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**Gender-Based Violence: examining battered  
woman syndrome as a criminal defence**

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## **Introduction:**

Gender based violence is a global issue and has been a core focus of a ‘gender-based renaissance’. This has sparked social movements such as the ‘Women’s Marches’ occurring across many global cities, social media discussions and campaigns, such as the ‘Me Too’ movement. This call to end gender-based discrimination and violence is particularly prevalent in South Africa where, in 2015, the South African rate of femicide per 100 000 women was 9.6 whilst the World Health Organisation global average per 100 000 women was 2.4<sup>1</sup>.

There are many social campaigns which aim to combat gender-based violence in South Africa. This paper contends that the law can contribute to this struggle; particularly by addressing a gap in criminal law which currently does not sufficiently recognise battered woman syndrome as a defence to criminal conduct.

This paper aims to demonstrate that the criminal law system has the opportunity to extend its protection of battered women. It can do so in two ways. First, the legal requirements for a claim of self-defence are met by an accused, experiencing battered woman syndrome, when the substantial impact of her abusive circumstances on her mental state are examined by taking a ‘substance over form’ approach. Second, by recognising that a person who fits the requirements of battered woman syndrome may lack the requisite capacity for criminal liability; thus, amounting to pathological incapacity due to the pattern of abuse experienced creating a mental illness.

### *Battered Woman Syndrome*

Dr Lenore Walker describes battered woman syndrome to be “measurable psychological changes that occur after exposure to repeated abuse”<sup>2</sup>. Trauma theories and psychological understandings of concepts such as learned helplessness, oppression, etc. have contributed to “understanding the psychological impact of physical, sexual and serious psychological abuse on a battered woman”<sup>3</sup>. The severity of these psychological impacts due to abuse have resulted

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<sup>1</sup> Africa Check ‘Femicide in South Africa: 3 numbers about the murdering of women investigated’ available at <https://africacheck.org/reports/femicide-sa-3-numbers-murdering-women-investigated/>, accessed on 19 May 2018 researched by Gopolang Makou.

<sup>2</sup> LEA Walker ‘Battered Women Syndrome and Self-Defence’ (2012) 6 *Notre Dame Journal of Law, Ethics & Public Policy* 321 at 326.

<sup>3</sup> *Ibid* at 327.

in battered woman syndrome being considered a sub-category of Post-Traumatic Stress Disorder (PTSD) as listed under the *Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised*<sup>4</sup>. PTSD can be described as a collection of thoughts, feelings and actions that logically follow a frightful experience which one expects to be repeated<sup>5</sup>. Therefore, as a sub-category of PTSD, these attributes are also experienced under battered woman syndrome.

Therefore, battered woman syndrome, is a result of severe psychological changes experienced through abuse that has altered the accused's perception of circumstances in comparison to that of a 'normal' person. Consequently, conditions such as what is considered an imminent threat, in accordance with the legal requirements of self-defence, are perceived differently by a battered woman. However, in her position, with the experiences of violence and trauma, subjective perceptions and factors need to be considered in order to give proper effect to the constitutional rights of the accused<sup>6</sup>. Consequently, in the case of battered women and their need for protection, a substantive approach needs to be taken towards justice for an accused who is a product of domestic and gender-based violence; as opposed to a strictly formal one, largely based on objective testing that does not account for diverse communities<sup>7</sup> with multi-faceted social issues.

Furthermore, being a subcategory of PTSD infers the presence of a mental illness, as apparent in the psychological changes which repeated abuse causes. Ultimately, an accused suffering from this syndrome can lack the mental capacity to appreciate the wrongfulness of her actions or lack the ability to act in accordance with this appreciation.

Under both these notions of self-defence and pathological incapacity, an accused suffering from battered woman syndrome should have the opportunity to successfully raise a defence that considers and draws on their experiences of abuse, and thus have the opportunity to exonerate themselves of criminal liability.

However, some academics, like Managay Reddi, disagree with this view and conceptualise battered woman syndrome differently. Reddi holds that there is no single definition of battered

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<sup>4</sup> Op cit note 2 at 327.

<sup>5</sup> Ibid.

<sup>6</sup> *S v Ferreira and Others* 2004 (2) SACR 454 (SCA) para 40.

<sup>7</sup> J Burchell *Principle of Criminal Law* 5 ed (2016) at 425.

woman syndrome. Instead, she believes that the term attempts to reflect a broad range of reactions experienced by a diversity of women in response to a “broad range of abusive conduct”<sup>8</sup>. Therefore, she is of the view that the use of battered woman syndrome in a legal context is controversial and concerning.

Furthermore, Reddi claims that courts should continue to treat abused women, who kill their abusers, according to the defence strategies available. However, this paper strongly challenges this perception. New psychology research in conjunction with case law demonstrates a movement towards understanding the subjective position of battered women and how their actions are affected by patterns of abuse. Additionally, Jonathan Burchell’s critique of an exclusively objective test for reasonableness contributes to how the current forms of testing under the existing defence strategies are potentially unjust<sup>9</sup>. Therefore, there is a strong argument advocating for a defence for women suffering from battered woman syndrome and who subsequently commit an offence against their perpetual abuser, by closely examining the elements under self-defence and pathological incapacity.

### **Self-Defence:**

#### *Definition of Self-defence*

Self-defence allows a victim of an unlawful attack, who has no other reasonable option available to him or her at the time of the attack, to act of their own initiative to “avert or minimise the danger that is being faced”<sup>10</sup>.

There are two 2 requirements for self-defence:

1. The attack must be against a legally protected interest and must be imminent or must have commenced but not yet completed.<sup>11</sup>
2. The defensive attack must be a reasonable response to the attack.<sup>12</sup>

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<sup>8</sup> M Reddi ‘Battered women syndrome: some reflections on the utility of this ‘syndrome’ to South African women who kill their abusers’ (2005) 18 *SACJ* 259 at 262.

<sup>9</sup> *Op cit* note 7 at 425.

<sup>10</sup> *Ibid* note 8 at 269.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* at 271.

*S v Ferreira*<sup>13</sup> refers to the influential work of Dr Lenore Walker, who describes three key standards that need to be met under a claim for self-defence: reasonable perception, imminent danger and equal or reasonable force to repel serious bodily damage or death<sup>14</sup>, which is aligned with South African law requirements for self-defence.

South African law defines and conceptualises self-defence according to two distinct groups:

1. Conditions relating to the attack and;
2. Conditions relating to the defence.

The requirements under each group must be met to warrant self-defence.

The conditions relating to the attack include there being evidence of an attack and that the attack was unlawful and exerted upon a legally protected interest<sup>15</sup>. The conditions relating to the defence involve establishing evidence that the defence was necessary to avert the attack, that it was a reasonable response to the attack and that the attack was directed against the attacker<sup>16</sup>. Walker's three key standards for self-defence are an amalgamation of South African law's conditions and requirements for self-defence.

As will be explained below, these three identifiable, legal requirements for self-defence are substantively present in instances where a criminal offence can be attributed to battered woman syndrome. This requires engagement with the contentious issues surrounding battered woman syndrome formally meeting the requirements for self-defence, such as timing of the attack; and demonstrating that a more substantive approach should be taken.

### *Reasonable Perception*

This standard requires identifying what a reasonable person would have perceived as danger and the evaluation of whether a battered woman, committing an unlawful offence, was reasonable in her perception of danger. The evaluation based on 'reasonableness' demonstrates the objective nature of excluding unlawfulness under self-defence.

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<sup>13</sup> 2004 (2) SACR 454 (SCA).

<sup>14</sup> Op cit note 2 at 321.

<sup>15</sup> Op cit note 7 at 122.

<sup>16</sup> Ibid at 125.

Reddi, from her opposing position, contends that each experience of a battered woman varies and is therefore vastly subjective, which is inharmonious with the objective nature of excluding unlawfulness. Consequently, Reddi believes it would be impossible to determine what a reasonable battered woman would have done<sup>17</sup>; and suggests that the current reasonable standard in criminal law be used. Walker concurs with this perspective to an extent in that the experiences of battered women are so heterogeneous that there is no typical way for them to act<sup>18</sup>. However, whilst this makes it difficult for the perceptions of a battered woman to be understood, it is only fair that “each woman’s thinking, feeling and acting be explained in the context of her life”<sup>19</sup>. This sentiment is shared by Jonathan Burchell who believes that the objective nature of testing reasonableness is inappropriate in diverse communities. He refers to *S v Melk*<sup>20</sup> in which a judge claimed the test to be unfair as its effect is that “the unsophisticated and uneducated shepherd will be treated no differently from the professor”<sup>21</sup>. There are commonalities amongst battered women which can be testified to by experts<sup>22</sup> and be used as a benchmark against which to assess the reasonableness of a battered woman. However, Walker and Burchell propose the inclusion of specific subjective factors, drawn from the life of the accused, to be considered in the assessment of reasonableness in order to be fair and just.

The ‘honest but unreasonable’ notion presents that an accused could have honestly believed that she was in danger, but this perception was unreasonable in the circumstances<sup>23</sup>. This notion is an attempt to include subjective factors from the accused’s life, as advocated for by Walker and Burchell. It can be used as a mitigating factor in lowering criminal responsibility<sup>24</sup>, particularly in relation to the unlawfulness of her conduct because whilst her perception of being in danger is unreasonable, it is honest. Walker believes that the objective nature of determining reasonableness in this context is a problem because she believes that:

*“If the standard is an objective one, then it is more difficult to meet as the average*

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<sup>17</sup> Op cit note 8 at 271.

<sup>18</sup> Op cit note 2 at 324.

<sup>19</sup> Ibid at 324.

<sup>20</sup> 1988 (4) SA 561 (A).

<sup>21</sup> Op cit note 7 at 425.

<sup>22</sup> Ibid note 19.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

*person under the law is generally expected to be a man, not a woman, and certainly not a woman who has experienced a history of abuse.”*<sup>25</sup>

Due to the insufficiencies of the standard objective test, Walker proposes that, in examining what is unreasonable but honest, there needs to be an analysis from a battered woman’s point of view<sup>26</sup>. Consequently, she draws on the importance of deriving knowledge from the social sciences, like psychology, which has developed an understanding of the commonalities that can be expected to influence the perception of a battered woman<sup>27</sup>. This provides a more equitable standard against which an individual battered woman’s perceptions can be measured<sup>28</sup>. Walker’s proposition invites a subjective element into assessing reasonableness in that it allows for the perceptions and abusive experiences of a battered woman to be considered<sup>29</sup>.

However, this is no different than our current position where courts consider the motives of accused suffering from domestic violence amongst other mitigating and compelling factors in the post-trial, sentencing stage. For example, the majority in *S v Ferreira* held that the accused’s decision to contract the killing of her abusive husband was something which had to be judicially evaluated<sup>30</sup>. Furthermore, it must be evaluated, not from a male or objective perspective<sup>31</sup>, but “by the Court placing itself as far as it can in the position of the woman concerned”<sup>32</sup> with the assistance of details of the abusive relationship and the expert evidence<sup>33</sup>. This echoes Walker’s view of including the perceptions and abusive experiences of battered women. However, in such cases as *Ferreira*, the damage is already done in prosecuting and then sentencing a woman suffering from battered woman syndrome. Nonetheless, Walker’s proposition exposes the objective standard of assessing reasonableness under the criminal component of the lawfulness as inadequate when applied to a diverse community. Jonathan Burchell also holds this belief and claims that it can result in injustice<sup>34</sup>, which will be discussed when examining what can reasonably be perceived as being imminent danger.

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<sup>25</sup> Op cit note 2 at 323.

<sup>26</sup> Ibid at 324.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> *S v Ferreira and Others* 2004 (2) SACR 454 (SCA) para 40.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Op cit note 7 at 425.

Therefore, this reasonable standard should involve some subjectivity, as expressed by Burchell and Walker. The consideration of subjective facts, based on the experiences and the severe mental strain experienced by a battered woman, would work towards a substance over form approach to criminal liability and provide protection to this vulnerable group as well as being more just in a diverse society such as South Africa.

In *S v Ferreira*<sup>35</sup>, the contract killing of her abusive husband resulted in the accused pleading guilty to premeditated murder<sup>36</sup>. On appeal, the court held that the moral blameworthiness of this woman depended on her motive and the subjective state of her mind to hire contract killers<sup>37</sup>. Hiring contract killers is a severely aggravating circumstance<sup>38</sup> to murder and was a major contributing factor to her conviction. In a sentencing appeal, it is usual to consider substantial and compelling circumstances<sup>39</sup> surrounding the accused. Therefore, in considering the “bestial treatment”<sup>40</sup> she experienced at the hands of her husband, the court draws vital attention to the effects of the severe abuse on her mental state and the warping of her perceptions. However, this served to only benefit the accused post-trial, at sentencing, leaving her to be subjected to what Burchell refers to as the ‘the potential injustice’ of the objective reasonableness test during the trial when determining the unlawfulness of her conduct. Therefore, a purpose of this paper is to demonstrate how the psyche of a battered woman becomes warped and abnormal. Thus far, attention has been drawn to how an exclusively objective reasonableness test does not cater for diverse realities such as that of a battered woman. In continuation, the adverse effects of abuse on the psyche will be examined. Moreover, the effectiveness of the criminal justice system is undermined when the effects of a damaged mental state is considered after the fact; especially when, for example, mental capacity is essential for imputing criminal liability.

### *Imminent Danger*

There is no self-defence if the attack has stopped or the ‘defence’ is in anticipation of an attack. This is because the ‘defence’ must not be about punishment or retribution but about

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<sup>35</sup> 2004 (2) SACR 454 (SCA).

<sup>36</sup> *Ibid* at 455.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* at 466 para 33.

<sup>39</sup> *Ibid* at 477 para 74.

<sup>40</sup> *Ibid*.



protection<sup>41</sup>. Therefore, a battered woman cannot defend herself against an attack that she anticipates or has already been completed as it would be interpreted as an act of vengeance or punishment and not self-defence; which would be considered as unlawful conduct.

A major deterrent for the use of a claim of self-defence is that a battered woman, may attack when there is no apparent active or pending danger from her abuser. This is evident in *S v Wiid*<sup>42</sup> where the accused shot her husband after he had stopped attacking her, and in *S v Ferreira*<sup>43</sup> where the accused hired two men to kill her violently abusive husband whilst he was in a drunken stupor. *S v Ferreira*, is distinguishable with regards to self-defence as the accused hired people to kill her husband as opposed to killing him herself. Nonetheless, it speaks to a pattern amongst battered women to attack when they believe their abuser is the least dangerous to them. Consequently, the contention around considering battered woman syndrome in relation to self-defence, boils down to timing and what is considered to be ‘imminent’.

This paper contends that patterns of ongoing abuse could drastically alter a battered woman’s perception of ‘imminent danger’.

Women suffering from battered woman syndrome are hypervigilant to cues of impending danger. They may engage in a pre-emptive defensive attack in anticipation of the abuser inflicting physical damage, as per their experience<sup>44</sup>. For instance, many women still perceive their abusive partner to be dangerous whilst they are sleeping, knowing their partner might wake up and immediately begin another attack and force sexual demands on her<sup>45</sup>. Moreover, most batterers stalk their victims, making escape impossible<sup>46</sup> and it is not unusual for them to threaten their victims with death<sup>47</sup>. Not only does this show the unlikelihood of exhausting all other lawful means of protection, it also speaks to the kind of conditions and the subsequent state of mind a battered woman is constantly living in, where the ever-present threat of attack

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<sup>41</sup> Op cit note 8 at 270.

<sup>42</sup> 1990 (1) SACR 561 (A).

<sup>43</sup> 2004 (2) SACR 454 (SCA).

<sup>44</sup> Op cit note 2 at 324.

<sup>45</sup> Ibid at 325.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

brings a new meaning to the idea of ‘imminent danger’<sup>48</sup>, such as experiencing flashbacks of previous abuse when placed in frightening situations that increases their perception of danger<sup>49</sup>.

Therefore, the formal, literal meaning of ‘imminent’ cannot be given effect to in cases of abuse. The patterns of violence and the state of living in constant fear changes the normal perception of danger, resulting in hypervigilance. This is evident as per Walker’s claim that a battered woman’s thinking, feeling and acting must be explained in the context of her life and the way in which abuse has “specifically impacted on her state of mind”<sup>50</sup> To ignore this in a legal assessment under self-defence would be to negate the traumatic experiences of a battered woman based on the general ‘objective’, formal view of ‘imminent danger’.

*Equal or reasonable force to repel serious bodily damage or death*

Identifying what would be reasonable in circumstances involving battered woman syndrome has proven to be a point of contention. However, by referring to case law, such as *S v Ferriera*<sup>51</sup>, *S v Marais*<sup>52</sup> and *S v Engelbrecht*<sup>53</sup> it is evident that constant, violent abuse alters the mental state of a victim, as will be explained later on, to the point where an objective approach is obsolete and insufficient. A subjective-objective approach, an amalgamation supported by Burchell and Walker, is more appropriate, considering that the distortion of a victim’s mind renders them outside the ‘normal’ paradigm of thinking and behaviour; and the reasonableness of an ordinarily person is no longer applicable. Nonetheless, despite her advocacy for the current reasonable standard, Reddi also presents a viable alternative approach to reasonableness.

Reddi claims that the defensive act must be a reasonable response to the attack<sup>54</sup>. She qualifies this rule by stating that self-defence should fail when the interest protected is extremely disproportional to the interest impaired<sup>55</sup>, a position held in *Ex Parte Die Minister van Justisie: In re S v Van Wyk*<sup>56</sup>. The case dealt with whether it was permissible to injure or kill another

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<sup>48</sup> Op cit note 2 at 325.

<sup>49</sup> Ibid at 327.

<sup>50</sup> Ibid at 324.

<sup>51</sup> 2004 (2) SACR 454 (SCA).

<sup>52</sup> 2010 (2) SACR 606 (CC).

<sup>53</sup> 2005 (2) SACR 163 (W).

<sup>54</sup> Op cit note 8 at 271 with reference to *Ex Parte die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A).

<sup>55</sup> Ibid.

<sup>56</sup> 1967 (1) SA 488 (A).

person by way of self-defence in defending one's property<sup>57</sup>. In making this assessment the court established that there are limitations to such a defence, for instance the means of self-defence should not be excessive in relation to the danger<sup>58</sup>. On this point the court held that manslaughter would not be allowed to repel a trivial assault<sup>59</sup>. From this Reddi draws the qualification that self-defence cannot apply where there is extreme disproportion between the interest protected and the interest impaired<sup>60</sup>; which is why the law calls for semblance between the defensive act and the harmful attack.

This semblance standard is assessed according to the reasonableness test. Reddi acknowledges that the greatest hurdles to overcome in self-defence are its objective components<sup>61</sup>.

Firstly, Reddi believes that it is inconsistent to lead evidence of battered woman syndrome. Such evidence compels the view that the accused is suffering from some type of mental disease or defect. Yet, despite this mental incapacity, her response to a threat is assessed according to a reasonable standard required under self-defence<sup>62</sup>. Secondly, she claims that the use of battered woman syndrome to explain an accused's conduct redefines her experiences into pre-existing legal divisions<sup>63</sup>. Not only do these divisions perpetuate the male discourse that dominates law, as also held by Walker, but it prejudices those that do not fit into these profiles<sup>64</sup>. This is problematic considering that both Walker and Reddi express that there is no 'single profile' for a battered woman.

Consequently, Reddi believes that expert evidence speaking to battered woman syndrome under the traditional self-defence doctrine only obscures the issue and presents the accused's action in a less reasonable light by referring to her "psychological abnormality"<sup>65</sup>. Therefore, since there is not a 'single profile for a battered woman, Reddi believes that a preferable standard of assessing reasonableness is to ask whether a reasonable person in the same extraordinary circumstances would have foreseen a claim of self-defence to be unlawful. Such a proposal seems plausible and consistent with a position held by some courts. For instance,

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<sup>57</sup> *Ex Parte die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A) at 488.

<sup>58</sup> *Ibid* at 489.

<sup>59</sup> *Ibid* at 498B.

<sup>60</sup> *Op cit* note 8 at 271.

<sup>61</sup> *Ibid* at 268.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid* at 269.

the court in *S v Ferreira*<sup>66</sup> held that it should evaluate the situation by placing itself, as far as it can, in the position of the accused<sup>67</sup>. However, *S v Ferreira*<sup>68</sup> was an appeal on sentencing. In sentencing, a post-trial process, mitigating and compelling factors, personal to the accused, are considered. This means placing a reasonable person in such a situation allows for subjectivity. But, as it stands, this does not occur within a trial. However, such a subjective inquiry is possible during a trial when claiming putative self-defence. This defence negates liability as the accused committed an unlawful offence but did so based on a genuine but mistaken belief that she was acting lawfully<sup>69</sup>. Consequently, the inquiry is about whether the accused had the intention to act unlawfully<sup>70</sup> which is a subjective inquiry in that it focuses on the accused's state of mind<sup>71</sup>; and not whether her belief was reasonable. However, whilst intention is a prerequisite for murder, the accused can still be charged with culpable homicide in which negligence is the required fault element<sup>72</sup>. This is where Reddi's preferred standard of assessing reasonableness is contemplated, in whether a reasonable person in the same extraordinary circumstances would have foreseen a claim of self-defence to be unlawful<sup>73</sup>. However, this still fails to consider the subjective circumstances of violent abuse experienced by a battered woman. Reddi and Walker observe that the reasonable person standard is still male dominant. Furthermore, even if a reasonable person were placed in such extreme circumstances, Walker holds that it would be difficult for a person who has never experienced or witnessed domestic violence to understand how a sleeping or unarmed man could be dangerous<sup>74</sup>. Evidently, the subjective inquiry in determining intention under putative self-defence can be circumvented by instead charging the accused with culpable homicide, and only to return to an insufficient and uniform objective assessment standard.

However, Burchell believes that the objective test has the potential for injustice in a community of diverse experiences<sup>75</sup>. The essence of Burchell's critique of the objective test for negligence, is that it essentially punishes the "unintelligent, ignorant or inexperienced"<sup>76</sup>, who fall outside

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<sup>66</sup> *S v Ferreira and Others* 2004 (2) SACR 454 (SCA) para 40.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Op cit* note 8 at 275.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Op cit* note 2 at 325.

<sup>75</sup> *Op cit* note 7 at 425.

<sup>76</sup> *Ibid.*

what is perceived to be ‘normal’ life experiences<sup>77</sup>. Whilst the objective test upholds equality before the law by assessing everyone according to an objective standard, it fails in enforcing substantive equality. An objective test punishes battered women and their divergent experiences with domestic violence as they fall outside the experiences recognised by the law, which Reddi and Walker expose for being male dominant. Consequently, Burchell proposes using a test that is a combination of subjective and objective factors. This amalgamation tempers the potential for injustice and substantively unequal treatment that is inherent in a rigorous objective standard of reasonableness<sup>78</sup>. Furthermore, an exclusively subjective test for reasonableness is nonsensical as it would blur the distinction between subjective intention and objective negligence<sup>79</sup>. Burchell’s approach to a subjective-objective approach to what is reasonable for a battered woman, is more conducive in establishing substantive equality by being cognisant of her violent and traumatic experience with domestic violence.

*Burchell’s subjective-objective approach embodied in the test for criminal capacity*

The premise for a subjective-objective approach, is that Burchell believes that a rigorous objective test for reasonableness is potentially unjust. As a solution, Burchell looks to the capacity inquiry because it is subjective and can accommodate objective factors<sup>80</sup>.

Burchell’s test falls under the conative portion of the test for criminal capacity (the test consists of assessing for cognitive and conative functioning). Since criminal capacity is a preliminary inquiry before negligence<sup>81</sup>, the negligence test itself remains unchanged. Instead, the individualisation of reasonableness occurs within an already partially subjective and objective inquiry into conative functionality. Therefore, if the subjective and objective standards within the capacity inquiry are considered, there will be no need to attempt to consider subjective factors into the following inquiry into reasonableness<sup>82</sup>; which is one of the issues this paper hopes to address. Burchell claims that this results in justice and logic coinciding<sup>83</sup>, because it does not force subjective elements to be considered in an inherently objective test like that for negligence.

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<sup>77</sup> As will be illustrated in *S v Mbombela* 1933 AD 269.

<sup>78</sup> Op cit note 7 at 427.

<sup>79</sup> Ibid.

<sup>80</sup> Op cit note 7 at 430.

<sup>81</sup> Ibid at 426.

<sup>82</sup> Ibid at 430.

<sup>83</sup> Ibid.

The standard reasonableness test determines where a reasonable person would have acted differently. However, Burchell's test determines whether the accused would have acted differently by considering the subjective factors that could affect her appreciation of the wrongfulness of her conduct and evaluating these conditions against "acceptable societal standards of behaviour"<sup>84</sup> of another person with the same or similar subjective factors<sup>85</sup>. This objective element is problematic because, as previously identified, battered women are a heterogeneous group. However, as explained by Walker, social sciences like psychology have identified commonalities amongst battered women which can be attested to; and be used as a benchmark against which to assess the reasonableness of a battered woman.

Importantly, the outcome of the standard test and Burchell's test is in essence the same, except the later individualises the standard of reasonableness - which Burchell believes to be unquestionably needed<sup>86</sup>.

The application of Burchell's proposed test can be seen in applying it after the fact to *S v Mbombela*<sup>87</sup>. In *Mbombela*, the accused killed a human being which he mistakenly believed to be a 'tikoloshe'. The trial court initially found the accused guilty of murder<sup>88</sup>. However, the Appellate Division applied the standard reasonableness test, which ignored personal factors such as race, intelligence or superstition<sup>89</sup>, and found that although his belief was unreasonable, it was bona fide and lowered the charge to culpable homicide. However, Burchell finds that according to an individualised standard of reasonableness, the accused could not have acted differently<sup>90</sup>. Firstly, the court accepted that his belief in the 'tikoloshe' was genuine and he shared the widespread communal belief in the fatal powers of a 'tikoloshe'. These subjective superstitious beliefs might have prevented the accused from appreciating the wrongfulness of his conduct<sup>91</sup>. Nonetheless, the accused would still not have the capacity to act in accordance with an appreciation for the wrongfulness of his conduct, as he reasonably lacked the requisite volitional capacity<sup>92</sup>. This is because he was informed of the 'tikoloshe' by young children, who, according to customary belief, were best able to identify evil spirits.

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<sup>84</sup> Op cit note 7 at 426.

<sup>85</sup> Ibid at 427.

<sup>86</sup> Ibid at 430.

<sup>87</sup> 1933 AD 269.

<sup>88</sup> Op cit note 7 at 429 with reference to footnote 69.

<sup>89</sup> Ibid at 429.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

There is no substantive change in assessing reasonableness just because subjective factors are being considered. In the standard reasonableness test, a value judgment needs to be made to determine what a reasonable person would have done. Similarly, in Burchell's test, a value judgment is needed when evaluating the relevant subjective factors against acceptable standards of social behaviour and, consequently, if the accused could have acted differently<sup>93</sup>.

Any test for reasonableness asks what the average reasonable person would do. However, patterns of violent abuse and degradation is not a normal experience for the average person. Therefore, assessing reasonableness according to the average person, without these experiences and perspectives, is prejudicial to an accused battered woman; as it would lead to an unfair conviction that would fail to consider the violations committed against her. Consequently, Burchell's approach of considering subjective and objective factors under criminal capacity is more considerate of the subjective experiences of battered women and is more appropriate in working towards substantive equality before the law.

A subjective-objective approach to self-defence is contentious. Therefore, in the alternative, battered woman syndrome, as an incapacity defence, is plausible considering the effects of abuse on the accused's mind. Furthermore, unlike self-defence, the test for capacity, as it stands, is subjective; as held by the Supreme Court of Appeal in *S v Eadie*<sup>94</sup>. However, the court also held that this inquiry must be approached with caution<sup>95</sup>. Cognisant of this cautious approach, it will be demonstrated that the mental and emotional distress caused by continuous abuse does diminish a battered woman's capacity with regards to unlawful, criminal conduct.

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<sup>93</sup> Op cit note 7 at 430.

<sup>94</sup> Ibid at 329.

<sup>95</sup> Ibid.

## **Pathological Incapacity:**

As self-defence aims to exclude unlawfulness, defences to exclude criminal capacity include non-pathological and pathological incapacity.

### *Non-Pathological Incapacity*

Non-pathological incapacity refers to the inability to appreciate the wrongfulness of one's conduct or to act in accordance with this appreciation due to external factors. Examples include intoxication, where the external factor is the consumption of an intoxicating substance; and provocation and emotional stress during which external factors cause the accused to experience extraordinary emotional provocation and stress.

Non-pathological incapacity due to intoxication is not directly relevant to the mental effects of battered woman syndrome. However, with regards to the broader understanding of incapacity, it is important to note that in *S v Chretien*<sup>96</sup> the court held that intoxication can exclude the required criminal capacity and intention of the accused<sup>97</sup>. In further efforts to understand incapacity, it should be noted that the Supreme Court of Appeal in *S v Eadie*<sup>98</sup> held that a non-pathological incapacity defence is about losing control, not losing one's temper<sup>99</sup>. Consequently, this created the expectation, within the non-pathological defences of provocation and emotional stress, that a person should control their emotions.

This paper aims to establish the importance of considering the subjective experiences of battered women. This requires using social sciences, such as psychology, to not only generate the semblance of a more substantively equal reasonableness standard; but to demonstrate the detrimental effects of systematic and continuous abuse on a battered woman's mental health. Consequently, a close examination of pathological defences is more appropriate.

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<sup>96</sup> 1981 (1) SA 1097 (A).

<sup>97</sup> However, in response to this judgement, an accused can still be convicted of a statutory offence under the Criminal Law Amendment Act of 1988.

<sup>98</sup> 2002 (3) SA 719 (SCA).

<sup>99</sup> Op cit note 7 at 329.



### *Pathological Incapacity*

An accused will be pathologically incapacitated, if at the time of the offence, he or she, suffered from a mental illness or defect, that deprived him or her of the capacity for insight or self-control. According to s 78(1) of the Criminal Procedure Act<sup>100</sup>:

A person who commits an act or omission which constitutes an offence and who at this time suffers from a mental illness or mental defect which makes him/her incapable of:

- a. Appreciating the wrongfulness of his or her act or omission; or
- b. Acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such an act or omission.

Under this definition, mental illness must be endogenous and have occurred after the development of normal intellectual, social and behavioural patterns<sup>101</sup>.

As will be demonstrated later on, battered women syndrome is a subcategory of post-traumatic stress disorder (PTSD) which alters the normal psychological, social and behavioural states of a victim; thus, satisfying the endogenous requirement. Furthermore, the endogenous requirement aims to exclude the malfunctioning of the mind due to external stimuli like a concussion, the use of drugs or alcohol or the administration of an anaesthetic<sup>102</sup>. However, this does not preclude external stimuli from creating a 'diseased mind'. This is supported by the Canadian Supreme Court in *Rabey (1980) 114 DLR (3d) 193 (SC)*<sup>103</sup> in its expression that the 'ordinary stresses and disappointments of life' are not external factors for this purpose. Therefore, exceptional external stimuli can be enough to cause a mental illness and such a stimulus is the onset of battered woman syndrome due to experiences of ongoing abuse. This is supported by Navsa JA in *Eadie*, who held that judges, with regards to emotional distress, are entitled to make legitimate inferences from objective circumstances<sup>104</sup>. In the context of battered woman syndrome, the objective circumstances of continuous abuse can legitimately

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<sup>100</sup> 51 of 1977.

<sup>101</sup> Op cit note 7 at 283.

<sup>102</sup> Ibid at 282.

<sup>103</sup> Ibid.

<sup>104</sup> Op cit note 7 at 329.

give rise to inferences as to the damage done to a battered woman's mental state<sup>105</sup>. This would contribute to the burden of proof on the accused to prove her mental disorder.

The standards of a pathological incapacity defence demonstrate that the legal focus is on whether the accused could appreciate the wrongfulness of their conduct and act in accordance with that appreciation. Failure to have this appreciation or act in accordance with it means that the accused has no criminal capacity and cannot be held liable. Furthermore, the onus is on the accused to prove, on a balance of probability, that they suffered from a mental illness at the time of the commission of the offence<sup>106</sup>. This means that a pathological defence is available to an accused suffering from battered woman syndrome if she can prove the probability that the ongoing abuse she experienced distorted her psyche to an extent that her mental state can be described as a sub-category of PTSD, a mental disorder<sup>107</sup>. To demonstrate that battered woman syndrome can meet the requirements of a defence of pathological incapacity, the legal test for insanity needs to be examined in conjunction with the views on mental illness provided by mental health professionals.

Under South African criminal law, mental illness will result in incapacity if it "affects the cognitive or conative capacities so as to deprive the victim of insight into the wrongfulness" of their conduct or "the capacity to control" their actions according to this insight<sup>108</sup>. Walker demonstrates that battered woman syndrome is a sub-category of PTSD<sup>109</sup>. She substantiates this claim by demonstrating that three major symptom clusters that can identify PTSD are also applicable to battered woman syndrome<sup>110</sup>: cognitive disturbances, high arousal symptoms and high avoidance symptoms. Thus, overall indicating the deterioration of the cognitive and conative capacities of a battered woman.

### *Cognitive disturbances*

Cognitive disturbances centre around memories of previous abuse which serve as constant reminders<sup>111</sup>. When in a frightening situation, battered women often have flashbacks of

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<sup>105</sup> Leading evidence of continuous abuse would assist an accused in discharging the burden of proof applicable to pathological incapacity.

<sup>106</sup> FFW Van Oosten 'Non-pathological criminal incapacity versus pathological criminal incapacity' (1993) 6 *South African Journal of Criminal Justice* 127 at 145.

<sup>107</sup> *Diagnostic and Statistical Manual of Mental Disorders, Third Edition* by the American Psychiatric Association.

<sup>108</sup> Op cit note 7 at 280.

<sup>109</sup> Op cit note 2 at 323.

<sup>110</sup> Ibid at 327.

<sup>111</sup> Ibid.

previous abusive incidents and re-experience them. This increases their perception of danger<sup>112</sup>, and can even alter their perception of ‘imminent’ danger.

Such a case was evident in *S v Ferreira*<sup>113</sup>. After ongoing physical abuse, being locked in a room with no food, being raped by her abuser and his threat of hiring black men to rape her, the accused began demonstrating hyper-vigilance and behavioural changes like sleep disturbances<sup>114</sup>. The extent of these effects left the accused feeling tremendously fearful and unsafe<sup>115</sup> every time she had a black customer buy fruit from her, as she believed it was the man or men hired by her abuser to rape her<sup>116</sup>.

She became so desperate in her circumstance that she attempted to use ‘muti’ to change the demeanour of her abuser. However, when this failed, she believed that her situation was becoming worse when in reality there was no objective change<sup>117</sup>.

#### *High arousal symptoms*

This symptom is also defined as high anxiety where the battered woman becomes hypervigilant to cues of potential danger<sup>118</sup>. Little things signal an impending violent incident and cause the battered woman to be nervous and highly anxious<sup>119</sup>.

The abuse experienced can alter a battered woman, cognitively and behaviourally, in a way that diverges from the norm. A broad understanding of mental illness is that there is a mental change after the development of normal intellectual, social and behavioural patterns<sup>120</sup>. It is understandable that the experiences in an individual’s life can alter these mental patterns and amount to a mental disorder, as evident by the diagnosis of PTSD. Similarly, the continuous abuse faced by a battered woman could change her mental patterns which is why “any implied or minor act of violence can be potentially understood...as a reasonable and imminent threat to her physical integrity”<sup>121</sup> – thus diverging from the normal assessment.

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<sup>112</sup> Op cit note 2 at 328.

<sup>113</sup> 2004 (2) SACR 454 (SCA).

<sup>114</sup> Ibid para 26.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Op cit note 2 at 328.

<sup>119</sup> Ibid.

<sup>120</sup> Op cit note 7 at 283.

<sup>121</sup> Op cit note 8 at 270.

### *High avoidance symptoms*

These symptoms involve the various means of avoiding the dangerousness of the situation<sup>122</sup>. For instance, battered women become isolated over time due to the power and control exerted over them by their abuser<sup>123</sup>. This was evident in *S v Ferreira*<sup>124</sup> where the abusive partner limited the accused's contact with her children<sup>125</sup>, isolated her from other people and made her financially dependent on him<sup>126</sup>. Furthermore, this symptom is often identifiable through battered women suppressing their feelings. This was also evident in *S v Ferreira* where, despite the ongoing violent abuse, the accused did not express her anger at her abuser<sup>127</sup>.

### **A legal and psychological approach to mental illness**

When assessing mental illness, there should not be a dichotomy between the legal approach and the perspectives of mental health professionals. This notion has already been explored in *S v Ferreira*<sup>128</sup> where there was testimony by psychology experts in order for the court to understand the circumstances of the accused, in order to ascertain mitigating and compelling factors to consider in her sentencing. The judgment also referred to Walker, who advocates for the incorporation of psychological perspectives and testimony in relation to battered woman syndrome as a defence due to the effects abuse has on the mind.

Furthermore, the three symptom clusters relating to battered woman syndrome demonstrate how psychological perspectives and testimony enhance the courts understanding of a battered woman's mental state in order to evaluate if she still has cognitive and conative capacity – as per the legal definition of mental illness. Therefore, expert evidence relating to the distorted psyche or abnormal state of mind of a battered woman, is important in better understanding the legal concept of capacity in such circumstances. Thus, ultimately giving effect to a greater cause, such as the constitutional rights and protection of battered women.

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<sup>122</sup> Op cit note 2 at 328.

<sup>123</sup> Ibid.

<sup>124</sup> 2004 (2) SACR 454 (SCA).

<sup>125</sup> Ibid para 19.

<sup>126</sup> Ibid para 23.

<sup>127</sup> Ibid at 464 at para 26.

<sup>128</sup> 2004 (2) SACR 454 (SCA).

There are certain nuances which are important to understand in order to apply legal principles effectively. For example, in the *S v Ferreira* minority judgement there is an indication that before resorting to killing her abusive partner, the accused should have tried other available avenues to alleviate herself from her circumstances<sup>129</sup>. However, an expert witness in the case explained that the accused's decision to kill her abuser, and hiring people to do so, was consistent with what research and experience has shown battered women to do<sup>130</sup>.

A psychological perspective assists in a better understanding of the mind-set and circumstances of an accused battered woman. This is important because, as explained in *S v Ferreira*, the court must evaluate the situation by placing itself, as far as possible, in the position of the abused woman<sup>131</sup>, in order to attempt to understand the full extent that abuse can have on the accused; which they did specially in relation to finding mitigating and compelling circumstances with regards to sentencing. The analysis of such an approach can also be seen in *S v Marais*<sup>132</sup>.

*S v Marais*, like *S v Ferreira*, concerned a woman, who after the continuous violent abuse by her husband, contracted his murder. The Constitutional Court in this case referred to the Supreme Court of Appeal judgment in *Ferreira*, with regards to the effects of domestic violence<sup>133</sup>. It refers to the SCA finding that “a contract killing arranged by a battered woman, depending on her subjective state of mind and motive, may constitute self-defence, provided that the killing is objectively justifiable and is thus a complete defence to a charge of premediated murder”<sup>134</sup>.

Even though both cases concerned appealing a sentence as opposed to the merits of a possible defence, the considerations in these cases speak to the drastic effects of battered woman syndrome to the extent that the court considers it substantial and compelling. Consequently, it is proposed that a court should ask: was the killing objectively justifiable if the court placed itself in the subjective position of the battered woman. In such instances the purpose is to fully understand the debilitating position of the battered woman and the effects of ongoing abuse on

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<sup>129</sup> *S v Ferreira and Others* 2004 (2) SACR 454 (SCA) para 65.

<sup>130</sup> *Ibid* para 10.

<sup>131</sup> *Ibid* para 40.

<sup>132</sup> 2010 (2) SACR 606 (CC).

<sup>133</sup> *S v Marais* 2010 (2) SACR 606 (CC) para 1.

<sup>134</sup> *Ibid*.

her mental state. In *S v Ferreira* it was evident that the accused only saw the abuse ending in the finality of the death of her abuser. However, in *S v Marais*, there was no intention to kill but instead the accused wished her husband to be ‘beaten into respecting her and treating her better’<sup>135</sup>. It is undisputed that the accused was being abused, but her life was never in danger; unlike in *S v Ferreira*, where the accused believed she had to choose between her life or her abuser’s. This meant that in *S v Marais*<sup>136</sup>, killing her husband was not a last resort, and there were other avenues for relief; as suggested by the minority judgement in *S v Ferreira*.

The effectiveness of the court putting itself in the subjective position of a battered woman, lies in understanding, as best as possible, her desperate and distorted mental state; which can be achieved by referring to social sciences such as psychology.

In *S v Engelbrecht*, the court referred to the trial court’s judgement that the accused suffered from diminished capacity during the premeditated murder of her husband<sup>137</sup>. This judgement was made based on the evidence, including that given by psychiatric experts who found the accused to have diminished capacity. The court referred to a Canadian case where it was expressed that expert evidence on the psychological effects of abuse on wives and common law partners is relevant and necessary to understand the position of an abused individual<sup>138</sup>.

This illustrates that whilst there are formal legal tests and definitions that must be applied, psychological perspectives enhance one’s understanding of the relationships and mental states involved. Thus, giving greater effect to substance rather than just form. Ultimately, this allows for legal tests and definitions to be applied correctly and fairly according to the nuances of the situation. This is in alignment with Burchell’s criticism of the objective test for reasonableness and the need for the law to be justly applicable to a diverse community.

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<sup>135</sup> *S v Marais* 2010 (2) SACR 606 (CC) para 5.

<sup>136</sup> *S v Marais and S v Wiid* 1990 (1) SACR 561 (A) deal with the controversial point of determining whether an attack against the abusive husband was due to a poor mental condition caused by abuse or merely ‘ordinary poor judgement’ due to substance abuse. Consequently, the later would amount to non-pathological incapacity which can cast doubt on whether there was pathological incapacity. However, this paper will not be dealing with the question of non-pathological incapacity and the contentious link it can have in determining whether there is pathological incapacity, such as what occurred in *S v Wiid*.

<sup>137</sup> *S v Engelbrecht* 2005 (2) SACR 163 (W) para 24.

<sup>138</sup> *Ibid* para 15.

## **Conclusion:**

Through Walker, it has been demonstrated that battered woman syndrome is a diagnostic sub-category of PTSD which is a consequence of trauma suffered through domestic violence. Women suffering from such a disorder should not be persecuted. The abuse they experienced was a violation of their constitutional rights, and their precarious and vulnerable position should not be perpetuated by the State subjecting them to punishment.

Therefore, until legislation around mental illness and pathological incapacity is revisited, a self-defence or a pathological incapacity claim should be available to an accused suffering from battered woman syndrome.

Furthermore, it is essential to apply knowledge acquired from the social sciences to legal tests relating to mental illness because it is the only way we can give fair judicial treatment to women committing offences whilst suffering from battered woman syndrome. Case law and academic writing refer to the importance of expert testimony to explain the dynamics of an abusive relationship and the psychological changes and deterioration that result from it. This is why the courts call for an evaluative approach where the courts put themselves in the subjective position of the battered woman. However, this approach has been limited to sentencing proceedings, post-trial and after the damage of prosecution is done.

Finally, the law cannot apply its legal tests and standards in a vacuum. Gender disparities in society means that the culture of a completely blind and rigorous objective assessment of scenarios can be more prejudicial than fair. This requires us to place greater value on substantive justice and equality. The psychological evidence shows that battered woman syndrome can meet the standards on self-defence and pathological incapacity. Furthermore, case law shows an inclusion of expert testimony and the willingness to take a more subjective approach. Consequently, it is clear that having battered woman syndrome as a defence for unlawful conduct is a legal possibility which would greatly assist in mending gender disparity in society by showing support, understanding and compassion for abused women.

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