

*HB Kruger*

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## Addressing domestic violence: to what extent does the law provide effective measures?

### Summary

The high incidence of domestic violence in South Africa calls for a competent legal response. The Constitution as well as international human rights conventions oblige the state to protect human rights, including the rights of victims of domestic violence. The government is, therefore, challenged to enact effective legal measures to address domestic violence. This paper undertakes to examine the current legal remedies and protection available to victims of domestic violence. The focus is on the *Domestic Violence Act* 116 of 1998. The Act is discussed, compared to previous legislation and critically evaluated to assess its effectiveness in addressing domestic violence.

### Bekamping van gesinsgeweld: beskik die reg oor effektiewe maatreëls?

Die hoë voorkoms van gesinsgeweld vereis effektiewe regsmaatreëls. Die Grondwet asook internasionale menseregte-konvensies verplig die regering ook om menseregte, insluitende die regte van slagoffers van gesinsgeweld, te beskerm. Die regering staan dus voor die uitdaging om effektiewe regsmaatreëls daar te stel om gesinsgeweld aan te spreek. Gevolglik ondersoek hierdie artikel die huidige regsremedies en beskerming wat vir die slagoffers van gesinsgeweld beskikbaar is. Die fokus is op die *Wet op Gesinsgeweld* 116 van 1998. Die Wet word bespreek, vergelyk met vorige wetgewing en krities geëvalueer om te bepaal hoe effektief dit is in die bekamping van gesinsgeweld.

## 1. Introduction

This article examines the legal remedies and protection available to victims of domestic violence in South Africa. The article is divided into three parts. The first part highlights why domestic violence is a burning issue that calls for a competent legal response. The second part outlines the historical development of legal remedies for domestic violence. As the *Domestic Violence Act 116 of 1998* is of utmost importance, its functioning is briefly discussed. The third part offers a critical evaluation of the Act. The remedies presently provided by the Act are assessed and compared with the previous legal position.

## 2. Domestic violence: a burning issue?

### 2.1 Domestic violence in South Africa

The general crime rate, which includes domestic violence, is alarmingly high in South Africa. In 2001, research by the South African Institute for Racial Relations (SAIRR) concluded that violent crime, including rape and murder, had escalated more than any other form of crime in South Africa.<sup>1</sup> Research commissioned by the SA Law Reform Commission disclosed on 8 August 2003 that the conviction rate for violent crime is only a disconcerting one percent.<sup>2</sup> For every hundred violent crimes reported to the police, perpetrators are convicted in only six cases.

Official statistics on the prevalence of domestic violence in South Africa are insufficient.<sup>3</sup> However, it is estimated that domestic violence takes place in one out of three South African households and that, on average, every six days a woman is murdered by her male partner.<sup>4</sup>

According to Hoosen<sup>5</sup> domestic violence has reached epidemic and gargantuan proportions. The preamble to the *Domestic Violence Act 116 of 1998* recognises that domestic violence is "a serious social evil and that there is a high incidence of domestic violence within the South African society".<sup>6</sup> In the light of the above domestic violence is obviously a high-priority matter demanding an efficient legal response.

### 2.2 Constitutional rights

The current Constitution of the Republic of South Africa, Act 108 of 1996, is the general standard with which the whole body of law must comply.<sup>7</sup> The

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1 *Die Volksblad*: 13 February 2001; Masuku 2002:5-7.

2 *The Star*: 5 August 2003.

3 Hoosen 1999:145.

4 Schoeman 2001:10.

5 Hoosen 1999:145; Murray and Kaganas 1994:24.

6 Act 116/1998.

7 Act 108/1996: section 2. "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

Constitution is the supreme law of the country with a wide spectrum of human rights contained in the Bill of Rights. The constitutional dispensation after 1994 challenged many aspects of the South African legal system, including the law pertaining to domestic violence.

Domestic violence violates numerous fundamental rights. According to Singh<sup>8</sup> “domestic abuse and intimate violence strip the recipient of the most fundamental rights to equal treatment, dignity and respect.” According to Van Marle<sup>9</sup> domestic violence mainly violates the following fundamental rights:

- the right to equality;<sup>10</sup>
- the right to dignity;<sup>11</sup>
- the right to life;<sup>12</sup> and
- the right to freedom of security of the person, which includes the right to be free from all forms of violence.<sup>13</sup>

Concomitantly, the Constitution emphasises a child’s right to be protected from maltreatment, neglect, abuse or degradation.<sup>14</sup> Thus the Constitution

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Kleyn and Viljoen 2002:94.

8 Singh 2002:166.

9 Van Marle 1996:183.

10 Section 9. “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken. (3) The 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. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more grounds listed in subsection (3) is unfair, unless it is established that the discrimination is fair”.

11 Section 10. “Everyone has inherent dignity and the right to have their dignity respected and protected.”

12 Section 11 “Everyone has the right to life.”

13 Section 12. “(1) Everyone has the right to freedom and security of the person, which includes the right —

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way, and
- (e) not to be treated or punished in a cruel or degrading way.

(2) 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.

14 Section 28(1)(d).

obliges the government to enact legislation to realise the fundamental rights of members of the South African society, including victims of domestic violence.

## 2.3 International conventions

South Africa has ratified a number of international human rights conventions which are relevant to domestic violence. However the ratification of the Universal Declaration of Human Rights which came into force in 1945, did not lead to a substantial recognition of fundamental rights or the development of human rights law in South Africa.<sup>15</sup> However, since South Africa has undergone a constitutional transformation in 1994, human rights have become a focal point. The United Nations Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Woman (CEDAW) were both ratified in 1995.<sup>16</sup> Shortly afterwards the African Charter on Human and People's Rights was ratified in 1996, followed by the African Charter on the Rights and Welfare of the Child in 2000.<sup>17</sup>

The above international instruments focus on a variety of human rights. Although freedom from domestic violence are seldom specifically mentioned, freedom from all kinds of violence, equal rights for men and woman as well as the recognition of dignity are generally emphasised. Accordingly, the South African government must enact law in order to comply with the human rights principles entrenched in these international conventions.<sup>18</sup>

## 3. Historical perspective

### 3.1 Common law

Before 1993 the criminal justice system provided victims of domestic violence mainly with common law remedies. After an incidence of domestic violence, a perpetrator could be prosecuted for applicable crimes such as assault, assault with the intent to do grievous bodily harm, indecent assault, murder, culpable homicide, *crimen iniuria*, rape, incest, malicious injury to property, and so forth.

### 3.2 *Prevention of Family Violence Act*

The above common law protection was broadened by the *Prevention of Family Violence Act* 133 of 1993. According to Van Marle<sup>19</sup> this Act was promulgated to address the increase in domestic violence. The Act came into operation on the 1st of December 1993 and mainly provided for a speedy civil interdict

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15 Patel and Watters 1994:v-vii.

16 Oosthuizen 2001:52-53.

17 Davel 2000:229.

18 Singh 2002:160.

19 Van Marle 1996:181.

in cases of family violence against a “party to a marriage”. The Act further stipulates that cases of suspected ill-treatment of children must be reported and that a husband can be convicted of raping his wife.<sup>20</sup>

Despite the positive contribution of the Act, Le Roux and others pointed out its substantial deficiencies.<sup>21</sup> Some of these deficiencies will be referred to in the discussion below.<sup>22</sup>

### 3.3 *Domestic Violence Act*

The above common law and the statutory remedies available to the victims of domestic violence were not adequately effective. In an attempt to provide a better legal remedy, the whole 1993-Act, except sections 4 and 5, was repealed and replaced by the *Domestic Violence Act* 116 of 1998. The Act which came into operation on 15 December 1999, will be briefly discussed below.

### 3.4 *Sexual Offences Bill 2003*

Recently, legal reform concerning sexual offences has been proposed in the *Criminal Law (Sexual Offences) Amendment Bill*.<sup>23</sup> Although the Bill does not specifically focus on domestic violence, sexual abuse often forms part of domestic violence. The Bill may thus be important in addressing domestic violence of a sexual nature.

The aim of the Bill is to widen the scope of the present common law crime of rape and also to create numerous new offences relating to sexual misconduct. In addition to codifying the common law crime of rape, the Bill substantially broadens its scope by defining rape as any unlawful and intentional penetration with the genital organs of one person into the anus or genital organs of another person.<sup>24</sup> At present only a woman can be raped. In contrast the formulation of rape in the Bill is gender neutral and accordingly any person (including a male), can be raped.<sup>25</sup> Currently, only the penetration of the vagina can lead to a conviction on rape, while the new rape offence includes penetration of the anus or genital organs of a female as well as a male.

The Bill also creates numerous new related sexual offences regarding incest,<sup>26</sup> child prostitution,<sup>27</sup> prostitution of mentally impaired persons<sup>28</sup> and so forth. In dealing with the offences of sexual violation<sup>29</sup> and oral genital sexual

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20 Sections 4 & 5.

21 Le Roux 1997:306-312; Hoosen 1999:143-144; Murray and Kaganas 1994:25; Fedler 1995:234; Oosthuizen 2001:57.

22 See the discussion under heading 4 below.

23 RSA 2003: GN 2067 Government Gazette: no 25282.

24 Section 2; SALR Bulletin 2003:3.

25 *Die Volksblad*: 1 August 2003.

26 Section 13.

27 Section 11.

28 Section 12.

29 Section 3.

violation<sup>30</sup> the Bill prohibits the “unlawful and intentional use of an object to penetrate a person’s anus or genital organs and also the penetration of a person’s mouth by a person or animal’s genital organs.”<sup>31</sup> The cautionary rule is presently still applied in certain instances, but the Bill stipulates that it will be abolished in sexual misconduct cases regarding the evidence of complainants and children.<sup>32</sup>

The proposed legislation contains radical reform that appears to be among the most progressive worldwide.<sup>33</sup> If the Bill is enacted, it will provide expanded legal remedies and protection for domestic violence victims who have been subjected to sexual abuse.

### 3. Synopsis of the *Domestic Violence Act 116 of 1998*

#### 3.1 Introduction

Since the *Domestic Violence Act 116 of 1998* (hereafter referred to as the Act) contains vital remedies for domestic violence victims, the gist of the Act will be briefly discussed. The preamble to the Act acknowledges that:

- South Africa has a high prevalence of domestic violence.
- The victims of domestic violence are among the most vulnerable members of our society.
- Acts of domestic violence may be committed in a wide range of domestic relationships.
- The remedies previously available to the victims of domestic violence have proved to be ineffective.
- The Constitution entrenches the right to equality and to freedom and security of the person. Thus, these rights of the victims of domestic violence must be protected efficiently.
- The South African government also has international commitments and obligations towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Rights of the Child.

In the light of the above, the *Domestic Violence Act* was enacted, in the words of the preamble, “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 this Act, and thereby to convey that the State is committed to the elimination of domestic violence...”

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30 Section 4.

31 SALRC Bulletin 2003:3.

32 Section 19.

33 *Rapport*. 26 January 2003.

### 3.2 Functioning of the Act

The Act aims to provide maximum protection from domestic abuse by providing mainly the issuing and enforcement of protection orders. Complainants who are in a domestic relationship with a respondent and are subjected to domestic violence may apply for a protection order. The Act defines “domestic relationship” to include not only married or divorced couples and family members, but also unmarried couples, same sex couples and even members sharing the same residence.<sup>34</sup> Apart from physical, sexual, emotional and economic abuse, the term “domestic violence” also includes a wide variety of conduct such as intimidation; stalking; damage to property and so forth.<sup>35</sup>

Applying for and obtaining a protection order is a civil procedure. The application may be brought by the complainant or on behalf of the complainant by any other person such as a police official, social worker or teacher, who has a material interest in the wellbeing of the complainant.<sup>36</sup> The application is lodged with the clerk of the court. When *prima facie* evidence is produced that undue hardship may be suffered if a protection order is not issued immediately, an interim protection order must be issued. Where an interim order is not issued, the respondent is notified to show cause why a protection order should not be issued on the return date.<sup>37</sup>

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34 Section 1; “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 opposite sexes) 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.

35 Section 1: ‘domestic violence’ means-

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (g) stalking;
- (h) damage to property;
- (i) entry into the complainant’s residence without consent, where the parties do not share the same residence; or
- (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant;

36 Section 4(3).

37 Section 5(4).

If the application is unopposed and the required *prima facie* evidence is proven, the court must issue the protection order. On the other hand, if the application is opposed, a hearing will take place upon which the court will decide whether or not to issue a protection order. The court may impose any reasonable conditions in the protection order for the safety or wellbeing of the complainant, such as prohibiting acts of domestic violence, prohibiting contact with a child, ordering the seizure of an arm or dangerous weapon from the respondent and so forth.<sup>38</sup> Upon granting the protection order, the court also supplies the complainant with a warrant for the arrest of the respondent, but suspends the execution of the warrant subject to compliance with the protection order.<sup>39</sup>

If the respondent does not comply with the protection order, the complainant may hand the warrant of arrest, together with an affidavit stating that the respondent did not comply, to the police.<sup>40</sup> The respondent may then be arrested for committing an offence in terms of section 17(a). On conviction, a fine or imprisonment for a period not exceeding five years or both may be imposed.<sup>41</sup>

## 4. Evaluation of the Act

### 4.1 Merits

#### 4.1.1 Extended protection

In the critical evaluation of the Act, the latter will first be weighed against previous legislation. The *Prevention of Family Violence Act* had made provision for a cheaper and more streamlined process to secure interdicts as protection against family violence.<sup>42</sup> This Act also commendably included protection for parties who were not legally married, since “parties to a marriage” was broadly defined to include married and divorced couples as well as parties who lived together as man and wife, but were not married.<sup>43</sup> However, the Act did not include other types of relationships such as homosexual relationships.

The *Domestic Violence Act* when compared with the *Prevention of Family Violence Act*, offers much broader protection for victims of domestic violence concerning the following aspects.

- Civil as well as criminal remedies

The Act provides a civil remedy, namely the obtaining of a protection order after a complainant has been subjected to an act of domestic violence. Concomitantly, the Act also makes provision for a criminal remedy. The Act

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38 Section 7.

39 Section 8.

40 Section 8(4).

41 Section 17(a).

42 Murray and Kaganas 1994:24.

43 Van Marle 1996:183.

does not criminalise domestic violence, but criminalises the breach of the protection order. When the protection order is violated, an offence is committed in terms of the Act and criminal proceedings may be instituted.<sup>44</sup> The previous Act did not provide for the latter. Another advantage of enforcing the court order by criminal prosecution is that no cost for legal representation is involved since the state represents the complainant.

- Conduct qualifying as domestic violence broadened

In the 1993 Act, “family violence” was not defined and the focus seemingly was on physical violence.<sup>45</sup> This Act did not indicate whether, for example, emotional, financial or verbal abuse, stalking or harassment would satisfy its requirements.<sup>46</sup> The lack of clarity about what behaviour constituted family violence produced legal uncertainty. Le Roux correctly pointed out that this was an unsatisfactory situation which violated the principle of legality.<sup>47</sup>

The *Domestic Violence Act* addressed this problem by defining “domestic violence” comprehensively.<sup>48</sup> The definition includes a wide variety of acts, such as different forms of abuse, stalking, harassment, intimidation, damage to property and so forth.<sup>49</sup> Concomitantly, the Act also gives a detailed definition of each form of abuse. Hoosen rightfully observed that the innovative inclusion of economic abuse is to be welcomed, since victims of financial deprivation are now able to seek redress.<sup>50</sup> Thus the Act not only clarified the meaning of “domestic violence”, but also greatly extended the meaning to provide broader protection.

- Expansion of protected persons

The 1993 Act only applied to “parties to a marriage”. The latter was defined as “a man and a woman who are or were married to each other according to any law or custom and also a man and woman who ordinarily live or lived together as husband and wife, although not married to each other”.<sup>51</sup>

Under the new Act complainants in a “domestic relationship” are protected. The categories of people who are entitled to relief are extended by the expanded definition of “domestic relationship”.<sup>52</sup> Various types of relationships are now included, e.g. same sex relationships, people with parental responsibilities for a child, co-residents (even if they are not related) and people who are engaged or dating.<sup>53</sup> The abuse of the aged in family violence is also addressed, since the Act specifically includes all family members related by consanguinity or affinity.

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44 Sections 7;17(a).

45 *Prevention of Domestic Violence Act*: section 2. See also Stassen and Stassen 1999:68.

46 Fedler 1995:243.

47 Le Roux 1997:307.

48 Section 1.

49 See the definition quoted above in footnote 36.

50 Hoosen 1999:146.

51 Act 133/1993: section 1(2).

52 Stassen and Stassen 1999:68; Bonthuys 1999:314-315.

53 See the definition of domestic relationship in footnote 35 above.

- Emergency measures available

Domestic violence is often life threatening or of such a nature that protection is needed without delay. When immediate protection is required, the court is now empowered to issue an interim protection order, which will provide emergency protection until the hearing.<sup>54</sup> Such emergency intervention was not available under the old Act.

- Court powers increased

The Act endows the court with a much wider scope of powers than it had under the previous Act.<sup>55</sup> In the protection order the court may impose prohibitions, conditions, orders or obligations on the respondent to ensure the safety and wellbeing of the complainant.<sup>56</sup> This includes for instance prohibiting the respondent from committing any act of domestic violence or from entering the complainant's residence or place of employment.

The fact that the court may also order the respondent to pay emergency monetary relief to the complainant, is welcomed. This relief includes compensation for loss of earnings, medical and dental expenses, household necessities or relocation and accommodation expenses. The relief is focused on expenses the complainant had to incur pursuant to the issue of the protection order against domestic violence.<sup>57</sup>

- Court jurisdiction clarified

The previous Act lacked specific guidelines regarding the jurisdiction of the court. The present Act has restored legal certainty by stipulating the court's jurisdiction in detail.<sup>58</sup> In short it provides that any court has jurisdiction to grant a protection order if the complainant or respondent resides or is employed in its area of jurisdiction. A protection order is enforceable throughout the Republic.<sup>59</sup>

- Increased criminal jurisdiction

If the respondent does not comply with the protection order, the court may impose imprisonment of up to 5 years.<sup>60</sup> The previous Act stipulated a maximum of only 12 months imprisonment.<sup>61</sup>

- Weapon control

Victims of domestic violence are often threatened, hurt or even killed by armed perpetrators. The previous Act did not address the use of firearms or other weapons in domestic violence. In terms of the present Act, the court may

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54 Section 5(4).

55 Act 133/1993: section 2(1).

56 Section 7.

57 Hoosen 1999:146.

58 Section 12.

59 Section 12(3).

60 Section 17.

61 Act 133/1993: section 6.

order the seizure of any arm or dangerous weapon in the possession of the respondent.<sup>62</sup> This measure contributes towards the safety of victims.

- Special duties for police officials

For the first time legislation imposes a specific duty on members of the South African Police to assist complainants involved in an incident of domestic violence. This duty includes informing complainants of the remedies available to them, assisting victims to find shelter, and obtaining medical treatment for them.<sup>63</sup> Failure by the police to comply with any obligation imposed by the Act constitutes misconduct and must be reported to the Independent Complaints Directorate.<sup>64</sup>

- Arrest without warrant

Since common assault is not an offence listed in the first schedule of the *Criminal Procedure Act* 51 of 1977, lawful arrest cannot be effected without a warrant.<sup>65</sup> However, in terms of the Act a peace officer may, without a warrant, arrest a respondent at the scene of domestic violence.<sup>66</sup> The advantage of this measure is that the complainant may report the matter and seek redress from the court without immediate intimidation by the respondent.

- Special duties for prosecutors

A further duty pertaining to prosecutors has been added. The Act prohibits a prosecutor from refusing to prosecute or from withdrawing a charge in respect of the contravention of a protection order, unless authorisation has been obtained from a prescribed senior member of the prosecuting authority.<sup>67</sup> According to Hoosen this duty prevents prosecutors from making such decisions independently.<sup>68</sup>

#### 4.1.2 Realising and protecting fundamental rights

The preamble explicitly states that the Act acknowledges the Constitution and in particular, the right to equality and to freedom and security of the person. The obligation of the State towards ending violence against women and children in terms of international conventions such as CEDAW is also recognised. But the measures introduced by the Act must be examined to see if they do in effect protect and realize the applicable fundamental rights.

A crucial fundamental right for victims of domestic violence is 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.<sup>69</sup> The issuing

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62 Section 9.

63 Section 2.

64 Section 18(4).

65 Act 51/1977: section 40(1)(b).

66 Section 3.

67 Section 18(1).

68 Hoosen 1999:147.

69 The Constitution of South Africa, Act 108/1997: section 12 — quoted in footnote 13 above.

of protection orders is a measure specifically created to protect victims from violence. The violation of these orders is criminalised to expedite and simplify the enforcement of the orders. The broadening of conduct qualifying as domestic violence as well as the increased compass of persons that qualify for protection also contributes towards realising the right to be free of violence. Other factors that enhance the protection of this right are: the availability of emergency measures; the increased criminal jurisdiction and powers of the court; and the duties imposed on police and prosecutors.<sup>70</sup> Since emotional, verbal and psychological abuse is also included in the definition of “domestic violence,” the right to psychological integrity entrenched in section 12 is also protected. If the above stipulations of the Act are properly complied with in practice by the criminal justice system, victims’ dignity and right to life will be protected and respected.<sup>71</sup>

The Convention on the Rights of the Child requires all states parties to take legislative measures to protect children from all forms of physical or mental violence, injury or abuse.<sup>72</sup> South Africa addressed this obligation. Apart from the more general fundamental rights, our Constitution endows children with specific rights, such as the right to be protected from maltreatment, neglect, abuse or degradation.<sup>73</sup> Although children subjected to domestic violence have the same general protection available to adults, the *Domestic Violence Act* includes numerous sections focusing specifically on children. The Act covers domestic violence inflicted upon children by not only parents and other family members, but also that by other persons with parental responsibility for the child.<sup>74</sup> An application for a protection order may be brought by children themselves or by another on behalf of a child and even without the assistance of a parent or guardian.<sup>75</sup>

The United Nations Convention on the Rights of the Child explicitly states that in all actions concerning children the best interests of the child shall be a primary consideration.<sup>76</sup> The best interest principle is also embedded in the African Charter on the Rights and Welfare of the Child and in our own Constitution. In line with this principle, the *Domestic Violence Act* allows drastic measures. The court is empowered to limit or even prohibit contact between the respondent and the child if it is the best interest of the child.<sup>77</sup>

The Convention on the Elimination of all forms of Discrimination Against Woman (CEDAW) focused on the elimination of discrimination against women and on equal rights for men and women. Statistics indicate that men are the perpetrators in about 90% of domestic violence incidents against women

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70 See discussion under 4.1.1 above.

71 The Constitution of South Africa, Act 108/1997: sections 10 and 11 — quoted in footnotes 11 and 12 above.

72 Article 19.

73 Section 28(1)(d).

74 Section 1 — see the definition of “domestic relationship” quoted in footnote 34 above.

75 Section 4(3) and (4).

76 Article 3.

77 Section 7(6).

and children.<sup>78</sup> CEDAW requires states parties to take appropriate measures to eliminate discrimination against women in various spheres, including family relations.<sup>79</sup> The preamble of the *Domestic Violence Act* singles out victims of domestic violence as particularly vulnerable and stresses the need to protect their right to equality. The Act gives effect to the preamble by introducing the far-reaching expansion of the protection as discussed above. Artz<sup>80</sup> states that with the enactment of this Act, the South African government has to a large extent succeeded in fulfilling the international obligation required by CEDAW towards ending violence against women.

#### 4.1.3 Deterrent effect of protection order

According to magistrate Venter<sup>81</sup> at the Tshepong victim support centre in Bloemfontein, the issuing of a protection order often deters the perpetrator. A substantial number of victims have reported that following a protection order no further domestic violence took place. However, since official statistics on the position nationwide are not available, a general inference to this effect cannot be made.

#### 4.1.4 Effective implementation of the Act

Although not introduced by the Act itself, innovative measures that have recently been established contribute towards the effective implementation of the Act.

##### Victim support centres

Victims of domestic violence are often scared and ashamed of reporting domestic violence and frequently do not have confidence in the legal system. Reporting the incident may result in exposure to further violence from the perpetrator. It may involve hours of travel, high travelling costs, problems due to staying away from work to report the matter, and time waiting to receive attention. It may also involve insensitive treatment from some police officials, medical personnel and court personnel.<sup>82</sup>

To address these problems, one stop support centres for victims of domestic violence have been established in Bloemfontein and in a few other parts of the country.<sup>83</sup>

##### Special courts for domestic violence

Secondary traumatising suffered during the court procedure is one of the reasons why domestic violence is often not reported. Victims and the public need to be reassured that domestic violence prosecutions will be professional and effective before they will have full trust in the criminal justice system.

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78 NPA Annual Report 2001:39.

79 Article 16.

80 Artz 2001:5.

81 Interview with A Venter on 13 August 2003, Bloemfontein.

82 Schoeman 1999:4; Le Roux 1997:305, 311; Singh 2002:167.

83 Rasool 2000:11.

The mission of the National Prosecuting Authority is to “provide a prosecution service which is prompt, vigorous and fearless in the public interest, guided by the Constitution and Bill of Rights, where all are treated with humanity and sensitivity”.<sup>84</sup> The Sexual Offences and Community Affairs Unit (SOCA) was established in September 1999 in the office of the National Director of Public Prosecutions (NDPP).<sup>85</sup> The SOCA unit aims to prosecute violent and indecent crimes efficiently, especially those against vulnerable members of society like woman and children. The unit also focuses on the reduction of secondary victimisation.<sup>86</sup>

To realise these goals various projects have been launched, including the establishment of special courts. Courts that specialise in the prosecution of domestic violence have been established in Bloemfontein and other centres countrywide. These courts strive to handle domestic violence cases promptly and professionally, thus restoring public confidence in the justice system and reducing secondary victimisation.

#### 4.1.2 Obstacles and Limitation

- Legal representation for children

The Act states that any party proceeding in terms its stipulations *may* be represented by a legal representative.<sup>87</sup> Where a child is a party, the above formulation seems inadequate to fully protect the child. Bearing the best interest of the child in mind, the Act should be amended to read that the court *must* appoint a legal representative for the child who is a party to the proceedings.

- Need for more victim support centers and special courts

The *Domestic Violence Act* is commendable for providing much greater protection for victims of domestic violence. However, it will be of little avail if it is not implemented effectively in practice. The legal remedies created by the Act must be accessible to victims in practice.

In this regard, victim support centres and special domestic violence courts make a valuable contribution. However, they exist only in some parts of the country. There is an urgent need to multiply their services, especially in rural areas.

- Funding

Substantial funding is required to equip special courts for domestic violence with adequate facilities such as victim-friendly waiting rooms and restrooms, intermediary facilities and so forth. In addition, funding is needed to establish more special courts to handle domestic violence effectively on a national basis.<sup>88</sup>

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84 NPA Strategic Plan 2001:2.

85 Rasool 2000:11.

86 NPA Annual Report 2001:37.

87 Section 14.

88 NPA Annual Report 2001:37; Schönteich 2000:10.

The government has limited resources, and funding for these necessities is not readily available. A lack of funding also hampers the establishment of more much-needed victim support centres throughout South Africa. Specialised training is to a certain extent offered to prosecutors, but substantial funding is needed to expand specialised training to all court personnel and other role players involved in domestic violence cases.<sup>89</sup>

- Training

The appropriate training of all role players in the treatment of victims in the criminal justice process can reduce secondary victimisation.<sup>90</sup> Quality training is also essential to provide effective, speedy prosecutions by specialist personnel. Although the initiatives of the SOCA Unit in providing multi-disciplinary training on domestic violence are laudable, this training is only available on a small scale and only at certain centres.<sup>91</sup> Special training for court personnel and all other role players who handle domestic violence cases is still a problem that must be prioritised nationwide, especially in the rural areas.

- Special duties imposed on police officials

The special duties imposed on members of the South African Police to assist complainants are welcome. According to the 2002 parliamentary report of the Independent Complaints Directorate, the police did address this duty. However, they encountered difficulties in realising their duties in practice. Often there is no shelter available to take victims to, and in some instances the police do not have enough vehicles or officers on duty to comply with the prescribed duties.<sup>92</sup> A consortium of researchers in the Western Cape monitored the application of the Act in two urban and one rural magisterial districts, including all police stations in the jurisdictions of these courts.<sup>93</sup> Over 600 protection orders were examined and 50 police interviews conducted. Some police conduct was found to contravene the stipulations of the Act. The Act for instance stipulates that complainants are entitled to have their full legal options explained to them by the police. Often only partial or even incorrect information was supplied.<sup>94</sup> In some instances they were not informed that civil and criminal remedies are available or that urgent intervention is available by means of an interim protection order.

According to Hoosen, compliance with the duties imposed by the Act will only become a reality “if the relevant enforcement agencies are properly trained and sensitised to the needs of the complainant in situations of domestic violence”.<sup>95</sup>

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89 Rasool 2000:12; Schönsteich 2000:11.

90 Meintjies-van der Walt 1998:163-164.

91 NPA Annual Report 2001:39.

92 *Daily Dispatch*: 4 December 2002; Artz 2001:8.

93 Artz 2001:5.

94 Artz 2001:6.

95 Hoosen 1999:147.

- Keeping data on domestic violence

The Act stipulates that record must be kept only of the number and particulars of incidents when the police failed to comply with obligations imposed by the Act.<sup>96</sup> The Act also stipulates that the Independent Complaints Directorate must report these statistics to Parliament, but only every six months. Data on domestic violence which is essential for research purposes and to identify and prioritise problem areas in the search for solutions is as a result meager. In addition, detailed official data on domestic violence is not readily available on a nationwide scale.<sup>97</sup> This problem of insufficient information should be addressed as a matter of priority. The Act should impose duties on the police and the courts to keep detailed official data pertaining to domestic violence.

- Criticism of the criminal sanction

The criminal sanction that follows when a protection order is violated, has been criticised. Some critics argue that criminal law should not “intrude” into private domestic relationships. They maintain that the law is not suited to regulate such relationships and that criminal sanction is often a catalyst for further domestic violence.<sup>98</sup> These critics claim that mediation is a more appropriate method of resolving domestic dissension, particularly when strengthened by therapy. On the other hand, if the parties involved and especially the offender do not co-operate, mediation and therapy are ineffectual, and inherently unenforceable. Accordingly, unconditional agreement with the criticism on the criminal sanction will be short-sighted. In many instances the criminal sanction is vital to protect victims.

Another argument is that criminal sanction often punishes not only the offender, but also the victim such as when the offender’s fine is paid out of family income or imprisonment leads to financial loss for dependant victims.<sup>99</sup> But this problem can be addressed by, for example, presiding officers choosing sentencing options, such as community service, periodical imprisonment or correctional supervision in place of a fine.

- Rehabilitation of perpetrators

Legal remedies alone cannot combat family violence effectively.<sup>100</sup> Although focusing on victims of domestic violence is obviously a priority, a critical need also exists for effective mechanisms to help and rehabilitate perpetrators of domestic violence. The Act does not contain any such measures. Innovative and appropriate sentencing options may still be explored by the courts, such as the inclusion of suitable life skills and rehabilitation programs by experts

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96 Section 18(5)(c); Anderson 2001:41.

97 Hoosen 1999:145.

98 Singh 2002:163; Fedler 1995:233.

99 Singh 2002:163; Le Roux 1997:305.

100 Van Marle 1996:183.

in the field.<sup>101</sup> Rehabilitating the perpetrator is a better means of ensuring family harmony than only punishment and deterrence through the criminal justice system.

- Restorative justice and support to victims

The Act does not refer to restorative justice nor to support and compensation for victims. Restorative justice does not aim to replace traditional retributive justice, but rather to enrich the judicial process by focusing also on the harm done to the victim and society. According to Correctional Services Minister, Ben Skosana, restorative justice emphasises the importance of holding offenders “directly accountable to the people they have violated and to restore losses and harm suffered by the victims”.<sup>102</sup> The South African Law Commission considers restorative justice to be (*inter alia*) “a process which seeks to redefine crime, interpreting it not only as breaking the law or offending against the State, but also as an injury or wrong done to another person”.<sup>103</sup>

Victims of domestic violence often need medical treatment and professional support. “No legal remedy will combat violence effectively if abused family members are not provided with support and protection at the same time”.<sup>104</sup> A proposed solution is to include as part of the offender’s sentence an order that requires the offender to pay for the medical treatment and professional support services rendered to the victim.<sup>105</sup> When offenders lack the means to pay, it is suggested that the State provide appropriate medical care and professional counseling to victims who sustain physical and psychological injuries due to domestic violence.<sup>106</sup> Through these proposals victims may benefit by means of restitution, reparation and healing, thus, addressing domestic violence more effectively.

- Public awareness

Domestic violence is often “invisible”, since it occurs behind closed doors. Victims often contribute to this “invisibility”, because of shame and fear of further violence should they make it known. Furthermore, when domestic violence is disclosed, a large percentage of the public still choose not to become involved.

Public awareness and support of victims are important factors in the effective implementation of the Act. The SOCA Unit arranged Open Court Days during which court procedure and other relevant issues were explained

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101 Similar sentencing options are included in section 20 of the Bill on Sexual Offences, e.g. adding a drug or alcohol rehabilitation order to the sentence. SALRC Bulletin 2003:4-5.

102 *The Citizen*: 25 November 2002.

103 Meintjies-Van der Walt 1998:158; SA Law Commission Issue Paper 7 Project 82. Sentencing Restorative Justice — Compensation for victims of crime and victim empowerment.

104 Murray and Kaganas 1994:25.

105 Meintjies-Van der Walt 1998:161.

106 This is also proposed in the Bill on Sexual Offences for victims of sexual offences — SALR Bulletin 2003: 4.

to the public on topics such as domestic violence.<sup>107</sup> Although this initiative is welcomed, it only reaches a small percentage of the community. Therefore, a great need still exists to sensitise the general public regarding the following:

- assistance and support to victims;
  - summoning of the police when necessary;
  - informing the victim about the available protection,
  - transporting the victim to a victim support center, if it is available; and
  - enforcing the viewpoint that domestic violence is wrong and punishable by criminal prosecution.
- Cultural and religious perspectives

Often victims of domestic violence do not institute prosecution against the perpetrator, because of cultural perspectives, religious beliefs or the accepted norms of a community. In these circumstances domestic violence as defined in the Act, is not considered wrong. In some communities one partner may “discipline” the other partner, or a parent may severely “discipline” a child, or even an adult child may “discipline” an elderly parent. In communities where lobola is paid for a woman, she and the children are regarded as the husband’s possessions with which he may do as he sees fit.<sup>108</sup> Due to these perceptions, victims often do not report domestic violence. Even when they do report it, some officials are unsympathetic and may even not accept the complaint.

According to Singh<sup>109</sup> “it is trite that when interfering with traditional practice, one is often faced with the bogey of making “paper” laws — laws that would be most strongly resisted by the very communities they claim to assist”.<sup>110</sup> On the one hand the victim has the fundamental rights to equality, dignity and security of the person, which includes the right to be free of all forms of violence.<sup>111</sup> Juxtaposed with these rights, are the rights to freedom of religion, the right to practise one’s religion and to participate in the cultural life of one’s choice.<sup>112</sup> The Constitution stipulates that the rights to practise religion and culture must not be exercised in a manner inconsistent with the Bill of Rights.<sup>113</sup> To align these competing rights, it is proposed that lawmakers perform a needs assessment, and balance the demand to preserve and practise religion and culture against the fundamental rights of domestic violence victims.<sup>114</sup> To realise this in practice is no simple task.

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107 National Prosecuting Authority of South Africa: Annual Report 2001:38.

108 Schoeman 2001:11.

109 Singh 2002:167.

110 Also see Le Roux 1997:305.

111 Act 108/1996:sections 9, 11 and 12.

112 Act 108/1997:sections 15, 30 and 31.

113 Act 108/1996: sections 30 and 31(2).

114 Singh 2002:167.

- Domestic violence not reported

Wives often endure domestic violence for the sake of their children, since criminal punishment imposed on the husband may lead to more hardship and further disintegration of the family.<sup>115</sup> Therefore victims of domestic violence frequently do not report domestic violence and do not use the criminal law remedies available to them, because they fear the consequences.<sup>116</sup> As mentioned above, these consequences may include further retributive violence and financial repercussions since the perpetrator is often the breadwinner.<sup>117</sup>

- Shelters for victims

The majority of shelters for abused woman are not subsidised by the government and are in a financial crisis.<sup>118</sup> According to Le Roux<sup>119</sup> in 1997 South Africa had only 14 shelters, while there were about 700 shelters for abused women in the United States of America. To implement the Act successfully, shelters must be available to victims who have made use of the legal remedies and, as a consequence, are homeless or in danger if they return home. It is trite that there is an urgent need for these shelters which should be subsidised or at least initiated by the State.<sup>120</sup>

- Abuse of the Act by complainants

Since the Act contains far-reaching measures to protect complainants, it also opens the door to abuse by vindictive complainants. The Act stipulates that it is an offence for a complainant willfully to make a false affidavit to the police stating that the respondent has not complied with the protection order.<sup>121</sup> Due to the false affidavit the respondent may be arrested, detained and charged before the complainant's offence is eventually discovered. The extent of this problem cannot be assessed, since no official data is available on prosecutions of complainants in this regard. It is recommended that such data is also kept by officials in order to assess, monitor and address the problem.

## 5. Conclusion

The high prevalence of domestic violence coupled with the challenges by the Constitution and international fundamental rights conventions oblige the government to address domestic violence efficiently. From only common law remedies, the legal protection for domestic violence has increased and developed to culminate in the *Domestic Violence Act*.

In comparison with previous legal protection, the *Domestic Violence Act* of 1998 has ameliorated the plight of victims of domestic violence by casting the net wider in substantially expanding the ambit of legal protection. The

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115 Le Roux 1997:305; Bonthuys 1999:322, 326.

116 Schoeman 1999:4; Le Roux 1997:305; Fedler 1995:234.

117 Singh 2002:167; Le Roux 1997:311.

118 Fedler 1995: 231; *Daily Dispatch*: 3 September 2002.

119 Le Roux 1997:306.

120 *Daily Dispatch*: 4 December 2002; Le Roux 1977:313.

121 Section 17(d).

remedies introduced by the Act also contribute in protecting and promoting fundamental rights embedded in the Constitution and relevant international instruments. Thus in passing this Act the government made a profound contribution in addressing domestic violence.

On the other hand, a critical evaluation of the Act reveals various deficiencies and challenges. Although formal protection against domestic violence is to a great extent achieved by means of the Act, major problems are still experienced in implementing the Act in practice. Victims often do not obtain real protection due to certain cultural and religious perspectives and a lack of public awareness and involvement. Other problems hampering the effective implementation of the Act are the dire shortage of victim support centres, shelters and special courts with trained personnel and appropriate facilities. Since adequate government funding is not available, these deficiencies cannot be addressed properly, and without these services the value of the legal remedy is eroded.

The challenge is to address the problems pointed out in the article and by doing so to ensure that formal protection becomes real protection in practice. It is of little use when progressive legislation is a theoretical exercise and not a pragmatic one.<sup>122</sup> Only when formal laws function successfully in practice, will public confidence in the criminal justice system be restored. And only then will the aim of the Act to afford maximum protection to the victims of domestic violence be fully realised.

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122 Artz 2001:4.

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