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Focus on Criminal Law in Southern Africa

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M. MABOREKE

1. INTRODUCTION

Although most people "like to think of the family as the abode of love; a safe retreat where any member of the family is sure of support and protection; of grandparents, parents, aunts, uncles, and children as a closely - linked network of individuals who will stand united in the face of a threat, the reality is rather different."¹

With specific reference to the problem of violence against wives within the Zimbabwean context it has been said:

"Everybody knows it exists. Everybody knows there is a great deal of it. But nobody knows its extent. There are no figures."²

It can be reasonably assumed that victims of this violence want to be protected from their husbands. This article examines the legal provisions governing violence against wives, their adequacy, appropriateness and as well as their current implementation.

2. THE LEGAL POSITION

Under both customary ³ and common ⁴ law the husband had the right

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1. Storr, A. (1978) Family Violence: An International and Interdisciplinary Study, Toronto, Butterworths, p. 1.
2. M. Maboreke's M.Phil Thesis, "The Legal Status of Women in Zimbabwe: The Laws Relating to Violence Against Wives and Child Custody As Illustrations", p. 38 See also, for instance, The Statement by the Minister of Community and Co-operative Development and Women's Affairs Mrs Joyce Mujuru in The Herald (Saturday 16th January) 1987.
3. (1975), Goldin and Gelfand, African Law and Custom in Rhodesia Cape Town, Juta p. 18; and 1928-62 Bangake and Magenge v Sikobo, SRN 150; 1944 Shoriwa v. Risi and Mubayiwa, SRN 275.
4. Huber, Jurisprudence of My Time. Vol 1 p. 48; Grotius 1.5.19 and 20.

to physically chastise his wife as a correctional measure or as a way of making her obey his lawful orders. This right appears to have been seen as proceeding from the husband's position as guardian of his wife, which, inter alia, made him responsible for his wife's liabilities to third parties.⁵ This rationalisation apparently lent morality, respectability and apparent legality to violence against wives and in effect operated to shield the husband from disporabation for assaulting his wife - at least if the assault meted out was thought to be commensurate with the wrongs committed.

The Legal Age of Majority Act 15/82 conferred majority status on all persons of 18 years and above. This is particularly significant in relation to women because by doing so it removed the yoke of perpetual minority which had hitherto been the linch pin of women's inferiority vis a vis their menfolk. In particular, the Legal Age of Majority Act removed the rationale for the husband's liability for the actions of his wife, at least to the extent that the liability was premised upon his being her guardian. This Act has also wiped out those consequences flowing from a husband's guardianship of his wife which might have formerly been seen as a justification for violence against wives. However, in marriages in community of property,⁶ for example, the position of the husband as the administrator of the joint estate might still be seen as a justification for his continued right to direct her actions, thus clothing a husband's assaults upon his wife to whom he is married in community of property with apparent legality and morality. There is, therefore, perhaps a need to review all laws which may in any way be construed as a legitimization or justification for violence against wives such as men's right to decide issues concerning women which in turn is indirectly used to justify violence against wives. Even this, however, may not suffice. To begin with, normative rules are but one of the structural determinants of behaviour and often a minor one at that; and secondly, such rules do not arise out of thin air but rather are integrated with a network of other elements and usually reflect the realities of everyday living. Consequently, a truly fundamental approach to the problem of violence against wives must address these very fundamental issues each of which is almost inseparably intertwined with the others.

There is no Zimbabwean case authority saying that the husband's right to chastise his wife is no more. Nonetheless it is quite clear that this purported right is no more.⁷ There is nothing within the definition of criminal assault indicating that violence against wives is in a class of its own. Further, an act cannot be both a right and criminal at the same time and husbands have been and are still being convicted for assaulting their wives something which would not be possible if they had a right to chastise their wives for it is inconceivable that they would be convicted for exercising their rights. The legal position is therefore that violence against wives is just as criminal as any other crime.

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- 5. Muchechesi v. Seven 1969 AACC 43.
 - 6. Those marriages in which property acquired during the subsistence of the marriage is held in equal undivided shares by the spouses.
 - 7. See e.g. Hunt, Southern African Criminal Law and Procedure, Vol II, p. 469.

3. REMEDIESA. CUSTOMARY LAWTHE SOCIAL DISPUTE SETTLEMENT PROCESS

The first remedy open to a wife who had been assaulted or was threatened with assault was an appeal to either her family of affinitation or her own natural family.⁸ The homes of relatives also acted as refugees in times of need. In cases where the wife sought refuge with a third party the onus was on the husband to follow her and after mediation by third parties the husband would usually offer compensation in atonement for his actions.⁹

Under customary law people who had a dispute usually tried to settle the matter between themselves and their families before resorting to the court which was usually used only as a last resort. In cases of violence against wives customary law provided a via media which was usually in the form of a "peace bond" of sorts. What customary law did in this instance was to require the husband to make an undertaking to refrain from further violence upon his wife and this undertaking was made a condition precedent to the parties' resumption of married life or cohabitation. This was sanctioned by the threat of increased compensation for further assaults and/or a family instigated divorce.

The social dispute settlement process discussed above, however, depended upon the continued existence of an intact extended family system. The extended family system, an outgrowth of the communalism of feudal pre-colonial Zimbabwe is being overtaken by the individualism of the present-day capitalist Zimbabwean economy. Consequently, the social dispute settlement process discussed above finds itself more and more unable to adequately, satisfactorily and effectively deal with issues arising from this changed socio-economic base. This is why third parties and relatives to whom assaulted wives have turned for assistance are reportedly generally not very helpful. For instance, in Florence Mushambi v Ishmael Mushambi¹⁰ the wife's brother repeatedly sent her back to her husband even though the latter had threatened to kill her; and in Agatha Gada v Lovemore Muchazivepi¹¹ the wife's unchallenged testimony was that after her husband had severely assaulted her on diverse occasions he took her to her uncle but her

"uncle refused to accept me for there was no munyai¹². My brother in Glen Norah refused to accept me as well and we went round four times and the fifth time we went to my uncle (the husband) said, "Do you want me to bring your daughter in a coffin?" and this is when my uncle agreed to have me there".

8. Shoriwa v Risi and Mubayiwa, 1944 SRN 275.

9. Golden and Gelfand, op cit, Shoriwa v Risi and Mubayiwa, op cit.

10. Harare Community Court, 30/85.

11. Harare Community Court 737/85.

12. The person who acts as a go between between the wife-giving and the wife-receiving families during marriage negotiations.

This shows that whatever merits the social dispute settlement process might have had it is becoming more and more futile to look to it for the resolution of disputes.

The social dispute settlement process fails to meet women's need for protection for various other reasons. First, third party intervention, especially where it takes the form of intervention by the extended family, is likely to be biased in favour of the party who is a member of that particular family. Since in most cases the woman is on the receiving end and she usually turns to her husband's family for assistance first. This factor is much more likely to operate against her rather than in her favour. Further, even in those cases where the wife turns to her own natural family for help, she might find that her family is reluctant to come to her aid lest they be misconstrued as aiding and abetting her in the behaviour being complained of by her husband and/or his family, and thereby compromise their bargaining position should the whole affray escalate into an inter-family conflict. In addition, even assuming that both a woman's family of affiniton and her natural one are not biased as a result of their relational standings to the parties, their response to a woman's need for protection from a violent husband is still limited because it is already coloured by the apparent general societal acceptance of violence against wives as a social norm rather than as an aberration which needs correction. The families themselves as members of that society have most probably also imbibed this value. In other words, they will most probably be biased in their response to a woman's appeal for protection because they are already biased in their perception of violence against wives.

Social dispute settlement also fails because it lacks authoritative intervention powers in inter-spousal violence. When a father's word to his son or a mother's wish to her son were still "law," familial intervention could perhaps have been "effective" protection for an assaulted wife. Nowadays, however, in most cases a father's word or a mother's wish no longer carry the same weight. Consequently, the efficacy of their interventionist powers in protecting a wife has been correspondingly reduced. Therefore, the social dispute settlement process can no longer be relied on to protect victims of violence against wives.

REFUGE

Under customary law, a husband had no obligation to maintain his absconding spouse, and the position of women was and in the generality of cases still is, of partial or total economic dependence upon one man or another:

"The position of the native woman must be regarded. She, under native law and custom, if not associated with or attached to some man, is lost. It is difficult for her to find even a habitation or home. She cannot acquire property for the future of any son, especially in regard to his marriage, and may be driven to follow the oldest profession in the world. She could only with the greatest difficulty find the means of suitably sustaining and bringing up her children." 13

Therefore, in real terms divorcing one's husband meant

13. Chiduku v. Chidano, 1922 SR 56, 88.

dependence upon one's father or his representative. Consequently, the father's or his representative's attitudes towards assuming this responsibility were of paramount importance to a woman's decision. But the disadvantages upon a father who intervened in a husband-wife assault case to protect his daughter were such as to militate against a father deciding to so intervene in the first place. It was contrary to customary law for a father to interfere in a fight between his daughter and her husband. His intervention had to be actually solicited or justified in view of the gravity of the fight and/or the special circumstances surrounding the case. Failure to observe this rule of social etiquette could jeopardise some of the father's rights in relation to the lobola paid for his daughter. It is trite that lobola served, *inter alia*, as a guarantee of the good behaviour not only of the spouses/cohabitantes, but of their respective families as well. The parties' behaviour was thus translated into, and reflected in their rights *vis a vis* lobola: those who were to blame lost some of their lobola rights to the other parties. A father's intervention on behalf of his daughter might have been perceived as condonation of the conduct to which her husband and/or in-laws were objecting. Such a situation would prejudice the father's bargaining position *vis a vis* lobola. On divorce if lobola had already been paid for his daughter he would only retain a small portion of it and, if it had not yet been paid, he would be unable to claim some of it, the amount forfeited depending on the blameworthiness of the wrong-doing party.¹⁴

In addition, if during the subsistence of his daughter's marriage a father who still held lobola for his daughter maintained his daughter and her children he could not claim a reimbursement from his son-in-law. The only exceptions to this rule were those cases in which the father undertook this obligation pursuant to an agreement between him and the son-in-law as well as those ones in which none of the son-in-law's relatives were willing to take on this responsibility and the father-in-law perforce had to undertake it.¹⁵ In cases where the father-in-law maintained his daughter and her children because he was shielding her from being assaulted by her husband it most probably would have been difficult to prove such an agreement, and most likely the daughter herself would not have gone to her father because her in-laws are not willing to take her in but because she sees their protection and intervention as being ineffectual against her husband's violent behaviour. Therefore, on the basis of the applicable customary law rule such a father was unlikely to be reimbursed. Quite clearly, therefore, this consideration militated against a father's coming to his daughter's rescue, at least as long as the marriage subsisted. Thus in Magomo Mutuwa v Henry Mupfeki¹⁶ the woman's father told his son-in-law, "I do not want to keep your wife and children for nothing."

Things have changed somewhat now. A husband is now the person primarily responsible for the maintenance of his wife and children whether or not they are staying with him.¹⁷ This duty is not

14. See M. Maboreke, M.Phil Thesis, Chapter 5.

15. See, for instance, Sitayi v Lomacala and Mhlala, 1928-62 SRN 28; Mado v Skudamedzi, 1928-62 SRN 193, Ginza v Ishannes 1928-62 SRN 755.

16. Case No. 115 Bindura District Court, 10 December 1981.

17. Section 12(3) and 4 of The Customary Law and Primary Courts Act 6/81.

conditional upon any consideration. It follows, therefore, that whatever the circumstances anyone who has to discharge this duty on behalf of the husband should be entitled to a reimbursement from him. This, however, does not affect the parties' positions in relation to lobola¹⁸ and this consideration might continue to influence fathers away from offering their daughters refuge.

DIVORCE

In the event of the failure of the social dispute settlement process discussed above there was still the remedy of divorce to fall back upon. The point has already been made that the general position of women was that of socio-economic dependence upon their menfolk. Under customary law, however, a man was not obliged to maintain his former wife/cohabitee or children whose physical custody did not vest in him. In real terms, therefore, divorcing one's husband meant dependence upon one's father or his representative, a prospect that both fathers and daughters may not have found easily palatable. Now, however, the Customary Law and Primary Courts Act No.6/81 provides that a man must maintain his former wife or cohabitee until her death or re-marriage whichever is the sooner. Consequently, even where the husband or male cohabitee is the woman's sole source of livelihood divorcing or leaving him is no longer necessarily tantamount to cutting one's lifeline as was the case prior to the enactment of this Act. It is important, however, to note that the efficacy of maintenance provisions in meeting the needs of assaulted women will perhaps ultimately depend upon the conscientiousness of those charged with their administration as well as those people whose homes must act as refuges/bases and who usually also have to meet the woman's initial expenses. As a very minimum requirement, therefore, the administration of maintenance claims and payments should be simple, efficacious and time-efficient.

B. GENERAL LAW

UNDER STATUTE

For the maintenance of peace the Criminal Procedure and Evidence Act 1983 provides for the issuing of peace "binding over orders" or interdicts¹⁹ and the entering of recognisances²⁰ against violent people, and this includes husbands who assault their wives. It also makes provision for the recovery of compensatory damages for any property, and/or injury suffered by the victim, provided however, that the victim specifically asks for them and the amount claimed does not exceed Z\$1000.00.²¹ There appears to be no reasonable reason for limiting the recoverable compensation and requiring the victim to specifically ask for compensation or for limiting this to damage caused to property either, since the compensation claimed has been occasioned by the accused. There is, therefore, perhaps no need for maintaining the current Z\$1,000-00 ceiling on compensation recoverable in terms of the Criminal Procedure and Evidence Act. It is therefore proposed

18. Because although maintenance liability for wife and children may affect the quantum of lobola to be paid over to, or retained by, the father-in-law, maintenance and lobola are nonetheless different institutions.

19. Section 361.

20. Sections 120 and 334.

that compensation be automatic and that the current ceiling be lifted, and that the categories of compensation recoverable be extended to cover damage to the person.

UNDER THE COMMON LAW

INTERDICTS

Under common law a husband who assaults his wife can be interdicted from so doing. However, this remedy is available only if the application for it is attached to a more substantial claim and there is a close nexus between the interdict claimed and that more substantial claim. In addition, the court also considers the applicant's chances of success in that more substantial claim.²² These provisions detract from the interdict's usefulness to assaulted wives. These wives may, for instance not want divorce or judicial separation but rather only want time in which to think things through and then make their decision. Further, the fact that a wife may not be successful in the more substantial claim to which the application for an interdict is attached does not detract from her need for protection against her violent husband. Therefore interdicts should perhaps be available without having to be attached to more substantial claims. This would also remove the question whether or not there is a close nexus between the interdict sought and the claim to which it is attached as well as the chances of success of that more substantial claim. Perhaps, too, interdicts relating to violence against wives should also be available on an interim as well as ex parte basis whenever this is reasonably necessary for the protection of women who have been, or stand the risk of being, assaulted. It is, however, conceded that the requirement as to reasonableness might be used as an avenue for the (re)-introduction/continued operation of negative attitudes, so counteracting the intended beneficial aspects of the proposed changes.

DELICTUAL COMPENSATION

The position used to be that whether the marriage was in or out of community of property, in the absence of a divorce or a judicial separation the husband was immune to delictual damages actions for assault at the suit of his wife.²³ The justification for this principle was, in the court's words in Mann v Mann,²⁴ as follows:

"Under Roman-Dutch law marriages are in community of property. Under such a marriage the husband is vested with control of the joint estate. It would be useless for the wife to sue him for money which he would receive and administer. Consequently, I do not see how there can be civil actions between them involving the payment of money by the one spouse to the other. If the wife sues her husband, the latter is entitled to the amount of the judgment paid over to her. As long as the marriage subsists and there is no legal "separation", it would be no advantage to the wife to get a judgment against her husband for

21. Section 341.

22. Christopher Terry McCabe v Alison Mary McCabe HC-H-109-86.

23. Mann v Mann 1918 CPD 89 (SA).

24. *supra*.

he still would be entitled to the administration of the proceeds."

Such an argument does not explain why the law denied a woman married out of community of property and who, therefore, has the administration of her individual estate, an action against her husband for delictual damages for assault. In the Mann case, *supra*, the court sought to justify the extension of this legal principle (i.e denying wives married in community of property the right to sue their husbands delictually for assault while they continue their married life together) to wives married out of community of property by arguing that

"It would be an anomaly to allow a wife married out of community of property to sue her husband for a tort and refuse that remedy to a wife married in community of property."

The reason why it would be an anomaly was not given. It is submitted that the court's argument is without merit or substance since allowing a wife married out of community of property such an action accords with legal principle and is even supportable on the court's own argument in relation to a wife married in community of property. It is here submitted that the real reason for disallowing wives such an action was really the protection of the husband's interests, vide

Voet 47.10.2. "a wife cruelly beaten by her husband ought not to proceed by way of the actio injuriorum in order that the fama of the husband may still remain."

According to Mann v Mann, *supra*

"One difference between the actio injuriorum in Roman Law and the actio infactum (in the case) consisted in the fact that the consequence of a defendant being condemned in the former action was that he suffered "infama" involving the loss of certain important civil rights.....whereas the actio in factum did not entail these consequences."

Ulrich Huber 2.3.10.21: "the actio inuriarum does not obtain between spouses because he who is condemned in such an action loses all reputation or at any event has reputation lowered."

Brouwer 25 goes even further to state that neither the actio injuriorum nor the actio infactum is open to an assaulted wife, meaning that such a wife is in fact remediless:

It has now been settled, however, that a wife can recover delictually for loss sustained as a result of the assault as well as for pain and suffering. 26 A question which arises is whether, with the current socio-economic reality of most women in Zimbabwe, such a move would benefit assaulted women to any significant degree. Between spouses the duty of support is mutual. Both spouses are also obliged to support their offspring. The reality, however, appears to be that in the majority of cases this duty devolves upon the husband; in others it devolves upon the husband and wife having regard to their

25 See Mann v Mann, 1918 CPD 89 (SA).

26. Rohloff v Oceans Accident and Guarantee Corporation Ltd 1960(2) SA 291(AD).

respective incomes and yet in others it falls upon the wife. An examination of literature on women's socio-economic placement in Zimbabwe, ²⁶ indicates that the last category is most likely to be made up of very few women, followed by the second category. It is quite feasible that after paying compensatory damages to the wife the husband might then refuse to contribute towards the upkeep of the family thereby forcing the wife to draw upon the judgment money for this purpose and thereby in effect negating the rationale behind the delictual damages action. The court could perhaps make an order expressly forbidding this kind of behaviour but such order would probably be so difficult to police that perhaps it should not be made at all. All these shortcomings notwithstanding, it is submitted that as a matter of principle the law should make provision for the recovery of delictual damages by an assaulted spouse whether or not their marriage still subsists and whether or not they still keep a joint household. This would not only help those women whose husbands do not hold back upkeep money in order to force the woman to spend the money given to her pursuant to the judgment on household necessities but would also serve to register legal disapproval of violence against wives.

DIVORCE AS A SOLUTION

Under general law another remedy open to a wife who had been assaulted by her husband is an action for divorce on the basis of the husband's cruelty. Until 7 February 1986 when the new Matrimonial Causes Act No 33/85 came into operation a divorce could be granted on, inter alia, the ground that a defendant spouse had "during the subsistence of the marriage treated the plaintiff with such cruelty as makes the continuance of married life insupportable".

Such a formulation does not encompass all forms of cruelty, thus impliedly permitting some forms of cruelty. Thus, for instance, it has been held that the test as to whether to grant a divorce on the basis of cruelty is as follows:

"a charge of cruelty is a serious charge and a spouse is not lightly to be held guilty of it, and the conduct complained, of should not come within the kind which has been described as the ordinary wear and tear of married life! (What should be considered) is whether the plaintiff has proved that during the subsistence of the marriage the defendant has treated her with such ...cruelty as to make the continue of married life in supportable. In doing so it is necessary to consider what the impact of the conduct complained of was on the complaining party... In a cruelty case the question is whether this conduct to this woman, or vice versa, is cruelty." ²⁷

Quite clearly, therefore, these legal provisions lacked a categorical statement that violence against wives of any kind is illegal and sanctionable by divorce for, from the above formulation

26. See e.g. M. Maboreke, op cit; The National Manpower Survey 1981; The Zimbabwe Report on The United Nations Decade for women; Report on the Situation of Women in Zimbabwe (UNICEF); "We carry A Heavy Load: Rural Women in Zimbabwe Speak Out", (UNICEF); O. Muchena, Zimbabwe Women: A Socio - Economic Overview.

27. Ryan v Ryan 1963 R & N 356 (SR).

not every violent act is seen as making the continuance of married life insupportable.

The now repealed Matrimonial Causes Act also provided that a spouse could not bring a cruelty charge against her/his spouse and get a divorce thereon if he/she were somehow to blame for that cruelty. Disputes between husbands and wives can rarely be seen in terms of black and white but, rather, grey. Therefore, realistically speaking, unless the wife were a saint, there is no way in which she could not in some way be perceived as being to blame for the assault. It is conceded that the provision required that the plaintiff spouse should have been "appreciably" to blame. Nonetheless the provision and its interpretation indicates a victim-blaming theory which seeks justification for the husband's cruel conduct on the wife's prior wrongful acts. The point is that the husband has no right whatever to assault his wife, and no amount of wrongdoing on the wife's part can bleach the husband's actions of their criminality although this has tended to be seen as reducing his moral blameworthiness. Therefore, for the law to hold as it did and still does that a wife cannot get a divorce unless the cruelty that she complains of has reached a certain stage and has brought about certain consequences is to negate the wife's right to be protected from all kinds of assault and amounts, in effect, to a legitimization of some degree of violence within the marriage institution.

The purely legalistic changes introduced by the new Matrimonial Causes Act 33/85 do not herald much for victims of violence against wives. 28 The new provisions require, as a condition precedent to the granting of a divorce on whatever ground, that the conduct complained of must be such as is "incompatible with the continuation of a normal marriage relationship." Apart from a slight difference in the wording and substantial construction which really is of no consequence for present purposes, this requirement is the same as that contained in the now repealed old Matrimonial Causes Act so that what was said above in relation to that old provision applies, mutatis mutandis, to this new provision. In any case, a "normal" marriage relationship as it has been apparently understood within the Zimbabwean courts almost inevitably entails some form of violence upon the one spouse by the other. Further, notions on what is reasonable to expect a spouse to bear are highly volatile, depending, as they do, on a particular judge's assessment of social values, again an issue on which there rarely is ever any consensus. Because of this fluidity and indeterminacy of the issues to be adjudicated upon, with a few exceptions and within the limits set by the doctrine of precedent, the outcome of particular cases will most likely hinge upon the individual judge's inarticulate premises. In addition, the new changes might, from the assaulted wife's point of view, actually be a move for the worse, at least in those cases brought before the High Court and in which, therefore, divorce can be granted only on proof of "irretrievable breakdown of the marriage". Where a wife objects to the violence and not to the marriage itself and would stay within the marriage if the husband were to shed his violent behaviour, it might be difficult for a wife to prove to the court's satisfaction that their marriage has irretrievably broken down. Since the wife is prepared to continue with the marriage if the violence stops, the

marriage has not irretrievably broken down.

4. POLICE RESPONSE TO VIOLENCE AGAINST WIVES

The police have come under fire from women who have sought their protection when being, or after having been, assaulted. It is reported that at most the police have just warned the ex-husbands/boyfriends not to do it again and/or advised the women on what action to take. Usually, however, it is reported that the police have been passive and bystanders and thus, for instance, in Venencia Manana v Andrew Manana ²⁹ the wife testified that when, during the course of being assaulted, she called for help the police were called but "nothing was done as they treated this as a domestic matter." Two basic methods are available to the police dealing with cases of violence against wives, viz, the formal and the informal methods. Informal methods range from persuasion down to threats of arrests. Formal methods involve the arrest of one or both parties and may indeed be very necessary in cases of serious assault or when the victim wants to lodge a formal complaint. Generally, however, an arrest is perhaps not the most desirable resolution of the conflict. In most cases the party arrested can gain almost immediate release by paying bail or simply promising to appear on the due date to answer to the charges. This quite often results in the husband returning home or to the scene of the conflict with a different and more potent reason for renewing the conflict. Informal methods, too, are not necessarily the best but they do appear better and more expedient than the formal ones though their efficacy may perhaps ultimately depend upon the individual man's respect for the word of a police officer. Both alternatives, however, do not allow for dealing with the causes of the problem. Consequently the police usually find themselves repeatedly confronted by a problem which, with the powers currently available to them, they cannot resolve. Given these limitations upon their interventionist powers in cases of violence against wives it is perhaps not difficult to understand why the police may fail or be reluctant to respond to wives' distress calls. Despite all this, however, the police remain probably the most appropriate agency to handle such cases because not only are they geared for emergency action on a twenty-four hour basis, but they also possess the authoritative intervention capability that such cases usually require. The police also have a very special role to play because not only are they the immediate representatives of a remote government control but they are also very often the first to be called to the scene of the violence as well as to whom the violence is reported and, as a result of this immediate or almost immediate participation, they are also uniquely placed to act as a referral agency to other available services. Perhaps, therefore, what the police need is the training and powers necessary to enable them to adequately handle such cases.

5 WOMEN'S SOCIO-ECONOMIC POSITION AND THE ADEQUACY OF THE CRIMINAL JUSTICE SYSTEM

As said before, under Zimbabwean law assaulting one's wife is a crime punishable by a fine, imprisonment or both. However these sanctions have, for a variety of reasons, not always proved appropriate or adequate.

29. Juvenile Court 68/85.

In Tembo Samson v The Queen ³⁰ the husband had assaulted his wife so severely that she sustained severe injuries, bled profusely and lost consciousness. In assessing sentence Beadle C.J held as follows:

"The appellant is employed in the Army and has been for seven years. He has a good record. He has no previous convictions and if he is sent to prison the evidence is he will lose his employment in the circumstances. His offence is a very serious one, but in view of his good record and in view of the fact that his employment is at stake, I do not consider that he should be sent to prison without the option of a fine and I hope in the circumstances the Army will see fit to re-employ the appellant "

This was also the approach adopted by the Court in Japhet Ngwaru v The State ³¹ where the Court held that:

"in normal circumstances and if these special circumstances were not present, I would regard an effective prison sentence as a proper punishment for an assault of this severity. However, the circumstances are there and for a prison officer with 8 years service who will lose considerable benefits and his job if an effective sentence of imprisonment were imposed it seems to me that this is a case in which the imposition of a fine with imprisonment in default of payment would be proper."

Unless necessary in the wife's own interests there appears to be no reasonable reason why a violent husband should be shielded from his voluntary, deliberate and intended actions: holding otherwise negates the whole purpose behind criminalising violence against wives in the first place. In the two cases given above the protectionist attitude adopted by the court towards the accused husbands despite their being the wrongdoers could, in financial terms, be viewed as protectionism towards the wives as well, least-ways where the husbands are an indispensable source of income to wives: because if a fine is imposed the money paid goes to swell the State coffers while the woman and the children go without, and if a prison sentence be imposed still the woman and the children suffer because of the redundancy forced on the family breadwinner. In fact in The State v Canneth Pedzisayi ³² the court is quite explicit about this for it set aside both the conviction and the sentence "because the complainant wife will suffer from it." In fact the general importance of the role played by women's socio-economic dependence on men in entrapping women within violent marriages is testified by the fact that in almost every article dealing with violence against wives there is some allusion to this aspect of the problem. ³³ Thus for instance, Emily Jane Goodman writes that

"Economic dependence is perhaps the single most common reason

30. Jdmt. No A.D. 152/76.

31. Jdmt. No. A.D. 172/80.

32. HC-H-207-83.

33. See D. Martin, (1976) (ed) Battered Wives of America, San Fransisco, Guide.

why abused wives choose to stay within a violent marriage",³⁴ and Prescott states that:

"for women with children, with low education, and without marketable skills, there are few alternatives to ending the violence in their marriages".³⁵

Clearly, therefore, the enhancement of women's socio-economic situation is a prerequisite for the success of solutions directed towards finding viable alternatives for women who find themselves locked within violent marriages/relationships. Not imposing either a fine or prison sentence, however, probably generates in the accused the feeling that the law condones his actions and that as he got away with it this time he might well get away with it again next time - meaning in effect, that the law loses its deterrent aspect. On the part of victim wives such an approach might well engender the feeling that the law connives with assailant husbands so that the wives might stop bothering about the law because the law does not bother about them. This argument questions the appropriateness and adequacy of the criminal justice system as a solution to violence against wives. For instance in Raymond Alan Mace v The State³⁶ the court was moved to remark that:

"It is in the highest degree improbable that a normal woman would inflict injuries of this nature on herself. It is, however, almost equally improbable that a normal man would inflict such injuries on his wife. It is, therefore, of the greatest importance at the outset to consider to what extent one is dealing with normal people in this case. The only evidence lending credibility to either allegation, that of the complainant or that of the appellant, is the clear evidence that such injuries were in fact inflicted on the complainant."

The aim of the law should be to provide protection for the assaulted wife whenever she asks for it. In addition, the law should seek, wherever possible, to be preventative and only turn retributive when its preventive aspect fails. However, there is not much latitude to the traditional criminal justice system. While violence against wives is usually symptomatic of deep-rooted inter-spousal conflict, the function of the judge presiding over a criminal case is to adjudicate on criminal innocence and/or guilt and to punish if necessary. Hence, although a judge may very well have some very good, humane solutions to some of the problems, as a judge of the criminal bench he/she is prohibited from using them because generally he/she is not allowed the luxury of exploring the underlying causes of a crime. The causal aspects of inter-spousal violence are diverse and the strategies to counter it must, therefore, be as diverse. Unfortunately, however, the criminal justice as presently constituted and structured is not as diverse. It is punitive and retributive rather than preventative and therapeutic; it tends to treat the result and rarely, if ever, the causal factors. Further, criminal law mandates that only the incident at hand be dealt with and that indirect circumstances and causes are largely irrelevant. In addition,

34. Maria Roy (ed) (1977), "Legal Solutions : Equal Protection under the Law," in Battered Women: A Psychological Study of Domestic Violence, New York, Van Nostrand Reinhold Co, p. 139, at 146.

35. Martin, op cit, at p. 84.

36. Jdmt No AD 46/72.

the constraints imposed by the rules of evidence and the requirements of due process of law may require dismissal of the specific charge, but the court's dismissal of that charge does not dismiss/solve the problem but only shelves it for a later and probably more potent eruption. Even a conviction does not bar a recurrence of the problem unless the conflict-generating factors are in some way dealt with. Consequently, the probability that the dispute will flare up again after the close of the criminal prosecution is almost assured. The overall aim should be to remove the violence from a marriage and restore marital harmony if that is what the victim wants and it is practicable. The point, therefore, needs to be considered whether, in view of the violence actually perpetrated or threatened, prosecuting the husband for the offence will achieve the desired marital harmony, by improving the relationship, enhancing the mutual respect which husband and wife should have for each other, increasing the husband's ability to understand and control his aggression or to satisfy the wife's need for protection as expressed by her appeal to the court for help. The failure of the criminal justice system to provide for the fact that the parties involved have an on-going relationship of mutual dependence, as well as the fact that whatever punishment the court imposes upon the husband will have some impact upon the whole family also testify to the inappropriateness of the criminal justice system as a long term solution to violence against wives in the generality of cases. In those cases in which the husband is beyond therapeutic measures the criminal justice system may still be appropriate and in such cases the law must be the best possible. In other cases, however, perhaps the solution for violence against wives is best sought elsewhere. More precisely, the point being made here is that legalistic measures need to be under-pinned by supportive social measures because apparently the law only works when it is in line with other social, economic and political factors.

The necessary converse side of the coin requiring the admission of politico-socio-economic considerations into the decision of a legal case is that judges should be granted sufficient powers to enable them to take judicial cognisance of these aspects. This is necessary not so much to exonerate the husband or lessen his moral blameworthiness and the criminality of his actions, as to enable the judge to make a decision which takes into account the real life situation of the spouses. Such a decision would probably earn the respect of both spouses as well as have longer lasting curative effects.

Generally speaking, for laws to have optimum effect they must be sympathetically interpreted by those who administer them. Consequently, what is called for is not just the involved personnel's legal training or a dogmatic legalistic approach which only sees the legality or illegality of actions but rather their humane qualities of being able to listen to, understand and show concern for human problems. The attitude that a certain level of wife beating is legitimate, or that it is legitimate among certain groups or sections of society, or that the wife "asked for it" must be weeded out of the mediation or decision-making processes. Above all, judges must be made not only to regard and deal with it with the disfavour it deserves but also as being morally wrong and socially unacceptable.

6. SOME NOTICEABLE TRENDS

Many cases involving violence against wives have passed through our courts both prior to and after Independence. It is not possible, nor indeed desirable to examine all of them in an article of this nature

and size. Consequently only a few illustrative cases are examined under this section and even then only when necessary to bolster a point or observation being made.

A. GENERAL ACCEPTANCE OF VIOLENCE AGAINST WIVES AS A SOCIAL NORM

An examination of some of the Zimbabwean case law on violence against wives indicates an apparent reluctance to view violence against wives as being sufficiently criminal to warrant legal reprobation. This attitude is apparent in both the courts and the victim wives/cohabitees themselves. On the part of the victims this is shown by the fact that approaching the court for relief in the form of a divorce action is usually a woman's last resort and that even when she eventually does so it is rarely on the grounds of physical cruelty.³⁷ Thus, for instance, in Zandile Ndlovu v Never Ndlovu³⁸ although the evidence adduced showed that the wife was really basing her action on the physical and mental cruelty of her husband, she framed her action as being one on "the grounds of bareness." And in Fransisca A/B Simon v Matope³⁹ a wife who had previously asked for a divorce on the basis of physical cruelty and had been told to go back and attempt a reconciliation, came back a year later claiming a divorce, this time on the basis of the irretrievable breakdown of the marriage and she got it, thus indicating a general acceptance of violence against wives as a social norm by the judiciary. A possible explanation for the wives' behaviour in seeking a divorce on grounds other than physical cruelty even where this would be the actual ground could be that they too are aware of this attitude on the part of the judiciary, perhaps as a result of seeing what is going on in the courts. Generally a wife seeks a divorce only after she has resigned herself to its inevitability. Therefore for the court to require the wife, as it did in this case, to attempt a reconciliation after she has approached it for a reprieve is to perhaps unnecessarily consign her to further violence by her husband who will still be shielded by the protective sheath of his being her lawfully wedded husband.

Consequently it is submitted that once a woman has proven the physical cruelty on which she bases her divorce action she should not, without her free and informed consent, be required to attempt a reconciliation.

In relation to criminal actions it is difficult to state categorically what the situation is because there is no way, without having had access to the full records of the individual cases analysed, in which one can tell whether the prosecution of an assailant husband was at the instance of the wife or that of the state. There is, however, perhaps no reason to assume that women would be more willing to resort to the criminal remedy when they have not shown any enthusiasm for the civil remedy of divorce, especially when the criminal law remedy concerned would leave them under the power of the person against whom they would have testified in court.

On the part of the police this apparent acceptance of violence against wives as a social norm is illustrated by their lukewarm

37. See Chapter 6 of M.Maboreke's M.Phil. Thesis.

38. Harare Community Court 284/85.

39. 1953 SRN 250.

response to victims' appeals for assistance.⁴⁰ On the part of the judiciary this same phenomenon is shown by several factors. Firstly it is shown by an apparent reluctance to hold the husband's right to physically chastise his wife obsolete. A case in point is Mucheno v Chisamba and Chisamba⁴¹ in which the husband had habitually assaulted his wife and had in fact been convicted several times for so doing. The husband actually agreed that he had "thoroughly asserted what he alleges to be his rights under Native law to chastise his wife severely." The court refused to hold categorically that a husband no longer has such a right. Instead, it held that it could

"not justify the extension of the husband's marital power under customary law to include nowadays an indisputable right to thrash his wife over a period of years... In particular, as both husband and wife do, or at any rate, did, profess Christianity, I felt it my duty to interpret the provisions of Native law strictly in conformity with civilized concepts. I accordingly refused to recognize that he had any right whatsoever to stab, or even thrash, his wife."

This case is by no means a blanket absolution of the husband's right to chastise his wife. At least two assumptions are inherent in the court's decision. The first one is that a husband who "moderately" chastises his wife, or "thrashes" her over only a short period of time, is only exercising his rights and that, therefore, the wife cannot create a matrimonial offence out of her husband's legally created and protected right. The second assumption is that a wife who is party to a "civilized" marriage is entitled to more protection than her barbarian counterpart who is party to an "uncivilized" marriage/union. It is generally agreed that these so-called "uncivilized" marriages/unions by far outnumber the "civilized" ones. Therefore, not many women could have benefitted from the Mucheno supra, qualification to the husband's right to chastise his wife. S v Mdindela,⁴² an Orange Provincial Division case, also typifies the prevalent judicial reluctance to hold the husband's right to chastise his wife extinct. Said Steyn, J. in that case:

"Quite obviously the accused was convinced that his wife had misconducted herself sexually during her absence and was deeply affronted at her. Man, in the sense of the male of the species, no longer possesses his wife as part of his chattels, but still prides himself on being the sole possessor of her affections and the sole recipient of her favours. It can truthfully be said that next to life itself the affectionate and unflinching fidelity of his wife is man's most precious personal possession. A deprivation thereof, or a firm, albeit erroneous, conviction of such deprivation, usually causes deep distress and often also the great wrath of hurt pride. The accused clearly fell victim to both those emotions and sought to ease his travail by doing violence to complainant's body. This violence was also intended to make her mend her ways, but that cannot excuse his actions, because a husband no longer has the right to administer even

40. Nyarai Bonde v John Makwavarara JC84/85, Florence Mushambi v Ishmael Mushambi. Harare Community Court, 30/85.

41. 1940 SR 157.

42. 1977 (3) SA 323.

moderate corporal correction to an erring wife. Yet, under certain circumstances, the reason for such correction can certainly temper the moral blameworthiness of the offended husband's conduct even though the correction is often unavailing".

B. SEEKING JUSTIFICATION FOR ASSAULTS

A reading of most of the cases cited above shows other phenomena typical of judges adjudicating upon cases involving violence against wives. There is an almost deliberate endeavour to find justification for the assault and emphasis upon factors that operate in the man's favour and down playing those that have a tendency to exacerbate his guilt.⁴³ In this way the courts have concerned themselves not so much with the (ex-) husband's/boyfriend's infringement of the wife's/woman's right to be protected from assault as with the reasons for the assaults. Thus, for instance, in Munemo v Mandiyera and Sengeza⁴⁴ the court confined itself to the questions whether or not the husband had "any valid excuse" for assaulting his wife and, if so, whether he had not overstepped the bounds of lawful correction. Another typical case in this respect is R v M. F. Clarke⁴⁵ in which a husband who had been bound over to keep the peace in relation to his wife had, in breach of this binding order, severely assaulted her just eight days after the issuing of this order. The court emphasized all the factors in the husband's favour in order to justify its substitution of a six months' imprisonment sentence with a wholly suspended three months' jail sentence, and this notwithstanding the husband's violent disposition as testified not just by the existence of the peace bond against him but also by the fact due to his violent disposition the parties' married life together had lasted a mere ten days. In this case, as in Esther Kangai A/B Pedzai v Mairos Kangai⁴⁶, the husband's previous convictions for assaulting his wife themselves a very rare phenomenon were not taken into account in either coming to the decision or computing the sentence.

C. VIOLENCE AGAINST WIVES - A CRIME IN A CLASS OF ITS OWN

At present violence against wives is just as criminal as any other crime which constitutes bodily assault. However, the sanctity of marriage and the adage that a man's home is his castle which apparently pervade the whole fabric of Zimbabwean society, at least in so far as most aspects of his relationship with his wife are concerned, are reflected in the legal system. Two cases are particularly reflective of this issue. In The State v Misheck Mandizvidza,⁴⁷ a case involving assault by a son upon his aged mother, Blackie, J. noted that:

43. See, for instance Munemo v Mandiyera and Sengeza 1943 SRN 261; R v M F Clarke 1969 (4) SA 91 (RAD).

44. 1943 SRN 262.

45. 1969 (4) SA 91 (R,A-D); see also s. 5, op cit.

46. Harare Community Court 240/85.

47. HC-H-353-86.

"The Attorney-General has referred to a number of cases where, notwithstanding some factual difference, more serious injury and permanent disability were caused to the complainants and yet the accuseds were sentenced to periods of imprisonment significantly less than that imposed on the accused in this case".

Examination of those cases referred to by the Attorney-General shows that all those cases involved husband/wife or boyfriend/girlfriend cases. A reading of The State v Misheck Mandizvidza, supra shows that both the magistrates' court and the High Court placed violence against wives on a rung lower than other kinds of intra-family violence. On the part of the magistrates' court this is shown by its imposition of a heavy sentence which was "not in line with decided cases", a practice rarely, if ever, adopted in relation to violence against wives. On the part of the High Court this is shown by its statement that "the accused was his 63 year old mother, and the accused's actions cannot be excused," a sentence expressing a moral sentiment conspicuously lacking in cases involving violence against wives. This shows that perhaps it is not the fact that the parties are related to each other which results in violence against wives being trivialized by the judiciary but rather the existence of a husband/wife or boyfriend/girlfriend relationship which costs the female parties thereto legal protection against physical assault. In fact, in the second of the two cases referred to above,⁴⁸ The State v John Mushava⁴⁹ involving a husband who had assaulted his wife, it was actually held by the High Court, per Reynolds, J.; that the "domestic" nature of violence against wives lessens the husband's guilt:

"It seems to me that this was nothing more than a domestic dispute"... "While conceding that it could not be said that the sentence the appellant received induced a sense of shock, [Counsel] for the appellant contended that this court is entitled to interfere with the sentence because, as he put it, the magistrate misdirected himself in assessing sentence as he did not take into consideration the fact that the assault on the complainant resulted from a domestic dispute. With respect I think there is no merit in this contention. The magistrate did bear in mind, in assessing sentence, that the dispute which occurred between the complainant and the appellant was a domestic one."

In other words, had the assault involved not been a domestic one, the sentence imposed by the magistrate would have been appropriate but because the assault was domestic, the sentence had to be proportionately reduced. In this way the court not only tacitly interpreted the marriage licence as a hitting licence but also extended this interpretation to cover boyfriend/girlfriend situations for the facts of this case were that the man had severely assaulted his girlfriend because she had refused to allow him to spend the night with her on the basis that he had stopped supporting her financially.

48. The first one, is The State v Misheck Mandizvidza, op cit, discusses immediately above.

49. HC-H-366-86.

UNREGISTERED CUSTOMARY LAW UNIONS

Although the judiciary has otherwise given full effect to s. 3(3) of the African Marriages Act⁵⁰ which provides, inter alia, that unregistered customary law unions are not marriages at all except for the purposes of legitimacy, custody, guardianship as well as rights of succession of the children, in practice the courts have added an exception of their own, viz, for the purposes of exculpating and/or lessening the man's assault upon the woman of its wrongfulness⁵¹. A relationship which is not deemed sufficient to give a woman a wife's legal rights is thus nonetheless deemed adequate for the purposes of the depriving her of the rights of a non-wife.⁵² This places the woman in a no-win position.

THE FACT OF A (PREVIOUS) RELATIONSHIP

The courts have not just said the existence of a marriage or unregistered customary law union between a man and a woman exonerates the man from responsibility for his criminal conduct in assaulting her: they have gone further and said that the fact of there being, or once having been, "love" between the two people, notwithstanding the irregularity of their relationship, washes violence against wives of most of its moral blameworthiness. Indeed, the courts have actually held that this factor should be specifically taken into account in giving sentence and operates to lessen the man's guilt.⁵³ A man's actions are thus held less reprehensible because they are perpetrated upon one who "loves" (or used to love) him, almost as if her "love" for him washes away the wrongfulness of his actions. Hence the legal institutions that deter people from taking advantage of each other generally do not welcome complaints by women who fall victims of their husbands'/boyfriends' physical violence. This is also, perhaps, the reason why when it is the husband who is expected to protect his wife who in fact turns out to be her assailant the question currently posed by the judiciary is not whether or not it was right for the husband to do so, but whether or not she has paid the obedience and fidelity due to the husband as a quid pro quo for his expected protection.⁵⁴ With respect, there does not seem to be a reasonable reason for holding that the existence of a "domestic" or "pseudo-domestic" relationship between the parties lessens the moral guilt of the man. If anything, it should perhaps be used to exacerbate his blameworthiness because he has abused the trust vested in him.

D. REFUSAL TO TAKE JUDICIAL COGNIZANCE OF VIOLENCE AGAINST WIVES

Violence against wives is a problem that is legally very inarticulate. The judges, while recognizing the criminality of

50. Chapter 238 of The Laws of Zimbabwe.

51. See, for instance, Maria Zhuwankinyu v Samuel Dangarembwa, JC21/40.

52. Except the right to maintenance in terms of s. 12 of the Customary Law and Primary Courts Act 6/81.

53. See for instance, Ruvengo Horwe v The State HC-H-311-86.

54. See, for instance, S v Mdindela, 1977 (3) S.A. 371 (OPD).

violence against wives, have apparently only paid lip-service to it⁵⁵ and have generally not allowed themselves the luxury of speaking out or acting against it even in the more shocking of cases. Because women's perception of violence against wives and their response to it are already coloured by their being products of a society which sees some form of violence against wives as the existential condition of marriage, analysing cases involving women who have sought the court's intervention or whose cases have been brought to the court by some third party is examining court response to violence which is generally seen as having gone beyond the norm. Because of this fact it is perhaps reasonable to expect the judiciary to speak out against the violence and yet the Maboreke study, *supra*, reports that in none of the cases analysed therein had the court reprimanded the husbands concerned regardless of the extent/gravity of the assault. To this indictment one could answer that it is not the court's function to distinguish between good and bad, that it is the court's duty to deliver legal judgments not moralisations, that if violence against wives is a social problem then it is problem for society at large because courts concern themselves with legal issues, and that, especially in relation to civil cases, courts do not take up violence as an issue because it is not raised as an issue before them. First, it is not always easy to axe the legal from the social because the relationship between them is dialectic. Second, although in some cases, and perhaps the majority of cases at that, the courts could, and perhaps should, have taken judicial cognizance of the violence and given it weight in their decisions and orders/sentences, it is by no means argued that they should, or could, have done so in every case. Rather, the point is the kind of expectations one should have of the judiciary in this respect; *viz*, whether the law should passively reflect societal values or whether it should act as an active social steering instrument guiding society towards a desired goal. In all the cases analysed in connection with this article the courts could have made a moral stand on the issue of violence against wives. After all, this would not have been the first time that the judicial fraternity had a made moral and policy stand on a social issue. They have done so and continue to do so in relation to drug abuse, infanticide, dissident activity and the rape of girls by their fathers or other relatives or acquaintances, to name only a few. That the courts do not adopt such an approach in relation to violence against wives is an indication of judicial trivialization of this kind of violence and at least partly explains the veil of invisibility which seems to shroud physical violence while the courts go about their duty of adjudicating upon cases in which violence against wives features. The courts have also apparently refused to take judicial cognizance of violence against wives in other actions. An illustrative case is Mucheno v Shimbi.⁵⁶ This was a child custody case. When the wife was pregnant with this child her husband assaulted her so severely that she had taken refuge with her natural family. Also as a result of the assault she had given birth prematurely and all the responsibilities consequent upon this had of necessity devolved upon the woman's father. The court gave custody of this child to its father. Admittedly the customary law relating to the custody of

55. For example Mucheno v Shimbi and Masango 1936 SRN 83; Mucheno v Chisamba and Chisamba, 1940 S R 1940 S R 157; S v Mdingela 1977 (3) SA 322.

56. 1936 SRN 83.

children is not premised upon the guilt principle but on the payment of lobola subject to the child's welfare.⁵⁷ But it is also trite that lobola also serves as a guarantee of the good behaviour of the parties. The court in the instant case had apparently accepted that an award of custody to the mother would not have been prejudicial to the child's welfare. Therefore the court could have legitimately registered its disapproval of the father's conduct in assaulting his heavily pregnant wife (especially since the child involved was the one whom the wife had been pregnant with at the time) by awarding custody to the mother. But it did not do this. Instead the court treated the assaults as being irrelevant to the custody question.

7. A COMPARATIVE PERSPECTIVE

There has apparently been an almost global awakening to violence against wives as a problem of not only legal but also social significance.⁵⁸ Moves to arrest the problem legislatively and socially have been made. Commendable laws have been passed, refuges and telephone hotlines, mediation centres and other referral institutions have been established. However, the experiences of those jurisdictions which are in the forefront of the battle against violence against wives indicate that the enactment of favourable legal provisions is largely meaningless unless backed by a positive attitude on the part of those institutions charged with implementing the provisions. Further, the continued high incidence of violence against wives in these jurisdictions bespeaks the complexity and multi-dimensionality of this problem and underlines the need for eradicated longer-lasting solutions.

Some see violence as just another manifestation of men's domination over women.⁵⁹ Others believe that husbands become violent because they have either witnessed, or themselves been victims of intra-family violence during their childhood,⁶⁰ because of their own psychopathology, or because they have drunk too much.⁶¹ Alternatively violence against wives is perceived as a response to social pressures due to bad housing conditions, financial difficulties unemployment and a generally impoverished existence.⁶² At times violence against wives is seen in terms of socialisation in a

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57. See M. Maboreke, Chapters 3 and 4 (M. Phil); Maboreke in Women and the Law in Southern Africa, Armstrong (ed) Harare, Zimbabwe Publishing House.
58. See M. Maboreke, op cit, chapter 7.
59. Dobash and Dobash, (1980) Violence Against Wives: A case Against Patriarchy, London, Open Books.
60. Eng. J. Hayford, (1974) "Wifebattering: A Preliminary Survey of 100 cases," British Medical Journal, p. 7; R. Gelles, (1974) The Violent Home: A Study of Physical Aggression Between Husbands and Wives, Beverley Hills, Sage Publications.
61. E Pizzey, (1974) Scream Quietly or the Neighbours Will Hear, Harmondsworth, Penguin.
62. British Association of Social Workers, "Working Party in Home Violence: Discussion Document," Social Work Today, Vol.6.

community which takes some types of violence for granted. ⁶³ Other theorists see the violence as a result of provocation by the victim herself through her psychological need for domination, excitement or attention. ⁶⁴ Yet others locate the cause of violence in husbands' inability to live up to the traditional stereotype of male superiority: the husband might be an underachiever in education employment, ⁶⁵ he may be denied access to power and prestige outside the home and so resort to violence within the home to reassure himself that in this one sphere at least he is "man" enough to remain in control, ⁶⁶ or he may find it difficult to come to terms with superior achievements in his wife; ⁶⁷ but yet others conceptualize violence against wives as reflexive violence springing from, or related to, structural, violence. ⁶⁸ Not a single one of these theories satisfactorily explains why violence against wives occurs and the very proliferation of theories seeking to explain it, as well as the almost global failure to successfully eradicate this problem show that there are no easy answers to the complex questions about the causes and solutions to this problem. For instance, an examination of some of the Zimbabwean cases on violence against wives shows that the reasons for such assaults are as many as they are varied. Women have been assaulted for suspected infidelity, ⁶⁹ asking for a stronger say in how the money they have earned should be spent, ⁷⁰ having, in the man's eyes "to be operated upon (Caesarean section) because she does not want to say her lovers," ⁷¹ refusing to perjure themselves to

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63. M.E. Wolfgang and F. Ferracutti, (1967) The Subculture of Violence: Towards An Integrated Theory in Criminology, London, Associated Book Publishers.
64. Anthony Storr, (1968) Human Aggression, London, Allen Lane, Penguin Press, E.Pizzey and J. Shapiro, (1982) Prone to Violence, Feltham, Middx, Hamlyn Paperbacks; M. Jobling, (1974) "Battered Wives: A Survey," Social Service Quarterly, Vol 47.
65. J.E.O'Brien, (1971). "Violence in Divorce - Prone Families" Journal of Marriage and the Family, vol.33.
66. W.J. Goode, (1971) "Force and Violence in the Family," Journal of Marriage and the Family, vol 33.
67. M. Pagelow, (1977) Battered Women: A New Perspective, Dublin, International Sociology Association.
68. David Gil, "Societal Violence in Family, Family Violence: An International and Interdisciplinary Study, op cit.
69. E.G. Mucheno v Chisamba and Chisamba, 1940 SRN 157; Munemo v Mandiyera and Sengeza, 1943 SRN 261; Hazvindi v Thomas Dhlamini, Harare Community Court 257/85; Pauline Vera Mhambi v Giddings Mhambi, HC-H-56-86.
70. Angeline Chiutsu v Dennies Garisa, 1969 CAACC 70.
71. Agatha Gada v Lovemore Muchazivepi Harare Community Court 737/85: there is a general belief especially among the older generation that a woman who gives birth by Caesarean section had been unfaithful and that an admission of her infidelity would enable her to have a natural birth.

save their husbands' skins, ⁷² allegedly never having had sex with their husbands although the couple had had children together, ⁷³ refusing to listen to the bible being read to her by her husband because she was recuperating from having given birth four days earlier, ⁷⁴ objecting to the husband having sex with other women in the family car, ⁷⁵ refusing to wash the sheets which the husband had used when having sex with other women after he had forced the wife to sleep in the spare bedroom, ⁷⁶ claiming that the assailant is the father of her illegitimate child, ⁷⁷ refusing to allow her boyfriend to stay the night with her because he had stopped supporting her financially, ⁷⁸ and the wife returning home later than anticipated. ⁷⁹ And having one's own money has not always proved the panacea that it might otherwise have been thought to be. The ambiguities inherent in people's lives in general and the causal factors of violence against wives in particular thus defy neat and comfortable accommodation in any one theoretical explanation. All these shortcomings notwithstanding, however, all the theoretical explanations re violence against wives put together deepen and broaden understandings about the problem, and is an indispensable tool in the search for a meaningful solution to the problem. Perhaps, therefore, the struggle for better and more effective protection for assaulted women should be fought on two fronts: with one seeking ways of improving the protection actually available to victims of violence against wives within the confines of the current set up and the other pursuing the fight to understand the causal factors of this violence with a view to finding eradicated solutions to it.

An analysis of the strategies adopted by other jurisdiction also reveals, inter alia, an almost global reliance/dependence on refuges for victims of violence against wives, probably indicating a realisation that perhaps refuges offer the most immediately practicable solution to this particular species of violence. Refuges,

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72. Florence Mushambi v Ishmael Mushambi Harare Community Court 30/85; Constance Shonge v Newett Rudolf Shonge and Mrs Ruth Sifelani, HC-H-414-86.
73. Esther Kangai A/B Pedzai v Mairos Kangai, Harare Community Court 549/85.
74. Elizabeth Hwarari v Naptuali Hwarari, Harare Community Court 549/85.
75. Sarah Masikati v Solomon Masikati, Harare Community Court 447/85; Zandile Ndhlovu v Never Ndhlovu Harare Community Court 284/85; Helen Chaniwa v Peter Chaniwa, HC-H-249-86; Constance Shonge v Newett Rudolf Shonge and Mrs Ruth Sifelani, HC-H-414-86.
76. Douglas Yobe v Hazel Mabvuu, Harare Community Court 247/85.
77. Tecla Mazani v Benjamin Samanyanga JC 14/85; Martha Mashaba v Martin Makuva, JC 103/85.
78. Ruvengo Horwe v The State, HC-H-311-86.
79. The State v John Mushava, HC-H-366-86.

however, though an important and necessary first step are but an amelioratory band-aid measure. The fact that such refuges as have been established are always enrolled to capacity is probably indicative of their limitation and a global failure at this stage to find a solution for violence against wives.

8. CONCLUSION

Close analysis of cases involving violence against wives reveals decisions suggesting that some judicial officers do sometimes take note of violence against wives. However most cases show that judges have little regard for the plight of women who are beaten by their husbands or boyfriends. The problem needs careful deliberation by scholars and politicians, appropriate law reform and conscientious implementation of the law.



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