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Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law

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INTRODUCTION

This paper describes the role of culture in perpetuating violence against women. It does this by contextualizing violence against women in South Africa within the grand project of transformation taking place there, and highlighting the possibilities of fundamental restructuring, with respect to rights and equality for women, when the feminist project intersects with the non-racial project. The paper, therefore, visits a familiar question, namely, the obstacles to transformation when the eradication of racism takes precedence over the elimination of sexism, as it historically has in South Africa. In addition, this paper describes recent attempts by the legislature and courts in South Africa to
curb violence against women. This paper concludes by focusing on the possibilities and limitations of the law in eradicating violence against women, and argues that a comprehensive approach involving institutions other than the law would ultimately be more fruitful.

I. DEMOCRACY, INTERSECTIONALITY, AND VIOLENCE

The birth of the "new" South Africa on May 10, 1994, 1 provided the impetus for a sweeping reconstruction and transformation of the society. The ravages of apartheid, with its ubiquitous spectre of poverty and unemployment, have left, and will continue to leave, a devastating societal scar, which will remain for some time. In addition, the determination of certain elements within the white ruling class to maintain the status quo at whatever cost, even after President Mandela's release from prison in 1990, has contributed to that scar. 2 For the first time in the country's history, however, South Africans now have the opportunity to shape an egalitarian society that will help compensate for the waste and loss of millions of lives in the pursuit of racial segregation and subordination. 3

The transformation project in South Africa is a monumental one, more complex, difficult and frustrating than anyone could have predicted. At the dawn of the new democracy in 1994, the euphoria was intoxicating; it represented the triumph of the human spirit as embodied by President Mandela's heroic victory after decades of incarceration. 4

The euphoria, however, has largely dissipated, in part, because of the practical realities of nation building, and the gap between expectation and possibility. Another contributing factor is the unspeakable wave of crime and violence that has gripped the country, which threatens to undermine the fabric of the new state. 5 Crimes against women have been particularly alarming. The Human Rights Watch Report on violence against women, published in 1995, chronicles a horrifying pattern of rape and abuse, and the inability of local communities to prevent such attacks. 6 The report, and other reports in South

1. This date marks the inauguration of Nelson Mandela as President of South Africa. See FREE AND FAIR ELECTIONS xv (Nico Steytler et al. eds., 1994).
2. See Jo-Anne Gollinge, Launched on a Bloody Tide: Negotiating the New South Africa, in SOUTH AFRICAN REVIEW 6: FROM 'RED FRIDAY' TO CODESA (Glenn Moss & Ingrid Obery eds. 1992).
3. For an interesting discussion on the negotiations which led to the first democratic elections, see ALISTER SPARKS, TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA (1st American ed., 1995); HERIBERT ADAM & KOGILA MOODLEY, THE NEGOTIATED REVOLUTION: SOCIETY AND POLITICS IN POST APARTHEID SOUTH AFRICA (1993); Nicholas Hayson, Establishing a Political Settlement in South Africa, in SOUTH AFRICAN REVIEW 6: FROM 'RED FRIDAY' TO CODESA 26 (Glen Moss & Ingrid Obery eds., 1992).
5. See id. at 133-52.
6. HUMAN RIGHTS WATCH/AFR., HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: THE STATE RESPONSE TO DOMESTIC VIOLENCE AND RAPE (Bronwen Manby & Dorothy Q. Thomas eds., 1995) [hereinafter VIOLENCE AGAINST WOMEN IN SOUTH AFRICA].
Africa, highlight the plight of women, especially young girls, who are trapped in communities where they live in constant fear of physical attack.

It is trite that the revolution in South Africa has largely been a legal one. Much of the energy of the protagonists mandated to chart the political transformation was focused on the centerpiece of the legal revolution, the new Constitution and its Bill of Rights. Between the period of President Nelson Mandela’s release from prison in February 1990, to the first democratic elections in May 1994, the content of the new constitution, and indeed the character of the new state, was acrimoniously debated by the major political parties. That process being completed, the economic and social “revolution” remains aspirational. In 1994, the African National Congress (ANC), the majority party in the government, produced a Reconstruction and Development Program, a five year plan of governance aimed at redressing the economic and social disparities between white and black South Africans. Since then the government has modified this program, replacing it with the Growth, Employment and Redistribution Program, ostensibly a more realistic plan to accommodate South Africa’s national needs and its place in the global economy. Arguably, improved economic and social conditions will go some way in alleviating violence against women.

The architects of the new constitutional order had at their disposal an array of constitutional models drawn from societies both similar to, and quite significantly different from, South Africa. Furthermore, as a consequence of the tenacious anti-apartheid campaign abroad, and widespread condemnation of apartheid, substantial international expertise was made available to lawyers

7. See discussion infra Part VI.
9. Lourens du Plessis, A Background to Drafting the Chapter on Fundamental Rights, in BIRTH OF A CONSTITUTION 89 (Bertus De Villiers ed., 1994).
13. In the years prior to the elections, South Africa had been host to a series of comparative constitutional conferences where South African constitutional lawyers and scholars could engage with their counterparts from around the world. In addition, a host of constitutional “experts” visited the country to offer their advice about the post-apartheid constitutional order. See, e.g., PUTTING WOMEN ON THE AGENDA (Susan Bazilli ed., 1991) (reporting conference proceedings focusing on strategies to incorporate women’s concerns into the constitutional process). See also AFFIRMATIVE ACTION IN SOUTH AFRICA, University of the Western Cape (1992) (reporting conference proceedings analyzing different models of affirmative action and their relevance and utility in South Africa).
14. The international abhorrence of apartheid is reflected in the volume of United Nations resolutions condemning apartheid, and particularly the international consensus that apartheid is a crime against humanity. See generally LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA (1990). See also Ibrahim J. Gassama, Reaffirming Faith in the Dignity of Each Human Being:
engaged in the South African constitutional process. The availability of international "experts" also bolstered the then nascent feminist movement in South Africa. For example, women's campaigns conducted at the grassroots level in South Africa were often supported by women's organisations and development agencies in Europe, North America, and Australia. In addition, feminist scholars in South Africa were being exposed to the body of feminist literature being produced elsewhere. Moreover, South African women activists were increasingly engaging with activists from other communities who were embarking on similar agendas in their own societies.

The process of democratization has enfranchised black women. The question of empowerment, however, is linked to enfranchising, but is not necessarily synonymous with it. The benefits of political empowerment can only be gained if women live in conditions free from constant attacks of violence and intimidation. Violence against women as a human rights issue has become an important matter in contemporary international human rights discourse and practice. International efforts at eradicating violence against women were bolstered by the United Nations Declaration on the Elimination of Violence Against Women. Some feminist scholars have lobbied for an expanded definition of violence, one that includes torture and economic subordination. Contemporary conditions in South Africa suggest that widespread violence against women preclude their access to the fruits of democracy—it constitutes a continuing violation of their human rights.

It is appropriate at the outset to commence with a caveat: the intention here is not to sound alarmist and to portray South African society as one of anarchy or chaos. Nor is there a purpose to portray women as helpless victims who are perpetually crippled by fear. Rather, the intention is to portray a realistic picture of the widespread violence against women, and the impact of such violence on the ability of women to enjoy the benefits of the new democratic order.

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15. See Mavivi Manzini, Road to Beijing, 23 AGENDA 101 (1994).
17. See generally PUTTING WOMEN ON THE AGENDA, supra note 13.
23. See generally VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6.
The use of the generic term "woman" in South Africa generates the same dilemmas as it has in other contexts. For example, critical race scholars have questioned its utility in the United States where race remains a fault line in the society. Without embracing wholeheartedly post-modern perspectives on identity, its recognition that although "phallogocentric hegemony" has to be challenged, gender identity as the site of contestation needs to be interrogated thoroughly, seems a useful theoretical approach. In other words, the identity of women needs to incorporate the fragmentation rendered by a host of factors, including class, culture, race and sexuality. In short, "identity is thus never fully formed but always at least minimally contested, often contradictory, and hence both questionable and mutable."28

The invocation of "gender particularities" and "intersectionality" in the South African context more adequately explains the situation of women. Moreover, this reality has until the mid-1980s been reinforced by the apartheid legal and policy edifice. Racial hierarchy was the essential component of apartheid; its remnants plague identity politics and the task of national reconstruction. Thus, an analysis that challenges gender inequalities needs to take this reality into consideration. This has been so in South Africa.

In South Africa the feminist project, with some difficulty and rancor, had to confront contextuality and difference at the same time that it lobbied for women's rights in the new Constitution. Similarly the strategy to eradicate

27. See Bonnin et al., supra note 24, at 112.
28. Id. at 113.
29. Joan Smith, The Creation of the World We Know: The World-Economy and the Re-creation of Gendered Identities, in IDENTITY POLITICS AND WOMEN 27 (Valentine M. Moghadam ed., 1994). There is an implicit task set for any essay that addresses itself to the relationship between identity politics and feminism, and that is what is at stake for women in the worldwide struggles over national, racial, ethnic or religious identities. An answer requires an analysis that sweeps aside the very historical specifics that are at the heart of identity politics, that insist not on universalism but exactly its opposite, particularity. See id.
33. See Catherine Albertyn, Women and the Transition to Democracy in South Africa, in
The consideration of violence against women also needs to incorporate the particularities of class, race, sexuality, and culture. From the statistics, it is arguable that all women in South Africa are at risk of violence, public and private. But, appropriate mechanisms to deal with the phenomenon of violence will need to take into consideration the reality that poorer women, and particularly black women, are most at risk because of the socio-economic realities that impinge on their daily lives. In other words, they live in places where they are more likely to be attacked and where appropriate support services are more likely to be lacking.

The culture of patriarchy and masculinity, however, pervades much of the society, and all women are subject to its violent consequences.

II. THE STATUS OF WOMEN IN POST-APARTHEID SOUTH AFRICA

A. Women and the Heritage of Apartheid

What was the particular legacy of apartheid on women? All women were relegated to a subordinated status in the society. The legal landscape was littered with gross gender inequities. For example, the operation of personal and family laws ensured that women were not treated as equals. Until recently, customary marriages were not recognized as legal unions because they were potentially polygamous. Wives of these unions were particularly disadvantaged because legal non-recognition meant they accrued no rights. Under African customary law, women were under the perpetual tutelage of a male, whether their father, husband, or even a son.

These patriarchal legal structures were buttressed and enforced by a culture that did not question the fundamental logic of such gender inequality.

For African women, these laws operated to deprive them of rights to rent or buy their own homes, to custody of their children, to an education, or a living

34. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 44.
35. See discussion infra Part VI.
36. See discussion infra Part II.
37. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 52, 53.
41. Kwa-Zulu GN 47/1982; Kwa Zulu Act on the Code of Zulu Law (1981). This situation has now been eradicated with the passage of the Recognition of Customary Marriages Act No. 120 of 1998.
42. See generally Albie Sachs, Judges and Gender: The Constitutional Rights of Women in a Post-Apartheid South Africa, 7 AGENDA 1, (1990) (suggesting ways to overcome structural inequality based on culture and laws).
wage. In addition, these laws were administered by White bureaucrats or their African surrogates; thus, their locus was to be found in the apartheid system which codified and sustained patriarchy.

Coloured and Indian women were left in a slightly more advantageous position. They were not subject to influx control laws and, therefore, had greater rights of labour, mobility, and were at least able to maintain the semblance of a family life. Their subordinate status was linked to the legal impediments mentioned earlier, but also to their inferior racial status—albeit superior to Africans—in the racial hierarchy.

White women too suffered legal discrimination, were subjected to paternalistic and sexist attitudes within their communities, and were victims of domestic violence and other forms of abuse. But for white women, their subordination as women was compensated by the privilege of being members of a superior group in the racial hierarchy. They could, therefore, offset their gender subordination by their racial elevation.

The migrant labor or influx control system had a particularly pernicious impact on the lives and status of African women. The operation of these laws ensured that African women were forced into a cycle of dependency on African men who found it easier to obtain permission to work in the cities. For the

43. See Nhlapo, supra note 40, at 10.
46. The Population Registration Act of 1950, repealed in 1991, classified South Africans into various racial groups, broadly white, "coloured," "Indian" and "African," with different subgroups in each of the "non-white" categories and with rights and privileges predicated on group identity in a racial hierarchy. See generally id. at 402.
50. The lifestyles of the overwhelming majority of white women under apartheid were exceedingly privileged. They had at their disposal an abundance of grossly underpaid domestic workers to clean their houses, tend their gardens and raise their children. See JACKLYN COCK, MAIDS AND MADAMS: DOMESTIC WORKERS UNDER APARTHEID 106 (2d ed. 1989).
51. This system was authorized by the Black (Urban Areas) Consolidation Act of 1945 and its subsidiary regulations. Sec. 10(1) of the Act stated that it was illegal for a black person to remain in a prescribed (white) area for longer than 72 hours and provided four exceptions: (a) a person who had been born there and resided there continuously since birth; (b) a man who had worked continuously for one employer for 10 years, or who had resided lawfully in the area for 15 years; (c) the wife or dependent child of someone who qualified under Sec. 10(1)(a) or (b); (d) a person who had been given permission to remain. See East Rand Administration Board and Another v. Rikoto, 1983 (3) 595. See also COCK, supra note 50, at 5.
52. See Amanda Kemp et al., The Dawn of a New Day: Redefining South African Feminism,
women who remained in the rural areas or the homelands, their livelihoods depended on absent husbands or sons sending meager allowances. Women were forced to eke out dire existences for themselves and their offspring. The following typifies life for women in the rural areas:

In the Transkei . . . the average household spent three hours every day fetching and carrying water. In rural Kwa Zulu, where three out of five women over the age of thirty suffer from a severe, crippling form of arthritis, sixty percent of households spent one hour per day collecting water. For those too disabled to collect it, water cost twenty-eight times more than it did for urban families.

The migrant labor system denied the majority of African people the right to a decent family life. Husbands and wives were forced, through the operation of the law, to live separately all year long, except for one month a year when men took their annual holiday. African children grew up with absent fathers—mandated by law—and were denied the opportunities to flourish and grow in a family environment. A woman might be married for ten years but only have spent ten months with her husband—the ten months representing the ten consecutive holiday periods.

Those women who did obtain permission to work in the urban areas were forced into domestic labor, the largest source of employment for black women. Domestic workers are the lowest paid workers and, until recently, were not covered by the labor statutes and regulations governing minimum wages and basic terms of employment. The condition of domestic employment, and particularly the isolation in individual homes, renders domestic workers especially vulnerable to dismissals or appalling conditions of employment.

One of the most profound legacies of apartheid has been to render women exceedingly vulnerable to physical and other forms of violence, both in the

53. See id.
56. Id. (citing INTERNATIONAL COMMISSION OF JURISTS, SOUTH AFRICA: HUMAN RIGHTS AND THE RULE OF LAW 20 (Geoffrey Bindman ed., 1988)).
58. See id. See also Cheryl L. Poinsette, Black Women Under Apartheid: An Introduction, 8 HARP. WOMEN'S L.J. 93 (1985).
60. See Fighting the Next Battle, supra note 49, at 53.
61. See Njobe, supra note 59, at 3. See also COCK, supra note 50, at 15-37.
public and private sphere. In fact, violence against women has reached epidemic proportions in South Africa. It has been estimated that one in every four adult women is regularly assaulted by her partner.62 The Weekly Mail and Guardian, a respected weekly newspaper, ran a series, in 1991, about violence against women, particularly the incidence of rape in Johannesburg and Soweto.63 The series chronicled a horrifying pattern of rape and abuse, and the inability of local communities to prevent this.64 In particular, it highlighted the grotesque plight of women, especially young girls, who are trapped in communities where they live in constant fear of physical attack.65

While the causes of the violence are many, a significant factor has been the traditional reluctance of the police to deal constructively with crime.66 The South African Police have historically prioritized the stifling of political dissent and control of black communities at the expense of the provision of conditions for safe communities.67 Because there never was an attempt by the police to involve communities in policing, violence against women has continued unabated.68 The last few years, however, have witnessed a concerted campaign by the Ministry of Safety and Security to come to grips with this monumental policing problem.69 In brief, a major legacy of apartheid has been that all women are rendered subordinate to men; and black women have been left overwhelming bereft of rights and resources.70 One of the most profound consequences has been a pattern of chronic violence against women.

62. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 45.
63. See The War Against Women’s Bodies, WKLY. MAIL, Sept. 6-12, 1991, at 12.
Multiplying the number of reported rapes by 20, sociologist Diana Russell has estimated that, in South Africa, 1038 women are raped every day, 111 of them in Soweto. 750 000 women are raped every year, making South Africa’s rape incidence the highest in the world—double that of the U.S.A. One in two South African women are raped in their lifetime, and the rape rate for Black women is three times higher than it is for Whites.

Id.
64. See id.
65. See id. at 13.
66. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 74-83.
68. Obviously the police had no legitimacy with Black communities—so a vicious cycle of violence could be perpetrated against Black individuals with the collaboration and acquiescence of the police. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 61. See also Suzanne Daley Young, Vulnerable and Violated in the New South Africa, THE N.Y. TIMES MAGAZINE, July 12, 1998, at 30.
69. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 95.
70. See FATIMA MEER, Women in the Apartheid Society, in THE STRUGGLE FOR LIBERATION IN SOUTH AFRICA AND INTERNATIONAL SOLIDARITY 169, 173, 181 (E.S. Reddy ed., 1992). It has been noted that South African society represents the greatest disparities between rich and poor and that Africans have been rendered the most destitute. See ALFRED MOLEAH, COLONIALISM, APARTHEID AND AFRICAN DISPOSSESSION 451 (1993). Economic marginalization created by the migrant labor system has resulted in African women bearing the brunt of such economic powerlessness. See id. at 470.
B. Women and the Heritage of Traditional Law

In South Africa, the ideal of non-racialism and the vision of a unitary system of government had so dominated the political discourse and rhetoric of the previous liberation movements and all opponents of apartheid that reference to tribalism and ethnic identification had largely been treated with disdain and skepticism.71 In reality, however, African culture has been so denigrated and marginalized by the dominant white society that the substance and the rhetoric of cultural identity and cultural pride—a cultural renaissance, as it were—will have particular appeal amongst sectors of black South African community.72

Along with women’s rights, questions of culture and ethnicity were largely neglected until fairly late in the constitutional negotiations. Those within the liberation movement avoided serious discussion of African cultural issues for a variety of reasons.73 First, the liberation movements largely were dominated by urban elites, who tended to neglect the concerns of rural communities.74 Second, African laws and customs, when accorded authority through the Bantustan structure and the system of chiefs, actually served a useful purpose in administering apartheid, because the chiefs were frequently the apartheid government’s surrogate in the so-called homelands.75 Third, successive South African governments utilized ethnic and cultural differences in the most malignant and opportunistic ways to further their policies of separate development, by accentuating cultural and ethnic differences, thereby undermining any sense of solidarity on the part of black South Africans.76

Furthermore, any discussion of customary law is confronted by two significant issues. First, it is difficult to ascertain how many African people live

72. See Chanok, supra note 44, at 69-70.
74. The last decade or so, however, has seen rural communities feature significantly in the anti-apartheid struggle and at the negotiations traditional leaders lobbied extensively for the constitutional protection of traditional law and institutions. See id. See also ALBIE SACHS, ADVANCING HUMAN RIGHTS IN SOUTH AFRICA (1992) (discussing negotiations process leading to formulation of South African Constitution).
75. The legal instrument that solidified this arrangement was the Black Administration Act No. 38 of 1927 (also known as the Native Administration Act). Through the passage of this Act, the South African government imposed upon the African population a national system of “recognition” of African law. See T.W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 62 (1991). Under this system, “the governor general (of the Union of South Africa) was made the supreme chief of all Africans, and was empowered to appoint and depose chiefs, divide or amalgamate tribes, deport and banish tribal groups or individuals, and legislate by decree for the scheduled native areas.” H.J. SIMONS, AFRICAN WOMEN 53 (1968).
76. BARBARA ROGERS, DIVIDE AND RULE: SOUTH AFRICA’S BANTUSTANS 93 (1976).
under a customary regime, or have significant aspects of their lives governed by customary law. It has been argued that despite the increased urbanization of South Africa, significant proportions of the African population still have aspects of their lives governed by customary law and that traditional authorities are, in effect, the bridge from the pre-colonialist Africanist past to contemporary South Africa.  

77 Second, except in the Code of KwaZulu Law, customary law has generally not been codified.  

It is therefore difficult to determine whether what is stated as customary law is authentically so.  

Traditional law and institutions in South Africa emerged from a legacy of marginalization and denigration.  

The colonial and apartheid legal order perpetuated an inferior role and status for traditional law within the national legal framework.  

Interaction and the resultant exchange of ideas and approaches between the two systems and their underlying values were almost non-existent.  

The question of customary law and its status in a democratic South Africa surfaced during a period of significant agitation around human rights issues. Arguably, human rights discourse during the 1970s and 1980s increasingly came to occupy center stage in the international law arena.  

The consequences of these developments are apparent in the formal encapsulation and homogenization of rights, such as those embodied in international human rights instruments like the International Convention Against All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.  

Part of this international codification of rights

78. See BENNETT, supra note 75, at 113.  
79. In many ways, this is irrelevant. The search for an “authentic” customary law is a fruitless one because customs are shaped, influenced, and transformed by a variety of factors. In particular, successive South African governments have distorted customary laws to suit the ends of a separate development and apartheid. For a thoughtful analysis of this issue see Martin Chanock, Reconstructing South African Law: Legal Formalism and Legal Culture in a New State, Address Before the Law and Society Association Meeting, Phoenix, AZ (June 1994) (on file with author).  
81. See id.  
83. See Makauwa Mutua, Hope and Despair for a New South Africa: The Limits of Rights Discourse, 10 HARV. HUM. RTS. J. 63, 68 (1997).  
has included a focus on the status of indigenous peoples, who have demanded recognition of their cultural and other derivative rights. In light of the historical denigration and marginalization of indigenous law and custom, the rekindling of the rights of indigenous peoples internationally resonated strongly in South Africa. This became apparent in the years preceding the elections; an unintended consequence at the constitutional negotiations was the emergence of a conflict between certain aspects of indigenous custom and the expanded consensus—albeit a fragile one—on women’s equality.

What became increasingly obvious in South Africa was that the metamorphosis from a European to an African country required that its Africanness be reflected in the legal system and that it incorporate certain aspects of traditional law. But this reality had to recognise that the strictures of traditional law kept women in perpetual tutelage. Rules about property ownership, custody and guardianship of children, and a plethora of personal and family laws relegated women to subordinate status. This conflict between the maintenance of traditional law and strictures on the one hand, and gender equality on the other, created the paradigm whereby those with vested interests in maintaining a traditional order were pitted against feminist activists during the constitutional negotiations. Both constituencies lobbied extensively to secure constitutional guarantees. The South African Constitution recognises the institution and role of traditional leaders. At the same time, the Constitution suggests that the principle of equality will supercede any aspect of

86. The designation by the United Nations of 1993 as the Year of Indigenous Peoples is an indication of the importance that the organization attributes to the plight of indigenous people. See Julian Burger, Report from the Frontier: The State of the World’s Indigenous People 50 (1987); S. James Anaya, Indigenous Peoples in International Law 152 (1996). South Africa’s official commitment to the philosophy of non-racialism, as a consequence of the victory over apartheid, precluded the dialectic around cultural and ethnic rights raging in many areas of the globe, which in turn affected South African political discourse. See J. Beall et al., A Bit on the Side? Gender Struggles in the Politics of Transformation in South Africa, 53 Feminist Rev. 30, 32 (1989). A further political imperative created by the conditions of apartheid was the reluctance on the part of African scholars, male and female, to critically review customary law. See, e.g., Women and Resistance in South Africa 123 (C. Walker ed., 1990). There was a general appreciation that criticism of any aspect of customary law could easily be manipulated to perpetuate an unstated assumption in white South Africa that African custom was primitive and backward. See id. at 34. For African women in particular, and this is particularly so in South Africa, there was always pressure not to be divisive in the face of an overwhelming racist enemy. See id. Feminist or female scholars have therefore not contributed substantially to the issue of law and custom, although there is now a growing literature in this field. See id. at 34-35. See also S.B. Burman, The Interaction of Legislation Relating to Urban Africans and the Law Regulating Family Relationships, Acta Juridica 89, 94 (1984); Chanock, supra note 44, at 56; Mokgoro, supra note 77, at 104.


89. See Kagaris & Murray, supra note 39, at 117.

90. See Murray & Kaganis, supra note 87, at 21.

traditional law that violates that principle.92

African values founded upon a tradition of communalism and mutual self-help, through the extended family and the larger community, have dominated customary law.93 The tragedy in South Africa has been that these values have not been allowed to influence much of the South African common law. Legal cross-pollination, in fact, has been minimal, and has left the common law bereft of a greater egalitarian basis.94 South Africa's new constitutional dispensation provides the possibilities of incorporating African values, as outlined in traditional law, into the new constitutional framework.95 Such incorporation may prove particularly useful in assessing appropriate mechanisms to stem violence against women.

III. SOUTH AFRICAN CULTURE AND VIOLENCE AGAINST WOMEN

The patterns and attitudes of patriarchy and sexism prevalent in South Africa are fairly typical of those in other societies.96 The forms of violence against women represent similar forms elsewhere.97 The situation in South Africa, however, displays certain patterns of violence against women which are unique. The first relates to the magnitude of the problem;98 the second relates to the particular legacy of racism and patriarchy, which has combined to spawn an ubiquitous masculinity throughout all sectors, classes, and cultures of South African society. In fact, Justice Albie Sachs of the South African Constitutional Court, has described patriarchy as "one of the few profoundly non-racial institutions in South Africa."99

There are three particular manifestations of South African culture which have spurned an ubiquitous masculinity. The first reason has been the consequences of the militarisation of the country since the Nationalist government took office, and since the 1960s, the conscription of large numbers of white males.100 The maintenance of the apartheid system was sustained by a massive military machine.101 Because only white South Africans could vote in the country, the burden of maintaining this system fell upon white males who

92. Section 211(3) states that the courts must apply customary law when the law is applicable, subject to the Constitution. See id. For a discussion on the Constitution's commitment to gender equality see discussion infra Part V.
93. See Mahomed, supra note 82, at 362.
94. See id.
96. See THE INTERNATIONAL HUMAN RIGHTS OF WOMEN: INSTRUMENTS OF CHANGE 25 (Carol Elizabeth Lockwood et al. eds., 1998).
98. The magnitude of the problem is dealt with in Section VI infra.
101. See id.
had to serve a period of two years in compulsory military service.\textsuperscript{102} The intensity of the resistance to Apartheid, both within South Africa and outside its borders, along with the consequent sense of siege that white South Africans felt and were exposed to, resulted in especially brutal and repressive tactics against the majority black population.\textsuperscript{103} These tactics, chronicled in detail in the final report of the Truth and Reconciliation Commission, are a testimony to the lengths to which the South African government would go to utilise its security apparatus to maintain white supremacy.\textsuperscript{104} In 1994, the new Democratic South Africa emerged from a period of extreme militarist brutality by a racist system of government, which was authoritarian at its core, and underpinned by an ideology which viewed black women as loose and licentious.\textsuperscript{105}

The second outgrowth of the country’s recent history contributing to the masculine culture can be located in the remnants of the political struggle in the black townships, which provided urban unemployed and politically disempowered youth with the opportunity to confront the government’s security and police apparatus.\textsuperscript{106} This confrontation, and its accompanying brutality, has led to a certain “lionising” of the urban comrade—almost always male—as representative of black manhood confronting the beast of apartheid.\textsuperscript{107}

Much of this struggle was “legitimate.” Black South Africans were denied even the most basic rights, and many of the country’s young black males found themselves politically and economically disempowered.\textsuperscript{108} They were unemployed and destitute, and they struggled selflessly and courageously to change their conditions. However, certain comrades\textsuperscript{109} went beyond politically

\textsuperscript{102} The wars against neighbouring states were particularly brutal. \textit{See generally} JOSEPH HANLON, \textit{APARTHEID’S SECOND FRONT: SOUTH AFRICA’S WARS AGAINST ITS NEIGHBOURS} (1986); Peter Vale, \textit{The Search for Southern Africa's Security}, 64 INT’L AFF. 697 (1991).

\textsuperscript{103} JOHN DE ST. JORRE, \textit{WHITE SOUTH AFRICA CIRCLES THE WAGONS, APARTHEID IN CRISIS} 61 (Mark Uhlig ed., 1986).

\textsuperscript{104} \textit{See} WEERAMANTRY, \textit{supra} note 100, at 103 (outlining, for example, banning, banishment, torture and death in custody, and public order policing). \textit{See also} South Africa’s Chemical and Biological Warfare Program, 2 \textit{THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION} Ch. 6.

\textsuperscript{105} \textit{See} The State Inside South Africa Between 1960 and 1990, 2 \textit{THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION} Ch. 3.


\textsuperscript{108} \textit{See} Woods, \textit{supra} note 106, at 64.

\textsuperscript{109} Sitas explains the phenomenon of the “comrade”:

Sociologists have largely discussed “comrades” or “amaqabane” within the parameters of two broad social indicators: black youth unemployment and Aonomic” behaviour. The first indicator, unemployment, has destroyed the life-chances and aspirations of the majority of youths. Studies emphasise how unemployment led to frustration and how that turned into aggression and violence. The second indicator is that of “normlessness,” the breakdown of values, the breakdown of a communal social solidarity and the anti-social actions that follow.

Sitas, \textit{supra} note 107, at 629.
acceptable bounds, as evidenced by Winnie Mandela's football team, and the "necklacing" of suspected informers.110 "Jackrolling" and "modelling" were particularly pernicious practices in the 1980s. The term "jackrolling" describes the routine practice of groups of men raping young women in Soweto, most often school girls.111 "Modelling" is the term used to describe requiring female informers to walk through the streets naked.112

The third contributing factor flows from traditional law and structures which rendered women perpetual minors, always under the tutelage of a male.113 Even though African culture and tradition emerges from a legacy of marginalisation and distortion largely accommodating the needs of successive colonial governments and the apartheid state,114 its role in perpetuating the subordinate status of women was profound.115 Moreover, the demand to accommodate to the new realities of an "African" South Africa116 risks the advancement of a political agenda by patriarchs who do not necessarily share the imperatives of gender equality.117

These three factors, a white militaristic and racist state, widespread defiance in the form of armed struggle, and patriarchal indigenous systems of law, combined to spawn a particular kind of South African masculinity, which left women in a particularly vulnerable position. This vulnerability is highlighted most acutely in the disturbing statistics of violence against women.118

IV. THE FEMINIST STRUGGLE IN THE CONTEXT OF THE ANTI-RACIST STRUGGLE

The energies of women's organisations in South Africa have historically been directed toward the eradication of apartheid. For example, one of the most significant and widespread protests in South Africa occurred in 1956, when approximately 20,000 women marched in Pretoria to protest the pass law system.119 Most of the major women's organisations have been adjuncts to, or

111. See The War Against Women's Bodies, supra note 63. See also infra note 188.
112. See Bonnin et al., supra note 24, at 122.
113. See generally Mokgoro, supra note 77.
114. See Chanock, supra note 44 and accompanying text.
115. See Nhlapo, supra note 89, at 111.
116. In South Africa the political mandate has been to Africanise the country. Post-1994 South African leaders no longer see the country as a European one located in Africa, but rather an African country with a history, culture and future inextricably tied to the African continent. See Gilbert A. Lewthwaite, Mandela Heir Sees African Rennaissance, BALT. SUN, Jan. 1, 1999, at A1.
117. See generally Mokgoro, supra note 77.
118. See discussion infra Part VI.
119. Until then women had not been required to carry passbooks dictated by the migrant labor system. A new law was passed which made such a requirement mandatory. See CHERYL WALKER, WOMEN AND RESISTANCE IN SOUTH AFRICA 193, 193-97 (1990). See also HILDA BERNSTEIN, FOR THEIR TRIUMPH AND THEIR TEARS (1986).
operated with, the specific purpose of opposing apartheid.  

The apartheid government's racial allocation of resources on education, health, welfare, housing and many other areas of government spending ensured that black people were locked into a spiral of dispossession, dislocation, and poverty. The system not only racialized the availability of resources through government spending, but a labyrinth of laws and policies ensured that access for black South Africans to resources through employment, access to property, and other private economic activity were severely circumscribed. Laws and policies which regulated the movement of black labor and access to housing, with its deleterious impact on family life, cemented the economic inferiority of black South Africans. This situation resulted in the quest for racial equality dominating the political and legal discourse prior to the constitutional negotiations.

The debate about women's rights or gender equality in South Africa surfaced relatively late in the negotiations, but those issues were presented to the delegates in an organized and persuasive manner. Events since demonstrate that issues of gender equality have moved from the margins to a central place in the post-apartheid political and legal agenda.

How did women succeed in persuading the drafters of the new Constitution that the "women's question" was part of the "national question"? The National Coalition of Women lobbied the major political parties throughout the constitutional negotiations to address women's issues and to commit themselves to the principle of gender equality. The Coalition also produced a Women's Charter which set out a broad statement of principles about women's rights. One particularly successful strategy by women activists was to ensure the active participation of women in government: they persuaded

120. See WALKER, supra note 119; BERNSTEIN, supra note 119. See also Jacklyn Cock, Putting Women on the Agenda, in PUTTING WOMEN ON THE AGENDA 27 (Susan Bazilli ed., 1991).
121. See supra text accompanying note 30.
122. See supra text accompanying note 30.
124. See generally Albertyn, supra note 33.
125. See id. at 39.
126. The preamble to the Women's Charter states:

We claim full and equal participation in the creation of a non-sexist, non-racist democratic society . . . . We set out here a program for equality in all spheres of our lives, including the law, the economy, education, development and infrastructure, political and civil life, family life and partnerships, custom, culture and religion, health, and the media.

WOMEN'S CHARTER FOR EFFECTIVE EQUALITY, Second Draft, 27.2.94.

The charter contains 12 articles which deal with (1) Equality; (2) Law and the Administration of Justice; (3) Economy; (4) Education and Training; (5) Development, Infrastructure and the Environment; (6) Social Services; (7) Political and Civil Life; (8) Family Life and Partnerships; (9) Custom, Culture and Religion; (10) Violence Against Women; (11) Health; (12) Media. See id. See also A REPORT ON WHAT THE SOUTH AFRICAN PARLIAMENT HAS DONE TO IMPROVE THE QUALITY OF LIFE AND STATUS OF WOMEN IN SOUTH AFRICA 8 (1995).
the African National Congress to allocate one-third of its parliamentary list to women candidates before the 1994 election.\footnote{127} South Africa now has a number of female ministers and deputy ministers, and the Speaker of Parliament is a woman.\footnote{128}

Despite these impressive gains, however, gender equality is still the step-child of national liberation. The precedence of the “race question” in political struggle, and women’s active participation in such struggle, raises questions about the possibilities of fundamental change with respect to women’s rights.

One could argue that a close association and identification by women’s organisations to the national liberation struggle often disadvantages women in that women’s issues are relegated to a secondary place on the political agenda. The theoretical framework, which strengthens and reinforces the struggle against racism, largely ignores women’s issues and instead frames those issues as a preoccupation of a discrete constituency of the oppressed community. Moreover, there is no historical tradition of gender equality in South Africa. Both European colonial society and African traditional society are male-dominated and patriarchal.\footnote{129} A combination of these factors often results in the discourse of women’s rights or gender equality as an afterthought devoid of the depth of analysis allocated to the national or race question.

The benefits of national liberation as a context for the struggle for women’s equality are numerous, and arguably outweigh the disadvantages. First, the concerns of women are raised in a community already amenable to political change. So, for example, even though women’s groups in South Africa have existed largely to further the racial struggle, the habits of political struggle, and particularly the tremendous organizational skills, can now be harnessed to lobby for women’s rights. It is undeniable that South African women activists have accumulated a wealth of political skills in the struggle against apartheid.\footnote{130} The organizational structures of trade unions, civic organisations and non-governmental organisations are replete with the input of women activists.\footnote{131}

Second, it becomes more difficult for the architects of the new order to ignore the demands of women, especially as many of the rights demanded by women are incorporated both in the Constitution and in the Reconstruction and Development Program. The incorporation of the principle of gender equality in


\footnote{128} See id. See also Brigitte Mabandla, Women in South Africa and the Constitution Making Process, in WOMEN’S HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 70 (Julie Peters & Andrea Wolper eds. 1995).

\footnote{129} See Cock, supra note 120, at 29.

\footnote{130} See generally Walker, supra note 119. See also Jeremy Seekings, Gender Ideology and Township Politics in the 1980s, 10 AGENDA 77 (1991) (tracing role of women activists in township politics during 1980s).

these two documents means that the government officially commits itself to the elimination of sexism and all of its manifestations.

Third, women's needs become national needs; women bring to the negotiating table the discrete and often overlooked experiences of women. For example, a program of land redistribution has to recognise the role women play in the agricultural sphere or the implementation of housing ordinances needs to take cognizance of the large number of female-headed households. In addition, because women's struggles revolve around very basic issues, for example, food, shelter, health, education, and physical security, the South African women's struggle might therefore be able to avoid "much of the elitism and class-bias which has weakened women's movements in the advanced industrial societies." 132

With respect to violence against women, the advantages just mentioned provide a solid foundation for structuring programs and policies that really will attack violence not just as an effect but also as a cause. In other words, both preventive and remedial approaches are possible. Violence against women is unfettered by the question of race; all women are victims or potential victims of violence, and all men are perpetrators or potential perpetrators. 133 Race therefore is not the central preoccupation, and does not detract from finding appropriate solutions. 134

V. THE CONSTITUTION AND GENDER EQUALITY

References to the ideals of non-sexism are scattered throughout the South African Constitution. 135 In the Founding Provisions, 136 the values that underpin the democratic state, including non-racialism and non-sexism are listed. 137 The most significant provisions relating to gender equality are found in the Bill of Rights, particularly the section on equality. 138 This section contains a general commitment to equality before the law and equal protection of the law 139 and provides that:

[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. 140

132. Cock, supra note 120, at 29.
133. This point does not ignore the fact that men and boys are also victims of sexual violence.
134. Note, however, the role that economic status and race play in perpetuating violence against certain groups of women. See infra Part VI.
136. See id. at ch. 1, §§ 1-6.
137. See id. at ch. 1, § 1(b).
138. See id. at ch. 2, § 9.
139. See id. at § 9(1).
140. Id. at § 9(3). Not all of these rights, however, are non-derogable. Derogation from the constitutional protection of equality is not allowed with respect to unfair discrimination solely on the grounds of race, color, ethnic or social origin, sex, religion or language. See id. at ch. 2, §
The prohibition on direct and indirect discrimination implicitly acknowledges the invidiousness and tenacity of institutionalized discrimination.141 This acknowledgment reflects the dominant jurisprudential trends in liberal democracies where the principle of equality has been trumpeted in constitutional and legislative packages.142 The inclusion of both sex and gender as grounds for proscribing discrimination protects women from invidious discrimination based on both biological and physical attributes, as well as social or cultural stereotypes about the perceived role and status of women.143

The goals of non-sexism are promoted in other sections in the Bill of Rights. Section 12 provides that:

Everyone has the right to bodily and psychological integrity, which includes the right—

(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.144

All of these provisions have the enormous potential of protecting women with regard to personal choices about birth control and reproduction. In a clause that has potentially profound consequences for victims of domestic and other forms of violence, the Bill of Rights provides that:

Everyone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources.145

37(5). The exclusion of sex, and not gender, as a non-derogable category reflects a certain reticence on the part of the constitutional drafters to upset prevailing stereotypes about the role and status of women. The South African drafters, however, were bolder than the American courts that subject sexual discrimination to intermediate scrutiny and racial discrimination to strict scrutiny. See, e.g., United States v. Va., 518 U.S. 515, 531 (1996) (citations omitted) (stating “skeptical scrutiny” is analysis to use for discrimination based on sex and “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action’); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding “all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny”).


143. See Majury, supra note 142, at 173-76. Majury stresses, however, that in the ensuing debate over the meaning of equality, women must be vocal and active. See id. at 186-87. She believes that women must “operationalize equality” instead of simply “defining it through legal analysis and theory making.” Id at 187. See generally Denise Meyerson, Sex and Gender, 9 S. Afr. J. OF HUM. RTS. 291 (1993).


145. Id. at § 12(1)(c) (emphasis added).
The constitution also protects freedom of expression only insofar that it does not involve,
advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.\textsuperscript{146}

An innovative inclusion in the constitution is the provision for the establishment of a Commission for Gender Equality empowered to promote, educate, monitor and lobby for gender equality.\textsuperscript{147} The Constitution also makes provisions for a Human Rights Commission to promote and protect human rights.\textsuperscript{148}

The Bill of Rights is fairly expansive, detailing who will be entitled to legal standing, and arguably lays the basis for class action litigation.\textsuperscript{149} The constitutional provisions promoting gender equality represent a major victory for women, but including these protections in a Bill of Rights is obviously only the first step on the road towards gender equality. Women activists will need to be vigilant in implementing and enforcing those protections.\textsuperscript{150}

VI. VIOLENCE AGAINST WOMEN—A NATIONAL CRISIS

Although accurate statistics are unavailable, both research and anecdotal evidence suggest that violence against women in South Africa has reached epidemic proportions.\textsuperscript{151} Arguably violence against women has always been a

\textsuperscript{146} Id. at § 16(2)(c) (emphasis added).
\textsuperscript{147} Id. at ch. 9, § 181(d). Section 187 provides for the following functions of the Commission for Gender Equality:

1. The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.
2. The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality.


\textsuperscript{149} It creates a means of enforcing some of the above-mentioned rights. Relief may be sought by:

(a) anyone acting in [his or her] own interest;
(b) acting on behalf of another person who cannot act in [his or her] own name;
(c) anyone acting as a member of, or in the interest of, a group or class per persons;
(d) [any one person] acting in the public interest;
(e) and an association acting in the interests of its members.

\textsuperscript{150} Id. at ch. 2, § 38.

The overall legal landscape for women appears positive. The government's Reconstruction and Development Program, a five year plan of governance, reflects a commitment to the principle of gender equality. See AFRICAN NATIONAL CONGRESS, RECONSTRUCTION AND DEVELOPMENT PROGRAM 9 (1994). See also The President of the Republic of South Africa & Another v. P.J. Hugo 1997 (11) SA 96 (CC) (providing expansive definition of equality).

\textsuperscript{151} See generally VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 18-25, 44-59.
serious problem; the distortions of apartheid merely rendered such violence either a private issue— with respect to domestic violence—or one confined to black residential areas and therefore of no concern to the police—in the case of rape or witchcraft.\textsuperscript{152} The new political atmosphere of transformation has resulted in greater recognition and exposure of this problem.\textsuperscript{153}

This paper focuses on two major forms of violence against women in South Africa: rape and domestic violence. These forms are somewhat racialized; domestic violence affects all women across class and color lines, whereas rape disproportionately affects black women.\textsuperscript{154}

A. Domestic Violence

While in the conventional wisdom abuse tends to bring to mind an uneducated, unemployed, working class man hitting his wife mercilessly, and... [although] literature and intervention with abusive men has revealed that the perpetrators of violence against women include men who hold respectable jobs and positions in society... [including] lawyers, doctors, psychologists, psychiatrists, priests and business executives. We call such men monsters, yet nearly every woman has had contact with an abusive man at some point in her life. He looks and behaves like any other.\textsuperscript{155}

Research carried out by several women's organizations in South Africa bear testimony to the high levels of domestic abuse across all sectors of South African society.\textsuperscript{156} For example, a survey conducted by the Human Sciences Research Council, a government-funded research organization, found that forty-three percent of 159 married women in their survey sample "in the Cape Town metropolitan area had been subjected to marital rape or assault."\textsuperscript{157} The

\begin{itemize}
  \item 153. In addition to activities by women's rights activists, NGO's, and feminist scholars, female parliamentarians have highlighted the issue. See generally \textit{VIOLENCE AGAINST WOMEN IN SOUTH AFRICA}, supra note 6.
  \item 154. See id. at 48, 52 (citing \textit{New Refuge for Rape Victims}, THE STAR, Jan. 17, 1995, (for rape statistics)).
  \item 155. Id. at 48 (quoting Mmatshilo Motsei, \textit{Detection of Woman Battering in Health Care Settings: The Case of Alexandria Health Clinic}, Women's Health Project, paper no. 30, Jan. 1993, at 5).
  \item 156. See id. at 44-45.
  \item 157. Id. at 45. The Human Rights Watch Report included the following statistics:
    Rape Crisis estimated in 1992 that one in every three women was assaulted by her male partner. The Women's Bureau estimates that approximately one in four women is abused by her partner. The Advice Desk for Abused Women estimates that one in every six women is regularly assaulted by her partner, and that at least one in four women is forced to flee at some time because of a life threatening situation in her home. People Opposing Women Abuse (POWA) and Coordinated Action for Battered Women also estimate that one in six women is abused by her partner. Research carried out in Soweto in 1994 found that one in three women attending a clinic for any reason had been battered at some time by the husband or boyfriend... Id. at 45 (citations omitted). The Women's National Coalition issued a questionnaire, which

\end{itemize}
alarming numbers suggest that the occurrence of domestic violence until recently has acquired a certain normalcy or banality, and women “do not seek help outside an informal network of family and friends.” In its comprehensive report, the Human Rights Watch noted the following findings from its surveys:

A man is seen as necessary, especially in the rural areas, to have any hope of economic security, and a degree of violence in a male-female relationship is frequently accepted as normal and inevitable.

Reliable statistics about the incidence of domestic violence are difficult to attain for several reasons. First, police records do not distinguish between domestic violence and other forms of assault. Moreover, abused women, and particularly black abused women, experience the police as largely indifferent and unsympathetic to their predicament. Second, no nationwide survey has been conducted to ascertain accurate statistics, although regional groups exist to support female victims of domestic and other forms of violence. Third, because South Africa does not yet have a tradition of refugees and shelters for abused women, most abused women who seek support do so from relatives and friends. That situation is changing slightly. Much of the evidence therefore remains anecdotal. Fourth, even anecdotal evidence remains unreliable because victims of domestic violence fear ostracism from their families—where there is pressure to remain in an abusive relationship—or their relatives, even though supportive, fear the stigma associated with domestic violence. Finally, because domestic violence is so widespread and is largely viewed as incidental to intimate, especially marital relationships, there exists a sense amongst abused

revealed that 38% of women respondents knew of a woman who had been battered. See id. (citation omitted).

158. See generally Catherine Campbell, Learning to Kill? Masculinity, the Family and Violence in Natal, 18 J. S. Afr. Stud. 614 (1992). Campbell recounts the findings of a survey to probe violence in the family. “Violence was a common theme in the young respondents’ accounts of their sexual relationships. Several respondents referred to the use of violence in what they called the ‘common practice of forced sex’ amongst young people. Violence also played an important role in the territorial control of women.” Id. at 626.

159. VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 47.

160. Id. at 46-47 (emphasis added).

161. See id. at 44.

162. See id. Incidentally, a study in Johannesburg, in 1995, of female homicide victims killed by their partners found a disproportionate number of the perpetrators to be policemen. See id. at 49, 49-50 n.93 (citing PEOPLE OPPOSING WOMEN ABUSE, “WOMEN SHOT”: A PILOT STUDY EXPLORING INTIMATE FEMICIDE IN JOHANNESBURG MAGISTERIAL DISTRICT OF GAUTENG, SOUTH AFRICA (Johannesburg 1995)).

163. See id. at 44, 45.

164. During the apartheid years (1948-1990), the South African government provided no funds to support non-governmental organisations that assisted abused women. See Fedler, supra note 152, at 240.

165. It is ironic that despite the considerable evidence of domestic violence, much opprobrium and stigma is leveled at the victim who is sometimes seen as bringing it upon herself. See Fedler, supra note 152, at 231.
women that it is futile to bother to report its occurrence.166

Domestic violence, however, is increasingly being recognized as interfering with a woman's rights to security, equality, health and development, and in violation of the South African government's obligation under CEDAW.167 The passage of the Domestic Violence Act168 in December 1998 by the South African Parliament vindicates such recognition and is a commitment by the South African government to address this problem.169

B. Rape

The statistics on reported rapes have grown dramatically in South Africa in the last decade.170 This increase in sexual assaults against women coincides with the statistics of growing crime rates in South Africa.171 One alarming statistic has been the increase in sexual assaults against girls.172

Although these numbers are disturbing, they do not reflect the reality that rape is largely under-reported.173 This under reporting reflects a few factors: the traditional lack of faith that women, particularly black women, evince in the police, who often appear unsympathetic and insensitive;174 the low rape conviction rates;175 and the trauma of a rape trial for the victim.176

Consequently, as is the case with domestic violence, accurate rape statistics are hard to come by. However, the spectre of rape looms large with women and is a major cause for concern.177 But the rape statistics are racialized. Unlike the situation of victims of domestic abuse, the victims of rape are overwhelmingly

166. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 47.
169. The Act is dealt with in detail in Part VII infra.
172. See id. at 51. See also Daley, supra note 68.
173. See More Rapes “Since ANC Came to Power,” supra note 170, at 1; VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 51, 52. This means that actual rapes approximate something like one million per year. See id. at 51.
174. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 74.
175. Only 16% of reported rape cases result in convictions. See More Rapes “Since ANC Came to Power,” supra note 170, at 2.
176. See Fedler, supra note 152, at 245.
177. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 50.
poor and black.178 South African police statistics confirm this, as well as the research carried out by various research bodies, hospitals, and clinics. For example, a clinic in a district near downtown Johannesburg found, in a 1992 study of rape victims that seventy-one percent of the victims were black, even though the 1991 census indicated three times as many white women as black women living in the area.179 Similarly, a survey in Cape Town in 1990 found that 93.6% of the women treated for violent attacks had an income of R1000.00 (U.S. $285) or less per month.180

These statistics largely reflect the reality of the lives of black women in a country where economic disadvantage and race coincide. It is poor women who have to take public transportation to and from work, where they are most vulnerable.181 They live in crime-ridden areas where the police presence is diminished and support services are often lacking.182 Homeless women, a growing population in South Africa, have increasingly become the targets of rape, especially gang rape.183 They typically sleep in railway and bus shelters where they are particularly vulnerable.184 In the homelands, where poverty is the local currency, women have to walk great distances to gather water and fuel.185 They often find themselves in isolated areas in the bush, where the likelihood of attacks are frequent.186

The conditions of poverty are most pronounced with the high incidence of sexual assaults on young girls,187 and the practice of "jackrolling,"188 as the following quotation attests:

When you leave your child alone in the home she is not safe. And in the street she is not safe. And in the school she is not safe. There is nowhere that she can walk and be safe. Girls are afraid somebody in a car will stop them and say, "get in." When they walk in the street they are raped by men with guns. Sexual abuse happens so much that some students stop going to school.189

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178. See id. at 52.
179. See id. at 53.
180. See id. at 52.
181. See id. at 53. The Report noted that “[i]n the Johannesburg inner city area a large proportion of rapes occurred while women were travelling to and from work. In many cases, women were abducted with the threat of physical harm, and often at gun point.” Id. at 53.
182. See generally id.
183. See id. at 56.
184. See id.
185. See id. at 57.
186. See id.
187. A survey in Soweto, in 1993, “found that 75 percent of rape victims were sixteen years and younger.” Id. at 53 (citing Lorna J. Martin, Rape in Johannesburg (Johannesburg: Centre for the Study of Violence and Reconciliation (1993)). See also The War Against Women’s Bodies, supra note 63.
188. “Jackrolling” is the term used to describe “the forceful abduction of women in . . . [black] townships.” VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 54 n.112 (citing Steve Mokwena, The Era of Jackrollers: Contextualizing the Rise of Youth Gangs in Soweto, at 18 (Johannesburg: Centre for the Study of Violence and Reconciliation (1991))).
189. Id. at 55 (quoting Diana Russell, Rape and Child Sexual Abuse in Soweto: An Interview with Community Leader Mary Mabaso, at 6 (Cape Town: Centre for African Studies, Univ. of
A sinister spin-off of "jackrolling" is that it is considered by some not to be a crime, but "just a game."\textsuperscript{190} Even schools, university dormitories, and women's hostels are no refuge for girls and young women, and are constantly targets for rapists.\textsuperscript{191} The trauma associated with rape and the physical and psychological cost to the victims are enormous. In addition, it is estimated that ten percent of rape cases will result in a pregnancy.\textsuperscript{192} In recent years, however, the usual risks associated with rape have accelerated, with the spread of the HIV virus in South Africa.\textsuperscript{193} Women activists, health organisations and women's support groups, therefore, have a human rights crisis to deal with which includes not just the right to freedom of security and safety, but the right to life itself.\textsuperscript{194}

VII. THE LAW'S RESPONSE\textsuperscript{195}

A. The Domestic Violence Act

In the dying days of the old South African regime, and in response to agitation by women activists, the government passed the Prevention of Family Violence Act [hereinafter "PFVA"]).\textsuperscript{196} The PFVA provided an interdict securing measure for abused women,\textsuperscript{197} outlawing marital rape,\textsuperscript{198} and was a significant legislative response to the widespread problem of violence against women. However, it soon became clear that the PFVA was deficient in many respects,\textsuperscript{199} and after the new government came into office, it passed the Domestic Violence Act, in 1998, [hereinafter "The Act"]\textsuperscript{200} which repealed large sections of the PFVA.\textsuperscript{201}

The Preamble to the Act recognises the frequent occurrence of domestic violence in South African society and renders it a "serious social evil."\textsuperscript{202} The

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\textsuperscript{190} See id.
\textsuperscript{191} See id. at 56.
\textsuperscript{192} See id. at 58.
\textsuperscript{193} See id. at 57. See also Suzanne Daley, Aids is Everywhere, but Africa Looks Away, N.Y. TIMES, Dec. 4, 1998, at A1.
\textsuperscript{194} See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 57, 58.
\textsuperscript{195} This section focuses on two major legal developments with respect to domestic violence and rape.
\textsuperscript{196} Act. No. 133 of 1993 [hereinafter "PVFA"]). There is no specific crime of domestic violence or wife battering in South Africa. Victims of domestic violence who wish to pursue relief under the criminal law, "have to lay common-law charges of assault" and battery. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 62. See also Fedler, supra note 152, at 232.
\textsuperscript{197} See PVFA, at § 2.
\textsuperscript{198} See id. at § 5.
\textsuperscript{199} See Fedler, supra note 152, at 234.
\textsuperscript{200} See The Act, supra note 168 and accompanying text.
\textsuperscript{201} See id. at § 21(1) (repealing "[s]ections 1, 2, 3, 6 and 7 of the Prevention of Family Violence Act . . . ").
\textsuperscript{202} See id. at Preamble. The Preamble reads as follows:
purpose is to:
afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of [the] Act, and thereby to convey that the State is committed to the elimination of domestic violence.203

The Preamble refers to the government's obligations under the Constitution, as well as South Africa's international obligations under CEDAW and the Convention on the Rights of the Child, to equality, freedom of security of the person, and ending violence against women.204 The Act provides that children may also benefit from the provisions in the Act.205

The definition of "domestic relationship" refers not only to heterosexual marriages formally recognised by the state, but includes persons married according to customary law, as well as homosexual unions.206 This definition also encompasses parents, children, and certain family members.207 The Act provides a comprehensive definition of "domestic violence" which includes physical abuse, stalking, and damage to property.208 The definition also includes economic abuse,209 as well as emotional, verbal and psychological abuse,210 and

Recognising that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective . . . .

Id.

203. See id.
204. See id.
205. See id. at § 1(iii). Specifically, "'complainant' means any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant . . . ." Id.
206. See id. at § 1(vii). Specifically,
Domestic relationship means a relationship between a complainant and a respondent in any of the following ways:
(a) they are or were married to each other, including marriage according to any law, custom or religion;
(b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
(c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
(d) they are family members related by consanguinity, affinity or adoption;
(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
(f) they share or recently shared the same residence . . . .

Id.

207. See id. at §§ 1(vii)(c)-(d).
208. See id. at § 1(viii).
209. See id.
210. See id.
harassment.  

The Act imposes on the police the duty to assist and inform a complainant of her rights under the statute. It also provides for a peace officer to arrest an abuser without a warrant “at the scene of an incident of domestic violence” upon reasonable suspicion that the abuser has committed an act of violence against the complainant.  

If the abused spouse is unable to apply for a protection order, the Act allows for a counsellor, social worker, teacher, or other individual to make the application on her behalf. The Act provides for the issuance of an interim protection order where the court is satisfied that there is evidence that an act of domestic violence has occurred, or that “undue hardship” would result if a protection order were not issued immediately. Such an interim order will be rendered permanent if the abuser does not respond within the time period prescribed by the Act or, if, after a hearing attended by the abuser, the court is satisfied that “on a balance of probabilities . . . the respondent has committed or is committing an act of domestic violence.” The Act provides for sweeping measures in the protection order to curb the incidence of domestic violence,
including a prohibition on the abuser from entering the victim’s residence or place of employment.\textsuperscript{220}

Of enormous benefit to victims of domestic violence, the Act provides for the imposition of “additional conditions which it seems reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant.”\textsuperscript{221} Such conditions include the obligation on the abuser to provide for rent or mortgage payments,\textsuperscript{222} or other emergency monetary relief.\textsuperscript{223} In addition, the Act also requires that the victim’s physical address is omitted from the protection order,\textsuperscript{224} or that the victim’s physical address is not identified in any way that may jeopardise her safety.\textsuperscript{225} The Act also provides that the abuser may be denied contact with his child, if it is in such child’s best interests.\textsuperscript{226}

The Act provides for a suspensive warrant of arrest to be authorized, which becomes operative when the abuser violates the protection order.\textsuperscript{227} The Act also provides for the South African Police Service to “seize any arms or dangerous weapons in the possession or under the control . . . of” the abuser on the order of the court.\textsuperscript{228} To protect the identity of the abused spouse, the Act mandates certain requirements with respect to the attendance at proceedings under the Act, as well as the publication of certain information connected therewith.\textsuperscript{229} The Act imposes an obligation on prosecutors and the police to

\begin{itemize}
  \item[(h)] committing any other act as specified in the protection order.
\end{itemize}

\textit{Id.} at § 7(1).

220. \textit{See id.}

221. \textit{See id.} at § 7(2).

222. \textit{See id.} at § 7(3).

223. \textit{Id.} at § 7(4). The Act also explicitly recognises the economic hardships imposed on the abused spouse who is forced to separate from an abuser, by providing:

if the court is of the opinion that any provision or a protection order deals with a matter that should, in the interests of justice, be dealt with further in terms of any other relevant law, including the Maintenance Act, 1998, the court must order that such a provision shall be in force for such a limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law.

\textit{Id.} at § 7(7)(b).

224. \textit{See id.} at § 7(5)(a).

225. \textit{See id.} at § 7(5)(b).

226. \textit{See id.} at § 7(6)(a).

227. \textit{See id.} at §§ 8(1)(a) & 8(4)(b).

228. \textit{Id.} at § 9(1).

229. \textit{See id.} at § 11(1)(a).

No person may be present during any proceedings in terms of this Act except—

\begin{itemize}
  \item[(a)] officers of the court;
  \item[(b)] the parties to the proceedings;
  \item[(c)] the person bringing an application on behalf of the complainant . . . ;
  \item[(d)] any legal representative representing any party to the proceedings;
  \item[(e)] witnesses;
  \item[(f)] not more than three persons for the purpose of providing support to the complainant;
  \item[(g)] not more than three persons for the purpose of providing support to the respondent; and
arrest and prosecute violators of the Act.230

The Act's purpose and many of its provisions promote a comprehensive legal response to attacking violence in the home. Its recognition and inclusion of relationships other than heterosexual relationships formally recognised by the state,231 provides greater protection for a wider range of individuals.232 The Act's definition of "domestic violence"233 recognises the plethora of abuse that batterers subject their partners, and advances ways of protecting abused women who may be left with inconsistent legal remedies.234 The duty on the police and court officers to inform women of their rights under the Act235 as well as the obligation to arrest and prosecute batterers, may engender greater compliance from officials who historically were indifferent or ignorant of the need for redress for victims of domestic violence.236

B. Vacating the Cautionary Rule

Rape in South Africa is defined as "unlawful, unintentional sexual intercourse with a woman without her consent."237 The definition of rape does not include coerced oral sex or sodomy, or penetration by the use of a foreign object; those acts are criminalized as indecent assault.238 The narrowness of the definition of rape has been criticised by women's activists in South Africa. One criticism has been that the definition of rape excludes any act of forced entry except forced penile penetration.239 In addition, the definition focuses on the lack of consent, not coercion, and provides that only women or girls can be

(h) any other person whom the court permits to be present:

Provided that the court may, if it is satisfied that it is in the interests of justice, to exclude any person from attending any part of the proceedings.  

Id. Section 11(2)(a) provides that "[n]o person shall publish in any manner any information which might, directly or indirectly, reveal the identity of any party to the proceedings." Id.

230. See id. at § 18(1). "No prosecutor shall—(a) refuse to institute a prosecution; or (b) withdraw a charge ... unless he or she has been authorised thereto ...." Id. "Failure by a member of the South African Police Service to comply with an obligation imposed in terms of the Act ... constitutes misconduct ...." Id. at § 18(4)(a).

231. See id. at §§ 1(vii)(a)-(f).


233. See supra notes 209-12 and accompanying text.

234. In other words, the Act recognises that, for example, removing a woman from an abusive situation, whilst dealing with the immediate physical threat, may subject her to severe financial hardship. See Fedler, supra note 152, at 241. See also supra notes 222-23 and accompanying text.

235. See supra note 214 and accompanying text.

236. See generally Fedler, supra note 152, at 239.


238. See id.

239. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 89 (citing Kathryn Ross, An Examination of South African Rape Law, in WOMEN, RAPE AND VIOLENCE IN SOUTH AFRICA 8 (1993)).
raped. 240

Although the limitations inherent in the definition of rape have clearly contributed to the low number of rape convictions, 241 another significant impediment is the application of the cautionary rule in rape cases. This rule has its origins in a cultural prejudice that women habitually lie about rape, and that to protect the due process rights of the accused, the state requires evidence to corroborate the rape victim's testimony. 242 As recently as 1985, the South African Law Commission supported the use of the rule in rape cases, explaining that:

Experience has shown that it is dangerous to rely on the uncorroborated evidence of the complainant in such circumstances . . . . [A] complainant could be motivated by an emotional reaction or spite, an innocent man might be falsely accused because of his wealth, the complainant might be forced by circumstances to admit that she had intercourse and then represent willing intercourse as rape. 243

Women activists have long argued that the cautionary rule perpetuates a stereotype that women are hysterical, deceptive and vengeful about sexual matters; it has been labeled as a "lingering insult to women." 244 These activists have argued that its discriminatory impact has no place in societies that are committed to equal rights between men and women. 245

South Africa's highest appeals court finally jettisoned the cautionary rule,

240. See id. at 89-90.
241. See id. The report points out that "[l]ess than one third of reported rapes reach the courts. Of those cases prosecuted, only half—that is, less than 15 percent of the reported cases—result in convictions." Id.
243. WOMEN AND SEXUAL OFFENSES, SOUTH AFRICAN LAW COMMISSION REPORT (Apr. 1985), cited in, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 102. The Appellate Division (South Africa's highest court of appeal) expressed this rule in S. v. Snyman, 1968 (2) SALR 582 (A) as follows:

Unlike an accomplice in a criminal trial, a complainant in a sexual case is not ex hypothesi a criminal. Nevertheless in respect of both of them there exists an inherent danger in relying on their testimony. First, various motives may induce them to substitute the accused for the culprit. Second, from their participation in events which actually happened, each has a deceptively facility for convincing testimony, the only fiction being the deft substitution of the accused for the real culprit. Hence in sexual cases there has grown up a cautionary rule of practice (similar to that in accomplice cases) which requires—
(a) the recognition by the Court of the inherent danger aforesaid; and
(b) the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused . . . .

Id. at 585 C-H.
244. See A. Armstrong, Evidence in Rape Cases in Four Southern African Countries, 33 J. AFR. L. 183, 193 (1989).
245. See id. See also VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 101; Victoria Bronstein, The Rape Complainant in Court: An Analysis of Legal Discourse, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 202, 202, 209 (Christina Murray ed., 1994).
in 1998, in a rape case involving a policeman as the accused. The female prosecutor argued that the "meaning and ambit of the cautionary rule should be revisited," and that the rule not only unfairly discriminates against women, but that it "unfairly increases the burden of proof resting on the state in cases involving sexual offences." The court, surveying jurisdictions that had abolished the cautionary rule, agreed that the rule no longer had a place in South African criminal jurisprudence. The court unanimously held:

The notion that women are habitually inclined to lie about rape is of ancient origin. In our country, as in others, judges have attempted to justify the cautionary rule by relying on "collective wisdom and experience". This was the justification before the reform of the law, in the UK. This justification lacks any factual or reality-based foundation, and can be exposed as a myth simply by asking: whose wisdom? whose experience? what proof is there of the assumptions underlying the rule? The fact is that such empirical research as has been done refutes the notion that women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses.

The abandonment of the cautionary rule has removed a significant obstacle to the successful prosecution of rape trials. It also has the potential of lessening the painful ritual that survivors of rape have to undergo to establish their credibility.

VIII. LAW'S POSSIBILITIES AND LIMITATIONS

Despite the innovative approaches taken by the South African legislature in the Domestic Violence Act, and the judiciary's decisive move to jettison the cautionary rule in rape cases, the law's response in situations of violence against women is, of necessity, a limited one. In South Africa, the use of the law is fraught with contradictions and skepticism for a variety of reasons. One is the lingering hostility, insensitivity, and incompetence of the major actors in the legal system, a system still largely male dominated. The second is the fact

246. See Jackson, 1997 (35) SALR at 1, 8.
247. See id.
248. See id.
249. See id.
250. See id.
251. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 103.
252. See supra note 201 and accompanying text. A significant piece of legislation, not dealing directly with violence against women, but which will arguably contribute to a rethinking of traditional attitudes towards women is the Recognition of Customary Marriages Act No. 120 of 1998.
253. See VIOLENCE AGAINST WOMEN IN SOUTH AFRICA, supra note 6, at 103 (quoting S v. D and Another, Namibia High Court (Oct. 1991) Strydom & Frank, J.J.) (stating "beyond a reasonable doubt" standard has been cited by the courts as the only acceptable test "whether the crime is a theft or rape").
254. See Bronstein, supra note 245, at 225.
255. See id. at 203.
that large numbers of women, because they do not have access to relevant information, may be unaware of the provisions of the Act, and as a result cannot take advantage of it.

A third reason may be the inappropriate legal response to domestic violence. The law's blunt approach and requirement of proof and certainty may not necessarily coincide with the immediate and long term needs of an abused spouse. She may want the abuse to end, but does not necessarily want to end her relationship with the abuser.256 Because of the peculiar nature of violence against women, and in order for the law to work most effectively, it needs to embark on an integrated response to a problem, which has its roots in economic and social powerlessness. Such a response has to find a way to link legal professionals with other non-legal professionals who support victims of violence. Ultimately, rape and domestic violence are about unequal gendered power relationships;257 this power imbalance interfaces with the law at the moment that violence is manifested. But it is the preconditions of subordination which reinforces and sustains the conditions for systemic violence.258

In the final analysis, the ability of the law to temper or even eradicate violence is compromised continuously by the contradictions between law's epistemological boundaries and cultural attitudes buffeted by social and economic arrangements. Cultural attitudes in South Africa, whatever their wellspring, have been constantly challenged since the advent of democracy there. The law's contribution, particularly the constitutional commitment to gender equality, has not been insignificant. South African women activists are incrementally mapping out a jurisprudential system of equality, which comports with the socio-economic realities of the country and the Constitution's commitment to equality.259 Although the law has been deeply implicated in creating and sustaining gender subordination in South Africa, the legal system's commitment to non-sexism paves the way for a non-sexist society. Feminist activists, equipped with valuable strategic skills to fight apartheid, can utilize them to undermine sexism and patriarchy. The challenges, however, continue, and the role of culture in perpetuating violence will need to be revisited constantly.

CONCLUSION

The situation of the majority of women in South Africa, and in particular the situation of large numbers of black women, is desperate. The formal encapsulation of rights in the constitution and enabling legislation will not automatically translate into substantive rights for women. For that to occur certain conditions have to exist. First, the government has to develop effective

256. See Fedler, supra note 152, at 234.
258. See id.
259. See Pat Singh, Protection From Violence Is A Right, in THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 136, 140 (Sandy Liebenberg ed., 1995).
enforcement mechanisms to implement the rights embodied in the Constitution. Second, the interpretation of such rights needs to be undertaken by adjudicators who will not ignore the historical legacy and the social, economic, and cultural realities of South Africa. But by far, the most essential condition is the continued vigilance by all South Africans who yearn for a society free of the oppression and discrimination against women.

The struggle to overcome gender and racial inequality has not been completed. But racism no longer has any capital, and the political commitment to non-racialism has jettisoned possibilities of its resurgence.260 The elimination of sexism, however, and its handmaiden, violence against women, still finds solace in a masculinist culture in which women’s subordinate roles continue to be reinforced. The task to alter this will occupy women in South Africa for a long time.
