its international law obligations, the Indian government has enacted eleven Acts that directly affect the well-being of women. Only those legal provisions that deal with eradicating domestic violence against women are discussed.

The large numbers of women, who had either been killed or physically abused because of dowry demands, were the impetus that led to the enactment of the Dowry Prohibition Act.⁵⁶ This Act prohibits the request, payment or acceptance of a dowry “as consideration for the marriage”, where “dowry” is defined as a gift demanded or given as a precondition for a marriage. Gifts given without a precondition are not considered dowry and are legal. However, the Act has been ineffective for two reasons: first, since dowry-givers as well as dowry-takers are liable to be prosecuted, those coerced into payment are disinclined to lay complaints with the police for

⁴⁸ The duties of the police are contained in ss 2, 8, 9 and 18 of the Act and include *inter alia*, ensuring that the complainant is not in immediate danger, rendering any assistance that may be necessary in the circumstances such as medical treatment or finding suitable alternate accommodation, informing the complainant of her right to lay a criminal charge and/or apply for a protection order, or arresting the abuser.

⁴⁹ “South Africa case study”, quoted in *Women’s Activism in Constitutional and Democratic Reform* 8 <http://www.adhoc25.org/gpage2.html>.

⁵⁰ The Constitution of India Act of 1949.

⁵¹ Article 14.

⁵² Article 15.

⁵³ Article 16.

⁵⁴ Article 39.

⁵⁵ Article 42.

⁵⁶ The Dowry Prohibition Act 28 of 1961.

fear of being themselves prosecuted; and secondly, the Act outlaws dowry "as a condition of marriage" whilst the making "voluntary gifts" permissible. This makes the sanction toothless as gifts may be claimed as voluntary even when they are not, or they may be deliberately distanced from the wedding ceremony to conceal their true nature. The Dowry Prohibition Act was amended in 1984 to permit the aggrieved person, or any recognised welfare organisation to file a complaint before a magistrate even if the girl's parents are hostile or unwilling to lodge a complaint.⁵⁷

The deaths of married women under mysterious circumstances have been a common feature in Indian society. The possibility that these deaths may have been related to dowry demands, has led to an amendment of the Indian Penal Code, with the insertion of section 304B commonly referred to as the "dowry death law".⁵⁸ In terms of this section, the death of a woman in the first seven years of marriage must be treated with suspicion and obliges the officer-in-charge of a police station in the area where the death has occurred, to send the body for a post mortem examination without requiring evidence on complaint that the deceased had been put under unreasonable pressure to supply a dowry.

Indian law has also made cruelty towards a married woman a substantive offence by the insertion of section 498A into the Indian Penal Code.⁵⁹ In terms of this section, "cruelty" is any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to her life, or physical or mental health. "Cruelty" also includes harassment of the woman where such harassment is intended to coerce her or any of her relatives to meet any demand for property; or the harassment is because of a failure by the woman or a person related to her to meet such demand. This provision supplements the Dowry Prohibition Act.

Despite these legal provisions, domestic violence against Indian women continued to be perpetrated at levels that clearly indicated that more legal intervention was needed. This led to the promulgation of the Protection of Women from Domestic Violence Act,⁶⁰ which is aimed at providing more effective remedies and better protection to women who are the victims of violence of any kind occurring within the family.⁶¹ This Act outlaws the physical, sexual, verbal, emotional and economic abuse of women in domestic relationships. Under the Act, the term "domestic relationship" refers to a relationship between two people who live or have, at some point in time, lived together in a shared household, when they are related by blood, marriage, or through a relationship in the nature of marriage, or are family members living together in a joint family.⁶² The Act may be invoked in instances of domestic violence against the woman if the perpetrator is her husband or male partner, or any other relative. It also sets out the powers

⁵⁷ S 7(b)(ii) of the Dowry Prohibition Act, 1968.

⁵⁸ Criminal Law (Second Amendment) Act, 1983.

⁵⁹ *Ibid.*

⁶⁰ Act 43 of 2005 which came into operation in November 2006.

⁶¹ The preamble of the Act.

⁶² S 2(f) of the Act.

and duties of protection officers and service providers in cases of domestic violence.⁶³ As the Domestic Violence Act has only been in operation since November 2006, it is difficult to gauge the effectiveness of its implementation at this early stage.

From a purely legal perspective then, South African and Indian women are assured of equality, and freedom from domestic violence. Despite these legal guarantees, evidently, women in both countries face extreme levels of social discrimination that most clearly manifests itself in the high incidence of violence in the domestic environment. The result has been that many of these women have become conditioned into believing that the violence in their lives is their due with some even of the notion that they are deserving of such violence.⁶⁴ In both South Africa and India, traditional hierarchical values often give men proprietary rights over women, with male family members having control over a single woman and her husband having control over the woman once she is married. The cultural marriage practices of *lobola* in South Africa and dowry in India, it is submitted, reinforce men's proprietary rights over women and in so doing serve to increase the vulnerability of women to domestic violence.

5 CULTURAL MARRIAGE PRACTICES

5.1 *Lobola* in South Africa

The practice through which a man pays some property for the right to marry a woman is commonly known as *lobola* or "bride price". It is a pervasive and enduring feature of African culture and usually consists of a large payment to the bride's family by the groom, traditionally, of cattle, but in modern times, of money or other items of value. In traditional society, the payment of *lobola* secured the position of the woman within the marriage and in the husband's family. It also granted her certain rights, claims and guarantees such as the right to maintenance by her husband and his protection, and other conjugal rights.⁶⁵ *Lobola* was seen as a factor that regularised or determined the validity of marriage under custom.⁶⁶ Therefore, even where a statutory marriage was being contracted, the bride's family would still demand *lobola*.

In contemporary times, *lobola* has mutated into yet another example of male control over women by commoditising women's bodies. The historical symbolism of *lobola* as a token of appreciation on the part of the groom's family has shifted to take the form of a commercial transaction.⁶⁷ These days for instance, *lobola* is linked to the educational qualifications and other attributes of the bride-to-be and her family. The more highly educated the woman or the more affluent her family, the greater the value of the *lobola*

⁶³ Chapter 3 of the Protection of Women from Domestic Violence Act, 2005.

⁶⁴ See, eg, "Closing the Gap: Gender-Based Violence in South Africa" 1 <http://www.irinnews.org/webspecials/PNGBV/print/p-6640.asp>.

⁶⁵ Knoetze "The Modern Significance of *Lobolo*" 2000 *TSAR* 532 533.

⁶⁶ Bennett *Human Rights and African Customary Law* (1995) 118.

⁶⁷ WLSA Research Trust *Lobola – Its Implications for Women's Reproductive Rights* (2006) 8.

demanded by her father and the other male members of her family.⁶⁸ It is not uncommon to find the bride's family demanding astronomical amounts of money and an assortment of gadgets such as satellite dishes, mobile telephones or even motor cars as part of the *lobola* for their daughter.⁶⁹ Thus, the marriage institution has served to turn women into objects or mere property, not only to enrich the male members of their natal families but also to be dealt with at the whim of their husbands and his family whose property they ostensibly become after marriage.⁷⁰ Although it may be argued that *lobola* does not constitute the purchase of a woman, the fact that a man or his family has parted with resources in order to acquire a wife affects the man's perceptions of the nature of the marriage relationship.⁷¹ Research indicates that many men who have paid *lobola* for their wives consider their wives to have been purchased by them and therefore regard them as their property.⁷² Remarkably, almost as many women as men share this belief.⁷³

It is primarily in this regard that there is strong opposition to the criminalisation of forced sexual intercourse on a wife, as many men believe that since the wife has been paid for, she is obliged to submit to sex.⁷⁴ The result is that women have little or no power in sexual decision-making. Some women are even of the notion that marital rape is obligatory sex required to pay their husbands back for the food and shelter provided for them and their children.⁷⁵ Married women who request safer sex practices, such as condom usage, may be accused either of having extra-marital affairs or of accusing their husbands of infidelity. Because of the notion that wives are the property of their husbands, married men regard female infidelity very seriously.⁷⁶ Research indicates that in South Africa, alleged female infidelity is the most common factor precipitating the murder of women by their partners.⁷⁷ Since the belief of being the husband's property is pervasive also amongst women, few of them are likely to regard coercive sex by their partners as rape. Therefore, the numbers of women likely to avail themselves of the legal protection against marital rape in South Africa will be minimal.

⁶⁸ Knoetze 2000 *TSAR* 533 refers to Dlamini "The Role of Customary Law in Meeting Social Needs" 1991 *Acta Juridica* 78 79, who argues that since the cultural practice of *lobola* operates "in a money economy, as it does today, [it] tends to acquire mercenary features which then discredit it because it takes on the appearance of the purchase of a woman".

⁶⁹ WLSA Research Trust 8.

⁷⁰ *Ibid.*

⁷¹ Bennett 118.

⁷² Women and the Law in Southern Africa "Lobola – A Price For A Bride" 4 <http://www.wlsa.org.zm/zambia/pages/26apr01p4.htm>.

⁷³ In a recent survey conducted in the Eastern Cape Province of South Africa, 82% of the men surveyed said that it is culturally accepted that if a man pays *lobola* for his wife, it means that he owns her. Some 72% of women surveyed concurred with this statement. Cited in *Population Reports* "Culture – A Double-Edged Sword" 3 <http://www.inforhealth.org/pr/111boxes.shtml>.

⁷⁴ Furthermore, the concept of marital rape does not exist in traditional African society. See, eg, Pieterse "Beyond the Reach of the Law? HIV, African Culture and Customary Law" 2000 *TSAR* 428 435.

⁷⁵ *Population Reports* 3.

⁷⁶ Pieterse 2000 *TSAR* 437.

⁷⁷ Cited in "Gender-based Violence and Women's Health" 10 <http://www.csvr.org.za/gender/pages/health.htm>.

Another insidious consequence of *lobola* is the role that it plays in the spread of HIV/AIDS. Forced or unprotected sex puts women at risk of contracting sexually transmitted diseases, including HIV/AIDS. A common belief of married men is that they have a right to multiple sexual partners and that their wives do not have the right to object as they have been paid for.⁷⁸ A woman seeking to divorce her husband based on his infidelity or sexual violence towards her is unable to do so unless her family repays the *lobola*. This is seldom possible as the *lobola* is very likely to have been spent or used up by this time. Women are therefore forced to remain in their marriages and suffer the violence. For the reasons already mentioned concerning condom usage, these women dare not bring up the issue of condoms even when they know that their husbands are exposing themselves to the AIDS virus.

Apart from sexual violence in the home, the practice of *lobola* is also linked to other forms of domestic violence such as verbal abuse and physical beatings. Husbands justify their actions by claiming that they have overall control and dominance over their wives as they paid *lobola* for them. Research indicates that men describe physical abuse as “discipline” or “punishment” and that it is justified to beat women “when they don’t listen” or “when they stand up for their rights”.⁷⁹ The same research reveals a striking observation about *lobola*, that it is viewed as a form of consolation to many of the women as they regard domestic violence to be an inevitable part of a woman’s lot in life.⁸⁰ The view expressed in this regard was that it is better to be beaten when *lobola* has been paid, unlike being beaten for nothing – because with *lobola*, the woman’s parents have at least received something for the assault.⁸¹

Apart from contributing to domestic violence becoming socially normalised, the practice of *lobola* also serves to increase women’s vulnerability to violence – the commercialisation of this practice has led to the commoditisation of women, which reinforces the notion, although a fallacy, that wives are the property of their husbands. Furthermore, women are restricted from leaving abusive marriages, as traditionally, their families have to repay the *lobola* if these women leave their husbands. The persistence of rights for customs that discriminate against women cannot lead to a change in the social dynamic that has so unceasingly caused women in South Africa to suffer so much pain. Therefore, for as long as these cultural practices are allowed to exist, in their current forms, women in South Africa will continue to struggle to achieve factual equality despite the existence of constitutionally enshrined gender and sexual rights.

⁷⁸ Mathabane “Lobola, AIDS and Africa” Monday, March 27, 2000 *Washington Post*.

⁷⁹ Kim and Motsei “Women Enjoy Punishment’: Attitude and Experiences of Gender-based Violence Among PHC Nurses in Rural South Africa” 2002 54(8) *Social Science and Medicine* 1243-1248.

⁸⁰ Kim and Motsei 2002 54(8) *Social Science and Medicine* 1249-1250.

⁸¹ *Ibid.*

5 2 Dowry in India

Few societies on earth exalt the institution of marriage as much as Indians do. In Indian society, a wife is traditionally seen as a “goddess” yet despite this term of esteem, women are treated with far less veneration than one would treat a goddess. The fall from grace of Indian women may be attributed to the highly patriarchal nature of Indian society with discrimination against the female of the human species beginning even before birth. Socio-economic compulsions and the socio-cultural bias against females have led to sex-determination tests being abused for aborting female fetuses.⁸² These same factors are the cause of widespread domestic violence against women. This begs the following questions: What is it that makes the birth of a girl child in India so unwelcome, and why is domestic violence so endemic in Indian society? The answers, it is submitted, lie in various cultural practices, including that of dowry, that commoditise women.

In Hinduism, marriage is not merely a contract but a sacrament. Most marriages in India are arranged by the parents of the bride and groom.⁸³ Before a marriage is finalised, the prospective bride is presented to the prospective groom and his family. The young woman is then scrutinized and if approved, “the bargaining over dowry begins”.⁸⁴ Dowry is one of the core issues that determine whether the arranged marriage takes place.

The practice of dowry has its roots in prehistoric times when women were regarded as the property of their fathers. This entitled the bride’s father to demand payment from the groom at the time of marriage for the loss of the labour of his daughter.⁸⁵ In medieval times with hypergamy being practised amongst the aristocracy in terms of which a woman of a lower class could marry a man of a higher class but not vice versa, the parents of the woman favoured such a union for the power and prestige that it would shower on them. They therefore willingly paid the expenses of such a marriage by means of a large dowry to the bride. This later became a widespread custom among the aristocracy. Dowry was considered the property of the woman and was in fact given to the bride by her family to strengthen her financial status in her matrimonial home.⁸⁶ Over time, however, dowry shifted from being a gift to the bride to being a groom’s entitlement.⁸⁷ The abuse of this custom eroded its original function as a safety net for the woman – instead, it has been corrupted to become the bait for the groom and the noose for the

⁸² Between 1978 and 1983, approximately 78 000 female fetuses were aborted after amniocentesis, with a study revealing that out of 8 000 abortions, 7 999 involved a female fetus. Cited in Devendra “Gender Discrimination: Before and After Birth” in Kapur (ed) *Girl Child and Family Violence* (1998) 161.

⁸³ An extensive study conducted in 1993, found that the marriages of 90.67% working women and 98.67% unemployed women had been arranged by their parents. Teja *Dowry: A Study in Attitudes and Practices* (1993).

⁸⁴ Rastogi and Therly “Dowry and its Link to Violence Against Women in India” January 2006 7(1) *Trauma, Violence and Abuse* 66 68.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

bride. Currently, the value of the dowry demanded is linked to the qualifications, profession and income of the groom.⁸⁸

The financial burden of dowry is a considerable factor in the preference of male children to female children in India. Daughters are regarded as another's property, merely raised in the parental home and then given away with a dowry.⁸⁹ Having no patriarchally endorsed worth in herself, a woman is made to look to material consumerables to enhance her value. This process of commoditisation compels the bride's parents to weigh their daughter with money and other material items to reflect her value and through these means enhance her ability to attract a groom. The bride's treatment in her marital home is often affected by the value of her dowry. Any attempt to oppose the rules of patriarchy by refusing the demands for dowry is likely to result in domestic violence and in some cases, even death.

The link between the practice of dowry and domestic violence is significant as the failure to meet dowry demands leads to women being physically and emotionally abused and sometimes even killed. Research indicates that 5 582 dowry-related deaths occurred in India in 1993⁹⁰ and that in 2002, this figure rose to 6 822.⁹¹ Killing by means of burning constitutes a significant portion of dowry-related deaths.⁹² Often these deaths are reported as suicides with the husband and his family claiming that the woman set herself alight. Historically, suicide by burning was a traditional practice known as *sati* performed in ancient times by women who threw themselves onto the funeral pyre of their deceased husbands.⁹³ Although this practice is now outlawed in India, it still occurs occasionally. Self-immolation because of unreasonable dowry demands is now more common than *sati* with some newly married women preferring death to the mental and physical abuse to which they are subjected.⁹⁴

6 HEALTH CONSEQUENCES OF DOMESTIC VIOLENCE

It is plainly obvious that traditional marriage practices in South Africa and India have contributed in no small measure to the perpetuation of male domination through the objectification of women. Consequently, the range of legal measures that exist for the protection of women in both countries is being undermined by these cultural practices that also weaken the ability of women to escape from abusive relationships. The health consequences to

⁸⁸ *Ibid.*

⁸⁹ Rastogi and Therly January 2006 7(1) *Trauma, Violence and Abuse* 70.

⁹⁰ Umar *Bride Burning in India* (1998) 2. Umar also states that many more cases of dowry-related deaths are unreported or recorded as accidental death in connivance with police officials and that over 90% of the cases of women burnt to death in Delhi were registered as accidents whilst only 5% were recorded as murders and 5% as suicides.

⁹¹ India, Ministry of Home Affairs, National Crime Records Bureau (2004). *Crime in India 2002*. New Delhi <http://www.ncw.nic.in/index1.asp?linkid=33>.

⁹² Kumar and Kanth "Bride Burning" 18 December 2004 364(1) *The Lancet* 18-19.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

women in abusive relationships are far-reaching with occasionally fatal results. Assaults result in injuries ranging from bruises and fractures to chronic disabilities such as partial or total loss of vision or hearing, and burns may lead to disfigurement.⁹⁵ Research indicates that high levels of violence during pregnancy pose a risk to the health of both the mother and the unborn foetus.⁹⁶ The worst consequence of assault may be the death of the woman.

Sexual violence and coerced sex can lead to unwanted pregnancies and the dangerous consequences that result from illegal abortions.⁹⁷ Furthermore, women in violent situations are less able to use contraception or negotiate safer sex practices with their abuser. The risk of contracting sexually transmitted diseases and HIV/AIDS is therefore high.

The impact of domestic violence on the mental health of women is often severe with sometimes-fatal consequences. Women who are repeatedly abused experience high levels of stress and stress-related illnesses such as post-traumatic stress syndrome, panic attacks, depression, sleeping and eating disorders, high blood pressure, alcoholism, drug abuse and low self esteem.⁹⁸ For some women, fatally depressed and demeaned by their abusers, suicide may appear to be the only escape from domestic violence.

The socio-economic costs of domestic violence against women in developing countries have been estimated by the World Bank to account for 5 to 16% of healthy years lost to women of reproductive age.⁹⁹ These costs exclude the financial burden that is placed on the medical, police, criminal justice and social welfare services of a country. All of these expenses taken together with the decreased labour market participation of abused women as well as their reduced job productivity and increased absenteeism, indicate that developing countries with high levels of violence against women, for the sake of their overall development needs, must involve themselves in strategic interventions that are orientated at eradicating violence against women.¹⁰⁰

7 CONCLUSION

“Cultural rights” are often the rationale for male domination of domestic and national affairs. International human rights law has repeatedly emphasised that women’s human rights cannot be violated on the grounds of cultural or religious norms. The constitutional and other legal provisions in South Africa and India emulate the stance adopted by international human rights law, yet

⁹⁵ UNICEF “Domestic Violence Against Women and Girls” June 2000 6 *Innocenti Digest* 9.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* The World Bank estimates count every year lost due to premature death as one disability-adjusted life year (DALY), and every year spent sick or incapacitated as a fraction of a DALY, with the value depending on the severity of disability.

¹⁰⁰ Ironically, the primary reason for policy-makers to attempt the eradication of violence is likely to be the cost of violence to the economic development of these nations, and not necessarily the well-being of women.

women in these countries continue to be affected adversely by cultural practices that commoditise them. Thus, even when women's rights are legally recognised in the abstract, long-standing patriarchal practices prevent their full expression in society. Unless there is a change in the patriarchal mindsets that dominate in both countries, the impressive legal gains that women have achieved will be nullified.

The illustrious Mahatma Gandhi himself contributed to the perpetuation of patriarchy with his advice to women "in danger of being violated". According to Gandhi, "[women] must develop courage to die rather than yield to the brute in man".¹⁰¹ In Gandhi's view women are the embodiment of non-violence. Therefore, instead of a woman killing the man attempting to rape her, for instance, she should rather take pleasure in self-sacrifice.¹⁰² This raises the question of for how long are we to goad women to sacrifice themselves at the altar of culture. It is submitted that appeals to culture are often an excuse to justify oppressive practices against women. However, culture is neither sacred nor static. Those aspects that oppress women must be ousted while preserving what is good. As Ghanaian lawyer Rosemary Ofihea Ofei-Afboagye so succinctly puts it: "A culture that teaches male mastery and domination over women must be altered".¹⁰³ Likewise, Sudanese physician Nahid Toubia asks "[w]hy is it only when women want to bring about change for their own benefit that culture and custom become sacred and unchangeable?"¹⁰⁴

Clearly, there is an urgent need for the search for suitable remedial measures to eradicate domestic violence from our societies, not only for the sake of the protection of half of humankind, but also to promote the economic development of the emerging nations of the world. Two fundamental issues require attention in this regard: the first is to ease the constraints of male-female relationships; and the second is to ensure women's development. The former demands a fundamental change in the socialisation process whilst the latter is only possible in a social structure that recognises women, not as moveable property, but as intrinsically valuable individuals in their own right. If the process of achieving the full emancipation of women requires that various cultural practices be razed, then let them be razed, and no regrets for them.¹⁰⁵ Until then, unfortunately, it is still tears for South African and Indian women.

¹⁰¹ Gandhi *Women* (1958) 89.

¹⁰² *Ibid.*

¹⁰³ "Explaining Intimate Partner Abuse" in *Population Reports* 3 <http://www.infoforhealth.org/prg/111/111boxes.shtml>.

¹⁰⁴ *Ibid.*

¹⁰⁵ Singh "Problems of Violence Against Women" in Vir (ed) *Violence Against Women and Their Exploitation In India* (2006) 116 126.