

**Shortcomings of the South African  
Domestic Violence Act 116 of 1998 in  
comparative perspective**

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# Declaration

**I declare that this dissertation is my original work and has not been submitted for the award of a degree at any university.**

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## CHAPTER ONE

### 1. Introduction

#### 1.1. Background

The Domestic Violence Act 116 of 1998 was promulgated in 1998 (hereinafter referred to as the Act). Its focus is on providing civil and criminal remedies (prosecution) for violence that arises from domestic relationships and to afford maximum protection to the victims of domestic violence. It is evident from its preamble that the adoption of the Act was motivated by the rise in incidents of domestic violence as it reads that: “Recognizing that domestic violence is a serious evil; that there is a high re-occurrence of domestic violence within South African society.” The use of the words “high re-occurrence” is a clear indication of the repetition of domestic violence incidents and that the re-occurrence is at a high rate.

The same views were expressed in the case of *Seria v The Minister of Safety and Security and Others* that “the Domestic Violence Act was promulgated in response to the alarmingly high incidence of domestic violence within the South African society”.<sup>1</sup> In this case Judge Meer commended the Act for being “the awaited addition to the South African jurisprudence and that it will promote the rights of equality, freedom and security of the person”.<sup>2</sup>

Close to 15 years since its adoption, the Act has not escaped criticism. On 19 February 2013, the Chairperson of the Portfolio Committee of Police called for the amendment of the Domestic Violence Act as according to her, the Act “was not adequately protecting women”.<sup>3</sup> Although she made no specifications of where amendments needed to be done, her statement was undoubtedly based on the increase in violence against women, as according to research one in four women have been subjected to domestic violence.<sup>4</sup> She called on members of the South African Police Service (SAPS) to come up with suggestions on how the legislation could be improved since they are at the forefront of the implementation of this legislation.

In contrast to the above, two days later on 21 February 2013, the then Deputy Minister of Justice and Constitutional Development, Andries Nel, described the Act as one of the

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<sup>1</sup> *Seria v Minister of Safety and Security and Others* (9165/2004) [2004] ZAWCHC 26 page 2.

<sup>2</sup> *Seria v Minister of Safety and Security and Others* (9165/2004) [2004] ZAWCHC 26 page 26.

<sup>3</sup> [http://www.parliament.gov.za/live/content.php?Item\\_ID=2868](http://www.parliament.gov.za/live/content.php?Item_ID=2868). Date of access (19 June 2013).

<sup>4</sup> Domestic Violence: Submission to the South African Law Commission in the light of International and Constitutional Human Rights Jurisprudence. Part 1. May 1997. 29 October 2008.

[http://www.speakout.org.za/about/prevention/preventin\\_domestic\\_violence.html](http://www.speakout.org.za/about/prevention/preventin_domestic_violence.html).

“best and most progressive pieces of legislation in the world”.<sup>5</sup> However he acknowledged that there are certain provisions in the Act that have caused complications when it came to implementation and that they will have to be reviewed and improved. He also did not specify the nature of the complications but indicated that the South African Law Reform Commission (SALRC) has been requested to look into the matter. As of August 2015, the SALRC had not published any proposals.

## 1.2. Problem Statement

South Africa has fought for years for its freedom and democracy. It has a Constitution that seeks to cure injustices of the past.<sup>6</sup> Despite all the violence that characterized South Africa in the past and it consequently attaining its democracy, violence still exists and sadly, it occurs mostly against the women despite being role players in the fight for freedom and equality.<sup>7</sup> The Constitution protects its citizens’ rights to gender equality<sup>8</sup> as well as psychological and bodily integrity<sup>9</sup>. The fact that there had to be a legislation that emphasizes the same rights provided for in the Constitution i.e. the Domestic Violence Act is a clear indication of the emphasis that is placed upon these rights, and the maximum protection that needs to be afforded to these rights. However notwithstanding the advent of the Constitution and the Act which is in place to protect these rights that seek to combat violence, domestic violence against women, still persists.

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<sup>5</sup> <http://www.justice.gov.za/docs/articles/20130221-domestic-violence.html>. Date of access (3 March 2014).

<sup>6</sup> Constitution of the Republic of South Africa, 1996.

<sup>7</sup> <http://www.anc.org.za/show.php?id=4667> Date of access (9 July 2015); Usdin et al “The value of advocacy in Promoting Social Change: Implementing the New Domestic Violence Act in South Africa (2000) 8 Reproductive Health Matters 55.

<sup>8</sup> 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 of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

<sup>9</sup> Section 12(2) Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions regarding 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.

Prior to the Domestic Violence Act, the legislation that dealt with violence arising from a private relationship was the Prevention of Family Violence Act 133 of 1993. This Act, however did not escape criticism. In July 1995 a group of attorneys petitioned the SALRC on the issue that the Prevention of Family Violence Act 133 of 1993 acted contrary to the principle of *audi alteram partem* rule, (a Latin rule that provides that the other party also has a right to be heard).<sup>10</sup> In February 1997 the SALRC published a comprehensive discussion paper on domestic violence for general information and public comments and for the publication of solutions to the problems that were identified by the SALRC.

Subsequent to the publication, the Minister of Justice and Constitutional Development appointed a Project Committee consisting of external experts drawn from the community, including non- government organisations and experts from the social, welfare and health departments, to assist with the processing of comments received on the discussion paper and to drive the process towards a final report and draft legislation on domestic violence. However due to Parliamentary time constraints, a draft Domestic Violence Bill (the Bill) emanating from the Project Committee was introduced by the Minister of Justice in parliament and that, was done prior to finalisation of the Commission's report.<sup>11</sup>

The Bill corresponded in a lot of aspects as it contained provisions that had been put forth by the researchers that formed part of the SALRC and the Department of Justice and Constitutional Development, however certain aspects that will be discussed in detail in this dissertation were lacking when the Bill was passed.

### **1.3 Research Questions**

The paper seeks to answer the following questions:

- How does the South African law perform in relation to combating domestic violence compared to international law?
- What are the shortcomings in the Domestic Violence Act and suggested solutions to combat domestic violence?

### **1.3. Research Methodology**

The Domestic Violence Act will be assessed against the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Protocol). Also the United Nation's instruments such as the United Nation's checklist in the Handbook

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<sup>10</sup> "Research Paper on Domestic Violence." South African law Commission. April 1999 3.

<sup>11</sup> "Research Paper on Domestic Violence." South African law Commission. April 1999 iii.

for Legislation against Women (the Handbook)<sup>12</sup> and Article 1, 2 and 4 of the Declaration on the Elimination of Violence Against Women (DEVAW) will also be used as part of addressing the research questions.

#### **1.4. Significance of the study**

The main aim of this study is to be of assistance to the legislature. The importance of this study cannot be overemphasized based on the alarming rate of domestic violence. Certain comments were received during the Project Committee and crucial aspects were suggested to be made part of the draft legislation. However some of these were omitted in the final draft due to parliamentary pressure. They are as follows:

- The Act is supposed to be gender-sensitive, however it is still gender-neutral;
- The Act does not expressly protect the elderly, children and the disabled people;
- The Act does not make provision for the victim to be protected from giving oral evidence under certain circumstances;
- There is no after-hour system that has been provided for in the Act, where the hearing of the application for a protection order can be arranged urgently with the presence of all necessary court officials outside the ordinary court hours;
- The Act does not provide for the deterrence of the offender by means of rehabilitation programmes and counseling in suitable cases;
- The Act does not expressly prohibit the perpetrator from entering any place that the perpetrator knows the victim frequents, or from watching, loiter near or hinder the victim;;
- The Act does not provide for any hearing pertaining to domestic violence be heard on camera due to the extremely private matters being at a possibility of being discussed openly;
- The preamble of the Act does not take into cognisance the right to dignity;

The above omissions, in conjunction with the alarming rate of domestic violence and the expectations by international law in dealing with domestic violence, are the motivation behind this dissertation.

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<sup>12</sup>Department of Economic and Social Affairs/ Division for the Advancement of Women: *Handbook for Legislation on Violence Against Women* (2010) New York: United Nations. The book can be accessed on <http://www.google.com> (accessed 27 March 2014).



## 1.5. Literature Review

In order to get a broader perspective on this issue of violence against women, research was conducted through the review of literature on the topic, in order to evaluate and substantiate any findings on the shortcomings. The following articles have been referred to:

In the article of Mogale S et al<sup>13</sup>, she quotes Smythe describing the Domestic Violence Act as follows:

“the act is considered to be one of the most inclusive and progressive pieces of legislation as it:

- (a) Recognizes a wide range of Violence Against Women( referred to as VAW)
- (b) Acknowledges that VAW can occur in a variety of familial and domestic relationships
- (c) Gives magistrates the power to serve abusers with court orders and extend this to even the workplace of the victims
- (d) Compels the perpetrator to maintain the victim’s finances while not staying in the same house or accommodation
- (e) Disarms the respondent who is the perpetrator and offers police protection to the victim
- (f) Outlines the obligatory duties of the police and
- (g) Lays down penalties for failure to execute duties.”

As will be seen in this dissertation, the Act, does not fully disarm the perpetrator, therefore the description of the Act as being inclusive in the sense that it disarms the perpetrator, is flawed.

In 2008/9 research was conducted by Mosaic, a non-government organisation and the Gender, Health and Justice Research Unit of the University of Cape Town. The research sought to find out why women who apply for protection orders under the Domestic Violence Act, later withdrew them. It showed that even though a number of women in South Africa apply for protection orders, they later retract them because of the severity of the violence that they experienced, the history of the violence, the threat that they receive after applying for protection orders without protection from the justice system and the general experiences that they have with the courts and the officials of

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<sup>13</sup> Mogale S et al : Violence Against Women in South Africa: policy Position and Recommendations, 2012.

the courts. The study attributed the withdrawal of protection orders by these women to lack of faith in the system.<sup>14</sup>

Michelle Govender<sup>15</sup> indicates that the steps that are being taken by the country in order to prevent violence against women are not adequate to prevent the re-occurrence of violence against women. She further indicates that South Africa can be held accountable for its less-effective way to address the seriousness and the re-occurring acts of violence against women. The article itself is very detailed with regard to what South Africa has attempted in trying to cure the illnesses of domestic violence however it refers to the reports that were produced by the government to the Beijing Platform of Action in 1999, outlining the mechanisms it had in place, but does not indicate what those mechanisms were, what has happened since 1999 and 2003 when this article was written, whether the situation subsided or escalated.

Govender further pointed out the problems that are facing South Africa with regard to violence, and one of the problems is the police officers. However the effect of poor statements that are taken down by police officers when victims report cases was not tackled in her article. Before a matter is brought to court, a docket is opened, a statement is taken, and the one important question is, is there a safeguard that when statements are taken, all the elements of the said crime of violence are made clear in the statement? This is also to avoid delays on matters and to ensure that the victims do not lose their confidence in the justice system and eventually withdraw cases.

Curran and Bonthuys<sup>16</sup> indicated that one of the shortfalls of the Domestic Violence Act is that it does not make a provision for the issuing of protection orders in traditional courts. Certain problems were identified as contributing to the continual existence of domestic violence in rural areas, which were the following:

- customary law is mainly applied in problems that arise from domestic relationships instead of the Domestic Violence Act itself;
- lack of education (most of the women are illiterate and therefore uninformed about their rights);
- limited or no support by their own families and the community as a whole; and

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<sup>14</sup> Artz L (2011) 'Fear or failure: Why victims of domestic violence retract from the criminal justice process' SA Crime Quarterly 37.

<sup>15</sup> (2003) 19 SA Journal on Human Rights 663.

<sup>16</sup> Curran E & Bonthuys E " Customary Law and Domestic Violence in rural South African communities"(2005) 21 SAJHR 607.

- fear of victimization.

The article is very detailed in breaking down the roots of the problems of domestic violence, but it lacks in that it does not provide solutions to the problems it points out. The article focuses more on the victims, and seems to forget to pay attention to officials that are assigned to secure the rights of the victims i.e. officials that get first-hand exposure to the problems, and whether they are doing their best in dealing with the domestic violence, or suitably trained to be of assistance to the victims. Thirdly, the article does acknowledge that customary law is mainly applied and that in most instances it does not seem to be affording women the protection that they deserve, but it does not say as to whether there is no way that traditionalists and community leaders can be made part of the courts. This dissertation disagrees with the authors, in stating that solutions to domestic violence in rural areas should be based on progressive rules of living customary law other than the rules derived from the legislation. There has to be consistency, in that law cannot always be adjusted to suit every single person's needs. Codified law has to be applied nationally to issues that deal with domestic violence in every material aspect.

This study however applauds the article for recognizing that women are strong and resilient species in that throughout the years they have shown to be fighting their way to the solution, as seen through the court cases<sup>17</sup>, this creates room for a positive outcome in the future.

In a research article of Mogale S et al,<sup>18</sup> there are limitations and gaps that are identified in the Act as well as the Criminal Law (Sexual Offense and Related Matters) Act No 32 of 2007. The said limitations are grouped into four themes :(1) governance and legal responsibilities, (2) public agenda and considerations, (3) prevailing culture and attitudes, and (4) ethical issues concerning impact or effectiveness and evaluations or research.

Similarly to the article by Govender, Mogale S et al acknowledges that culture and society have an influence on violence against women. Unlike Govender, this article has clearly scrutinised the Act and made a finding of what the Act lacks, in that it does not take into account the cultural factor, and does not deal with the issue of how cultural and social influences can be dealt with in order to deal with violence against women.

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<sup>17</sup> S v Mvamvu. An unreported Supreme Court of Appeal judgement case no 350/2003 delivered on 29<sup>th</sup> September 2004; Bhe v magistrate Khayelitsha 2004 (1) BCLR 27 (C).

<sup>18</sup> Mogale S et al : Violence Against Women in South Africa: policy Position and Recommendations, 2012.

The article acknowledges that the government has tried to accept and recognise the “previously swept under the carpet” violence against women. The government has even come up with a new portfolio of the Ministry for Women, Children and People with Disabilities. The article makes a few suggestions such as the involvement of the Minister of this Portfolio together with the government of the general public and other stakeholders in order to establish what is preventing the effectiveness of the Act. This dissertation is in full agreement with the article, in the gaps that it has identified as well as the recommendations it suggests.

A lot of other writers are referred to in the dissertation, such as Hunter,<sup>19</sup> who discusses how legislation can end violence against women. One of the important points that he makes is that although law is a valuable source to bring about social change, however be that as it may, when legislation comes into effect, it focuses on the transgressions of the past, and does not necessarily prevent the perpetrators from future unlawful conducts. This study is however of the view that legislation is not good enough without informed and committed action, and further that the Act might be lacking in some aspects, but does not lack in a disastrous manner for it to be unable to prevent the occurrence of further occurrence of domestic violence.

In her book on *Domestic Violence and International law*, Meyersfeld<sup>20</sup> discusses the issue of prevalence of domestic violence in states and introduces her concept of systemic intimate violence. She does this by focusing on international law and its sources. Furthermore she asks the question of whether these sources prohibit domestic violence, and if they do, can it be said that the right not to be subjected to domestic violence is international and can thus be referred to as a customary international law seeing that many states recognise the right not to be subjected to domestic violence. She looks at the elements of customary international law and also the different approaches that can be used for a right to fall under customary international law, and concludes that based on the rapid response by a lot of states to prohibit domestic violence, domestic violence prohibition does fall under customary international law, although there has to be development in this aspect. This study totally agrees with her in this regard.

She further explores the concept of systemic intimate violence, what it comprises of and the consequences thereof. She makes very detailed recommendations of how systemic intimate violence can be prohibited and how the skills of state officials who are entrusted with the obligation to protect victims of domestic violence can be improved.

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<sup>19</sup> Hunter C(2006) *The Master’s tools Revisited: Can law contribute to ending violence against women*, vol 37, 57-68.

<sup>20</sup> Meyersfeld B(2010) *Domestic Violence and International law*: Hart Publishers.

Can the state be held responsible, and what are the obligations that the state is responsible for? And further, is there value in the systemic intimate violence concept being applied internationally? These are just some of the questions she asks. Her book makes an analysis of the shortcomings in respect of how the issue of domestic violence is implemented and makes a conclusion that despite the shortcomings, there will be a solution regarding systemic intimate violence and state conduct.

This study will be applying her theories, approaches, and recommendations in this dissertation to make a finding on the shortcomings of the Domestic Violence Act and the recommendations on how they can be rectified.

## CHAPTER TWO

### 2. The concept of Domestic Violence in South Africa

#### 2.1. A brief explanation of the notion of Domestic Violence

In order to be able to point out the shortcomings in the Domestic Violence Act, it is important to understand the concept itself, its origin and the rights that come with its being in existence, particularly where the victims are concerned, is there sufficient protection for the victims, and that, can be detected by analyzing the rights already in place.

Domestic violence takes place privately in that it occurs mostly behind closed doors. It is also known as family violence and can take the form of abuse of one partner against another partner that are in an intimate relationship with one another, people who are related to one another or between those that are living together in the same house, married or not and also people who are dating and not necessarily staying together. It is experienced by both men, women (whether in a heterosexual relationship or a homosexual relationship) and children and can take any form, verbal, physical, emotional, psychological, and sexual or can involve a property involving either one of the parties to which the victim has an interest. This description is a clear indication that domestic violence affects even the family unit. Even the courts agree. In *S v Baloyi*, the court said that:

“All crime has harsh effects on society. What distinguishes domestic violence is its hidden repetitive character and its immeasurable ripple effects on our society and, in particular on family life”<sup>21</sup>

The Domestic Violence Act defines domestic violence as “physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant’s residence without consent where the parties do not share the same residence or any other controlling or abusive behavior towards a complainant where such conduct harms or may cause imminent harm to the safety, health or wellbeing of the complainant”.<sup>22</sup>

Any victim of domestic violence may apply for a protection order as prescribed for in the Act,<sup>23</sup> provided there is a domestic relationship between the applicant and the respondent. The Act defines a domestic relationship in section 1 as being a relationship between the complainant and the respondent in any of the following ways: “

- (a) they are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating, or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) they share or recently shared the same residence.”

## **2.2. The origin of the Domestic Violence Act**

Prior to 1990, the preventative measures that were put in place to deal with the issue of domestic violence were not beneficial to the poor who did not have access to the courts nor the financial means to appear in court. Women either had to go to the High Court at a high monetary cost or to the local or magistrates’ court to obtain either a peace order or an interdict. The application could be equated to instances where one is being

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<sup>21</sup> S v Baloyi and others (CCT29/99) [1999] ZACC19, 2000 (1) BCLR 86 par 11.

<sup>22</sup> Section 1 of the Domestic Violence Act 116 of 1998.

<sup>23</sup> Section 4(1) of the Domestic Violence Act 116 of 1998.

bothered by the loud noise of neighbours having a party or the neighbours' dog barking loudly, this is indicative of the small amount of weight that was placed around the issue of domestic violence.<sup>24</sup>

In 1993, as a result of the pressure from the activism around gender issues, the apartheid regime came up with the Prevention of Family Violence Act<sup>25</sup>. The Act was passed hastily and criticism arose that the National Party, which was the ruling party at the time, was being opportunist simply because it was facing the first democratic elections, and was hoping to save its face.<sup>26</sup> The Act was criticized for a number of issues including but not limited to, the provision of inadequate protection as a result of its narrow definition of domestic violence, the minimal protection that it afforded in that it did not apply to people who were not in a marital relationship, for being unclear on the issue of circumstances under which respondents were excluded from seeing their kids and also from having access to their possessions, and also for violating on the basic principle of *audi alteram partem* rule. It was however praised for recognizing marital rape.<sup>27</sup>

The Domestic Violence Act came into existence to cure the shortcomings in the Prevention of Family Violence Act. It was passed in 1998, and came into operation on the 15<sup>th</sup> December 1999. It came into effect to also bring the legislation in line with the final Constitution of South Africa. Certain provisions in the Constitution of South Africa are expressly specified in the Act as being taken into account in coming to the protection from domestic violence, such as the right to equality, freedom and security.<sup>28</sup> Similarly to the previous Act i.e. the Protection of Family Violence Act 133 of 1993, the Domestic Violence Act took into account South Africa's international obligation under the United Nations Convention on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child, and it is my opinion that the ratification and the acknowledgement of these treaties has to be evident in the provisions in the legislation so long as the ratification is consistent with the Constitution of South Africa.

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<sup>24</sup> "Domestic Violence Act Implementation: 10 year review by Tshwaranang Legal Advocacy Programme" < <https://pmg.org.za/committee-meeting/10786> (accessed on 02 September 2015).

<sup>25</sup> Prevention of Family Violence Act 113 of 1993.

<sup>26</sup> Usdin et al "*The value of advocacy in Promoting Social Change: Implementing the New Domestic Violence Act in South Africa* (2000) 8 Reproductive Health Matters 56.

<sup>27</sup> South African Law Commission on Research Paper on Domestic Violence (1999) Report Pretoria: Government Printer.

<sup>28</sup> The Preamble of the Domestic Violence Act.

### 2.3. Rights afforded to the complainant by the Domestic Violence Act

The Act provides for protection from domestic violence by means of a protection order that is issued against the perpetrator.<sup>29</sup> The victim is protected from physical, sexual, emotional, verbal, psychological and economical abuse, intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent, where the parties do not share the same residence or 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.<sup>30</sup> All this protection is offered where there is a domestic relationship between the victim and the perpetrator.

The victim has the right to be assisted by any member of the SAPS, at the scene of the incident of domestic violence, or as soon as the matter is reported. The SAPS member must do the following:

- (a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment
- (b) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and
- (c) if it is reasonably possible to do so, explain to the complainant the content of such notice in terms of the Act and the right to lodge a criminal complaint, if applicable.<sup>31</sup>

Any complainant may in the prescribed manner apply for a protection order.<sup>32</sup> In cases whereby the complainant is not represented by a legal representative, the victim has the right to be informed of the relief available to her and also of the right to lodge a criminal complaint against the perpetrator if a criminal offence has been committed by the respondent.<sup>33</sup> Further on, the victim has a right for an application to be brought on behalf of the victim, that is in cases where the victim is a minor, mentally retarded, unconscious or a person whom the court is satisfied that will be unable to provide the required consent.<sup>34</sup> Despite the provisions of any other law, any minor or any other person may on behalf of a minor apply to the court for a protection order without the assistance of the parent, guardian of the minor, or the assistance of any other person.<sup>35</sup>

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<sup>29</sup> Section 4 and 5 of the Domestic Violence Act 116 of 1998.

<sup>30</sup> Section 1 of the Domestic Violence Act 116 of 1998.

<sup>31</sup> Section 2 of the Domestic Violence Act 116 of 1998.

<sup>32</sup> Section 4(1) of the Domestic Violence Act of 1998.

<sup>33</sup> Section 4(2) of the Domestic Violence Act 116 of 1998.

<sup>34</sup> Section 4(3) of the Domestic Violence Act 116 of 1998.

<sup>35</sup> Section 4 (4) of the Domestic Violence Act 116 of 1998.



The victim has a right to bring forth an application for a protection order outside of court hours, if the court is satisfied that the complainant may suffer undue hardship.<sup>36</sup> The complainant may apply for the protection order to be set aside or for the conditions to be varied.<sup>37</sup> The applicant (as well as the respondent) has a right to bring forth additional evidence which can be oral evidence or may in the form of an affidavit before the court, and the court may consider such evidence.<sup>38</sup> This right of the respondent to be able to bring forth evidence as well is an indication that the rights of the respondent also have to be observed and be taken into account. The rights of the respondent are just as important as those of the victim, and that was the reason behind the application by the attorneys that the principle of *audi alteram partem* rule has been taken into account during this process. One can therefore assume that it is for this reason that the outcome of the Project Committee report which was the Draft Bill, took into account the rights of the perpetrator.

The respondent has a right to appear before the court and submit reasons why the protection order should not be issued.<sup>39</sup> This is where the court gets to hear the other side which is that of the perpetrator. The respondent has to be served with the record of any evidence as well as the interim protection order in the application by the victim<sup>40</sup>, alternatively, the clerk of the court may serve the certified copies and notify the respondent to show cause on the return date why the protection order should not be made final.<sup>41</sup> The interim order is not enforceable until it has been served on the respondent.<sup>42</sup> If the respondent fails to appear before the court, and there was proper service then the court has to issue the protection order and make it final, provided that there is sufficient evidence before it that the respondent has committed an act of domestic violence.<sup>43</sup>

From the above one can see that the legislation is accommodating to all parties concerned regarding their rights. However the question still arises whether in fact all rights have been observed particularly where the rights and protection of the victims are concerned.

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<sup>36</sup> Section 4(5) of the Domestic Violence Act 116 of 1998.

<sup>37</sup> Section 10(1) of the Domestic Violence Act 116 of 1998.

<sup>38</sup> Section 5 (1) of the Domestic Violence Act 116 of 1998.

<sup>39</sup> Section 5 (3)(a) of the Domestic Violence Act 116 of 1998.

<sup>40</sup> Section 5 (3)(b) of the Domestic Violence Act 116 of 1998.

<sup>41</sup> Section 5 (4) of the Domestic Violence Act 116 of 1998.

<sup>42</sup> Section 5(6) of the Domestic Violence Act 116 of 1998.

<sup>43</sup> Section 6 (1) of the Domestic Violence Act 116 of 1998.

## CHAPTER 3

### 3. South African Law on domestic violence and international law

#### 3.1. The relationship between South African law and International law on domestic violence

The Constitution is the binding law in South Africa, and it imposes obligations on the state<sup>44</sup> to respect the rights of its citizens which are enshrined in Chapter 2 of the Constitution. This fact is emphasised in the case of *S v Baloyi* where the Constitutional Court held that “the Constitution imposes a direct obligation on the state to protect the rights of all persons to be free from domestic violence”<sup>45</sup>. It is the same Constitution that provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law<sup>46</sup> and may consider foreign law<sup>47</sup> and further that the courts when interpreting any legislation must prefer the interpretation that is consistent with international law.<sup>48</sup> This was emphasised in the case of *Carmichelle v Minister of Safety and Security and Another* where the Constitutional Court held that the state is obliged by the Constitution and international law to prohibit gender based discrimination that has an effect of impairing women from enjoying their fundamental rights and freedoms and that the state must take reasonable and appropriate measures to safeguard those rights<sup>49</sup>. It is therefore of great interest that the Constitution encourages the observance of international law in their legislation, and also encourages the state to protect the rights in the Bill of Rights.

Internationally, article 38(1) of the Statute of the International Court of Justice provides that in deciding cases, the courts should take into account international law, which will be in the form of conventions that have been ratified by the said states, international customs generally accepted as law, the general principles of law as recognised by

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<sup>44</sup> Section 7(2) of the Constitution of the Republic of South Africa provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>45</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 11.

<sup>46</sup> Section 39 (1) (b) of the Constitution of South Africa, 1996.

<sup>47</sup> Section 39 (1) (c) of the Constitution of South Africa, 1996.

<sup>48</sup> Section 233 of the Constitution of South Africa, 1996.

<sup>49</sup> *Carmichelle v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) par 52.

civilized nations as well as the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.<sup>50</sup>

However, this seems not to be a reflection of all materials and forms of state practice that comprise the modern sources of international law anymore. Resolutions, declarations and statements of the UN Secretary General, the General Assembly and treaty bodies and the jurisprudence of regional courts are viewed as the modern sources of international law, or evidence of customary international law.<sup>51</sup> A brief discussion of the different sources and their position with regard to the issue of domestic violence will follow.

Although there is no hierarchy of sources of international law, treaties are seen to be the primary sources of international law. The most relevant treaty for the issue at hand is the Convention on the Elimination of Discrimination Against Women (CEDAW). CEDAW was adopted in 1979 and its main objective is the elimination of any form of discrimination against women. It sets out a common international standard that the states must follow. South Africa ratified the Convention in 1995 therefore the provisions of CEDAW are binding on it. Although the main objective of CEDAW is to combat discrimination against women, there is no provision in CEDAW that deals with violence against women. The omission of CEDAW to deal with the issue of domestic violence is remedied by the Declaration on the Elimination of Violence Against Women (DEVAW) which will be of relevance in this dissertation.

One other treaty that is of relevance is The Protocol to the African Charter on Human and People's Rights on Rights of Women in Africa, which is a treaty instrument that came into effect in November 2005. It is a regional treaty that is binding on states that have ratified it such as South Africa. African women are able to use the treaty to exercise their human rights. The aim of the Protocol is to eliminate every discrimination against women and to ensure the protection of the rights of women.

In addition to the above, there is The Handbook that was prepared by the Department of Economic and Social Affairs/ Division for the advancement of women. The book came about to improve on the existing laws on violence against women and to develop new laws. There are recommendations in the book which serve as a tool to support efforts to provide justice, support, protection and remedies to victims in such a way that it holds the perpetrators accountable. However the recommendations in the book, are not binding on any state, but as stated already, may be used as a tool.

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<sup>50</sup> Statute of the International Court of Justice.

<sup>51</sup> Meyersfeld B(2010) *Domestic Violence and International law*: Hart Publishers 2.

In the Handbook, there is a call for the enactment in legislation of broad definitions of all forms of violence against women in accordance with international human rights standards, and the book also provides specific recommendations as to how legislations should define domestic violence and sexual violence. It provides States with guidance of how legislation pertaining to protection orders has to be legislated.

Despite this book being available, a lot of states throughout the world still fail to fulfill their international and domestic obligations to combat domestic violence.

### **3.2. The Domestic Violence Act in comparison to international law**

As has been noted above, that there are treaties and conventions in place that South Africa has ratified, this dissertation seeks to find out if the ratifications are evident in the domestic legislation. The said treaties and conventions will be used as a measure to compare South Africa's compliance and, the rest of this section is dedicated to making that comparison which will be done in accordance with the criteria compiled from concepts contained in these treaties and conventions.

#### **3.2.1. Express protection of women against violence**

The Protocol recognises in its preamble that women are the most vulnerable to domestic violence and goes as far as providing the definition for women. In the definitions, harmful practices means all behaviour, attitudes and/ or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.<sup>52</sup> Women are defined as persons of a female gender including girls.<sup>53</sup>

It further does not refer to domestic violence but rather to violence against women, which is applicable to even the issue of violence that arises out of a domestic relationship.

Article 2(2) provides that the states shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

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<sup>52</sup> Article 1 (g) of the Protocol to the African Charter on Human and People's rights on rights of women in Africa.

<sup>53</sup> Article 1 (k) of the Protocol to the African Charter on Human and People's rights on rights of women in Africa.

It is provided in article 3(4) that the states shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

Article 4 is of paramount importance to the issue of domestic violence as it provides in subsection 1 that every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited. Article 4(2) states that state parties shall take appropriate and effective measures to:

- (a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
- (b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
- (c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
- (d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
- (e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women's victims;
- (f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
- (g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
- (h) prohibit all medical or scientific experiments on women without their informed consent
- (i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women
- (j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women.
- (k) ensure that women and men enjoy equal rights in terms of access to refugee status, determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents

Article 5 makes a provision of the elimination of harmful practices and it provides that state parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. Article 5(d) provides that state parties shall take all necessary legislative and other measures to eliminate such practices, including the protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

The DEVAW recognizes women as the main victims in domestic violence. In its Preamble it is stated that:

“Concerned that some groups of women such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence”.

The DEVAW also does not deal with the issue of domestic violence specifically, it deals with violence against women. Article 1<sup>54</sup>, 2<sup>55</sup> and Article 4 can be understood to be relevant to the issue of domestic violence.

The DEVAW provides in its article 1, 2 and 4 for elimination of violence against women. Article 1 specifically provides for gender-based violence. It is indicated in the article that violence against women, “is an act of violence that is gender-based”, this serves to confirm that violence is mainly aimed at women because they are of a specific gender.

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<sup>54</sup> Article 1 provides that : “for the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

<sup>55</sup> Article 2 provides that : “ Violence against women shall be understood to encompass, but not limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;  
(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;  
(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Article 4 provides that:

“States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

- (a) Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;
- (b) Refrain from engaging in violence against women;
- (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
- (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms
- (e) Consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by non-governmental organizations, particularly those concerned with the issue of violence against women;
- (f) Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;
- (g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;
- (h) Include in government budgets adequate resources for their activities related to the elimination of violence against women;
- (i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;
- (j) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the

- inferiority or superiority of either of the sexes and on stereotyped roles for men and women;
- (k) Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;
  - (l) Adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence;
  - (m) Include, in submitting reports as required under relevant human rights instruments of the United Nations, information pertaining to violence against women and measures taken to implement the present Declaration;
  - (n) Encourage the development of appropriate guidelines to assist in the implementation of the principles set forth in the present Declaration;
  - (o) Recognize the important role of the women's movement and non-governmental organizations worldwide in raising awareness and alleviating the problem of violence against women;
  - (p) Facilitate and enhance the work of the women's movement and non-governmental organizations and cooperate with them at local, national and regional levels;
  - (q) Encourage intergovernmental regional organizations of which they are members to include the elimination of violence against women in their programmes, as appropriate.”

The Handbook indicates summarily that violence against women is a manifestation of the unequal power of relations between men and women and a violation of women's human rights. It recognizes that violence against women is gender based.<sup>56</sup>

Prior to the passing of the Act, during the process of the drafting of the final report and the draft Bill by the SALRC, the University of the Western Cape Community Law Centre expressed the view that the definition of a domestic relationship is flawed in that its gender-neutrality overlooked the reality that the majority of the victims of domestic violence are women. They argued that this definition defeats the purpose of gender equality.<sup>57</sup>

It was said by the President of South Africa in the State of the Nations Address on the 13<sup>th</sup> February in 2014 that:

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<sup>56</sup>Department of Economic and Social Affairs/ Division for the Advancement of Women: *Handbook for Legislation on Violence Against Women* (2010) New York 13.

<sup>57</sup> “Research paper on Domestic Violence.” South African law Commission. April 1999. para 5.2.31



“One of the key focus areas is to eradicate violence against women and children. We have introduced a number of measures to respond to this challenge. These include the reopening of the Family Violence, Child Protection and Sexual Offences Units as well as the Sexual Offences Courts. We thank the many NGOs that promote the rights of women and children who contribute positively to this important work”.<sup>58</sup>

The averments by the President serve as an indication that indeed, the most vulnerable people included women and children. The same sentiments are shared by the women’s league of the President. In their discussion paper on gender based violence, it is pointed out that there violence is indeed stereotyped, and that women are at the bitter end of violence due to their gender, the prescribed behaviours, norms and attitudes. Violence against women is as a result of hierarchies and structural inequalities that are caused by belief in systems, cultural norms and socialization processes.<sup>59</sup> Victims do not obtain adequate protection due to certain cultural and religious perspectives and lack of public awareness and involvement.<sup>60</sup>

The view by the Women’s League is precisely why domestic violence is gender based and the reason behind the provision of article 4(d) of the Protocol, and should be sufficient reason for the express acknowledgement of domestic violence being gender based. South Africa has not acted adequately to modify the attitudes of its patriarchal society especially in the area of violence against women. In the case of violence against women, there has been no substantive action addressing issues of stereotyping and there has been no attempt of dealing with the underlying frustrations of both men and women.<sup>61</sup> I am of the view that the only way this can be done is through the legislation. While domestic violence is not exclusively a female problem, it is important to recognize that women form the majority of domestic violence victims, in that way, there will be promotion on where the focus has to be maximized.

### **3.2.2. Express protection of elderly people, people with disabilities and children**

Article 22 and Article 23 of the Protocol are undertakings by state parties to protect elderly women and women with disabilities from violence and it is provided in article 22(b) that the state parties undertake to ensure the right of elderly women to freedom

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<sup>58</sup> [www.google.com](http://www.google.com). Date of access [ 2015/08/06].

<sup>59</sup> <http://www.anc.org.za/docs/discus/2014/genderz.pdf>. Date of access [ 2015/10/12].

<sup>60</sup> Kruger HB “Addressing *domestic violence: to what extent does the law provide effective measures?*” (2004) 29(1) Journal for Juridical Science 171.

<sup>61</sup> Govender M “*Domestic Violence: Is South Africa meeting its obligations in terms of the Women’s Convention?*”(2003) 19 SAJHR 677.

from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity and article 23 (a) provides that the state parties undertake to ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

In its Preamble DEVAW recognizes women with disabilities, elderly women form part of the most vulnerable people. On the other hand article 5 (d)<sup>62</sup> read with article 22<sup>63</sup> and 23<sup>64</sup> of the Protocol provides for protection of elderly women or women who are disabled from all other forms of violence, abuse and intolerance.

One of the crucial aspects that were discussed by the Project Committee was the fact that the Prevention of Family Violence Act<sup>65</sup> did not expressly protect elderly people,<sup>66</sup> the children<sup>67</sup> and disabled people.<sup>68</sup> Despite the fact that the Act came into operation subsequent to the suggestions that were made during the Project Committee discussion, and also subsequent to the DEVAW existence, elderly women, disabled women and women in general are still not expressly protected by the Act.

In a research conducted by the Gender Advocacy Project and Tshwaranang<sup>69</sup>, it was found that people with disabilities were underutilizing the Act. This article finds that if the Act specifically expresses that the objective is also to protect its disabled citizens, then the expression will bring about improvement and encouragement to disabled people to

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<sup>62</sup> Article 5 provides that state parties shall prohibit and condemn all forms of harmful practices which negatively affects the human rights of women and which are contrary to recognized international standards. States parties shall take all necessary legislative and other measures to eliminate such practice including:

(d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

<sup>63</sup> Article 22 provides that the state parties undertake to:

- (a) Provide protection to elderly women and take specific measure commensurate with their physical, economic and social needs as well as their access to employment and professional training;
- (b) To ensure the right of elderly women to freedom from violence including sexual abuse, discrimination based on age and the right to be treated with dignity.

<sup>64</sup> Article 23 provides that the state parties undertake to:

- (a) Ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision making;
- (b) Ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

<sup>65</sup> Prevention of Family Violence Act 113 Of 1993.

<sup>66</sup> "Research Paper on Domestic Violence." South African law Commission. April 1999. Para 5.2.33.

<sup>67</sup> "Research Paper on Domestic Violence." South African law Commission. April 1999. Para 5.2.35.

<sup>68</sup> "Research Paper on Domestic Violence." South African law Commission. April 1999. Para 5.2.43.

<sup>69</sup> "Domestic Violence Act Implementation: 10 year review by Tshwaranang Legal Advocacy Programme" < <https://pmg.org.za/committee-meeting/10786> (accessed on 02 September 2015).

utilize the Act. It is further my opinion these are not just women, but they are women with special needs who need special protection.

It was submitted by the Project Committee that there should be a comprehensive inclusion of all those exposed to risk of domestic violence. Although it is conceded that a broad definition of the class of persons eligible to seek protection could be criticised for including relationships that fall outside the “domestic” realm. However, since the aim is to provide protection from violence, a definition which is criticised for being too broad is preferable to a definition that is criticised for being too narrow. If a person who arguably falls outside the domestic realm is protected by invoking the provisions of domestic violence legislation, it would be a small price to pay, if any, for the assurance that victims who ought to qualify for the intended protection will at least be entitled to apply for relief. Vulnerable people, such as children, the disabled and the elderly ought to be offered special protection.<sup>70</sup>

One of the domestic relationships that the Act recognises is the one between parents and their children or people who have a parental responsibility towards the child.<sup>71</sup> From this definition one can make a deduction that the Act recognises that domestic violence can be inflicted by parents on the child. However, the same Act goes on to limit the child by indicating that an application may be brought on behalf of a child without the written consent of the child. South Africa is party to the United Nations Convention on the Rights of the Child. The treaty provides that in all the actions the best interest of the child shall be a primary consideration.<sup>72</sup> My view is therefore that the Act should be clear in the sense that the child should be free to bring forth an application, with or without assistance, it cannot be in the interest of the child, if bringing forth the application has to depend on being assisted as it is provided for by the Act.<sup>73</sup>

Research has shown that children are silent parties when it comes to domestic violence, and are either sometimes victims to domestic violence or witnesses domestic violence. As a result, they even develop mechanisms of how to deal with domestic violence, and parents are unable to deal with such symptoms as they themselves could be subjected to domestic violence.<sup>74</sup> It is my view therefore that bringing down the curtain that children may only apply for protection orders if assisted, would bring about a significant change.

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<sup>70</sup>“ Research Paper on Domestic Violence.” South African law Commission. April 1999. Para 5.2.42.

<sup>71</sup> Section 1 of the Domestic Violence Act 116 of 1998.

<sup>72</sup> Article 3 of the Convention on the Rights of the Child.

<sup>73</sup> Section 4 (3) of the Domestic Violence Act 116 of 1998.

<sup>74</sup> Matthews S et al (2001) “Combining Stories and Numbers: An analysis of the Impact of the Domestic Violence Act (No 116 of 1998) on Women” 35.

### 3.2.3. Protection against threat to economic abuse

The Protocol defines violence against women as all acts perpetrated against women which cause or could cause them physical, sexual, psychological and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.<sup>75</sup>

The Protocol provides in its Article 1(j) that violence includes even the threat to take such acts. The Act does not contain the provision of threat for all its forms of domestic violence. It does not protect threat to economic abuse. This means that the threat to deprive the victim of finances is not seen as an offence and that it will take actual deprivation of financial resources before the victim can be protected. The failure of the Act to protect this right can also be seen from the definition of the word respondent in the Act, the respondent is defined as any person who is or has been in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant<sup>76</sup> as opposed to being any person who commits or threatens to commit any such conduct defined as being domestic violence. Women stay in abusive relationship despite the Act stating that it protects them against economic abuse,<sup>77</sup> what more if they are being threatened.

### 3.2.4. Recognition of domestic violence as an offence

The Handbook recommends that violations of protection orders have to be criminalized, in that domestic violence has to be reported on as a crime on its own, not falling under any other crime.<sup>78</sup>

South Africa does not recognize domestic violence as a crime on its own. Domestic violence is reported under other crimes such as assault, assault with the intent to do

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<sup>75</sup> Article 1 (j) of the Protocol to the African Charter on Human and People's rights on rights of women in Africa.

<sup>76</sup> Section 1 of the Domestic Violence Act 116 of 1998.

<sup>77</sup> Morei N "Domestic Violence in South Africa: Women and Children Under Siege" (2014) 5 Mediterranean Journal of Social Sciences 938.

<sup>78</sup> Department of Economic and Social Affairs/ Division for the Advancement of Women: *Handbook for Legislation on Violence Against Women* (2010) New York 50.

grievous bodily harm, sexual assault and malicious damage to property.<sup>79</sup> It is further required of the South African Police Service to submit six monthly reports to parliament indicating performance by the police and actions taken against them for non-compliance.<sup>80</sup> However, according to the SAPS Factsheet 2013/2014 at the time of the release of these statistics, the SAPS was already 6 months late in the submission of its report. This is in contrast with the provision by article 4(m) of DEVAW as statistics in relation to domestic violence as a crime are not compiled, in that way the prevalence and seriousness of the crime cannot be properly monitored, and seeing that the police have been entrusted with being at the forefront in ensuring that the Act is adequately implemented, the measures taken by the police can therefore not be monitored.

This undermines the purpose and relevance of the Act, which came into effect as a result of the alarmingly high rate of domestic violence. If domestic violence is not regarded as a crime, then why was it necessary to have an Act that provides for it? Also, if reports are furnished late, it means the seriousness of the prevalence of the crime does not get the serious and immediate attention deserved. This can also mean that only the SAPS would know about the statistics of the domestic violence, and not the public of South Africa, thus being in contravention of article 4(k) of DEVAW.

In an article published in The Times newspaper dated the 15 June 2015 researcher Lisa Vetten from the Wits Institute expressed her concerns about the SAPS not being compliant to the Act in that the national police commissioner had failed for the past two years to submit reports on domestic violence to parliament. She expressed her concerns and said that the SAPS were “breaking the law”.<sup>81</sup>

In a journal article by Bendall C<sup>82</sup>, she indicates that women still choose not to report domestic violence due to the fact that they still see domestic violence as a private matter despite measures that have been put in place. This may mean that the failure by

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<sup>79</sup> <https://www.issafrica.org/uploads/PolBrief71.pdf>

○ Cached

<sup>80</sup> Usdin et al “*The value of advocacy in Promoting Social Change: Implementing the New Domestic Violence Act in South Africa* (2000) 8 *Reproductive Health Matters* 57.

<sup>81</sup> <http://www.timeslive.co.za/thetimes/2015/06/15/Police-failing-to-enforce-Domestic-Violence-Act>. Information can be accessed through [www.google.com](http://www.google.com).

<sup>82</sup> Bendall C (2010) *The domestic violence epidemic in South Africa: Legal and Practical remedies Women’s studies* 39: 2 *Bristol University* 115.

the system to recognize domestic violence as a crime, does not erase the mentality on women that it is still a private matter.

Although some may argue that an assault by a husband on his wife is an assault like any other, it is my view that the prevalence of this offence warrants its recognition as a crime on its own, and in that way domestic violence will receive the attention, focus and monitoring it deserves.

### **3.2.5. Recognition that domestic violence affects other rights**

The Preamble of the Protocol takes into account the right to life, health, dignity, physical integrity, security, health and reproductive rights in conjunction with the right not to be subjected to domestic violence, whereas the preamble of the Act takes into account only the right to equality, freedom and security. Although this would not necessarily mean that the other rights would be overlooked by the courts as having been violated in the offence of domestic violence, my view is a broader legislation is better than a narrow one. Domestic violence does have health implications and some of them can be long term.<sup>83</sup>

### **3.2.6. Protection of victims from being subjected to domestic violence at places they frequent**

One of the recommendations in the Handbook is that legislation should provide that protection orders contain the following measures: Order the perpetrator to stay a specified distance away from the victim and her children (and other people if appropriate) and the places that they frequent<sup>84</sup>. It is my view that the victim has to be afforded maximum protection and be at liberty to go to any place without fear of her rights being violated.

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<sup>83</sup>Govender M “*Domestic Violence: Is South Africa meeting its obligations in terms of the Women’s Convention?*”(2003) 19 SAJHR 664.

<sup>84</sup> Department of Economic and Social Affairs/ Division for the Advancement of Women: *Handbook for Legislation on Violence Against Women* (2010) New York 46.

### 3.2.7. Disarming of the perpetrator

The Handbook recommends that the legislations prohibit the perpetrator from purchasing, being in possession of or using a firearm or any weapon as specified by the court<sup>85</sup>.

The Act deals with the issue of arms and dangerous weapons in section 9 and it does not prohibit the perpetrator from purchasing a firearm. The Act focuses only on the firearm(s) that the perpetrator already owns at the time when the matter appears before court, and does not protect the victim from the possibility of the perpetrator obtaining a firearm later and using it on the victim. This omission is a huge risk on the life of the complainant's life, and probably of that of the victim's children if any.

Section 9(3) of the Act deals with seizure of a dangerous weapon and it provides that:

any dangerous weapon seized in terms of subsection (1)

(a) must be given a distinctive identification mark and retained in police custody for such period of time as the court may determine; and

(b) shall only be returned to the respondent, or, if the respondent is not the owner of the dangerous weapon, to the owner thereof, by order of the court and on such conditions as the court may determine: Provided that (i) if in the opinion of the court, the value of the dangerous weapon so seized is below R200.

Research has shown that the use of weapons intensify as victims attempt to seek help from the outside.<sup>86</sup> It is my submission that a dangerous weapon does not have to have monetary value attached to it for the courts to decide that it would be safe for the perpetrator to be in possession of it. Where the life of a human being is concerned, there should under no circumstances be any weapon whatsoever that the perpetrator is allowed to be in possession of. The fact that the perpetrator had to be arrested because there was suspicion of him having committed the offence that has an element of violence is sufficient reason not to trust the perpetrator with any weapon whatsoever.

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<sup>85</sup> Department of Economic and Social Affairs/ Division for the Advancement of Women: *Handbook for Legislation on Violence Against Women* (2010) New York 46.

<sup>86</sup> Artz L (2011) "Fear or Failure?: Why victims of domestic violence retract from the criminal justice process" SA Crime Quarterly 37.

### 3.2.8. Protection of the victim from giving evidence in court

For a protection order to be issued, live (oral) or viva voce testimony, sworn statement or affidavit of the victim should be sufficient and no further independent evidence should be required.<sup>87</sup>

However section 6 of the Act provides that:

- (1) If the respondent does not appear on a return date contemplated in section 5(3) or (4) and if the court is satisfied that:
  - (a) Proper service has been effected on the respondent and
  - (b) The application contains prima facie evidence that the respondent has committed or is committing an act of domestic violencethe court must issue a protection order in the prescribed form
- (2) if the respondent appears on the return date in order to oppose the issuing of a protection order, the court must proceed to hear the matter and-
  - (a) Consider any evidence previously received in terms of section 5(1);<sup>88</sup> and
  - (b) Consider such further affidavits or oral evidence as it may direct, which shall form part of the record of the proceedings.
- (3) The court may on its own accord or on the request of the complainant, if it is of the opinion that it is just and desirable to do so, order that in the examination of the witnesses, including the complainant, a respondent who is not represented by a legal representative-
  - (a) Is not entitled to cross-examine directly a person who is in a domestic relationship with the respondent; and
  - (b) shall put any question to such witness by stating the question to the court, and the court is to repeat the question accurately to the respondent.
- (4) The court must after a hearing as contemplated in subsection (2) issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.

In terms of the provisions of section 6(1) to 6(4) of the Act, one can draw an inference that it is always expected of the complainant to be in court at all times. There is no provision for a sworn affidavit being admitted as the only and the most sufficient evidence which can assist the court in coming to a finding. The Act only provides protection on the victim in instances where the respondent is absent in court. This compromises the safety of the complainant as she always has to be present in court to face the perpetrator that she might be running away from and is in no doubt scared of.

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<sup>87</sup> Department of Economic and Social Affairs/ Division for the Advancement of Women: *Handbook for Legislation on Violence Against Women* (2010) New York 48.

<sup>88</sup> Section 5(1) provides that the court must as soon as is reasonably possible consider an application submitted to it in terms of section 4(7) and may for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings. Section 4(7) provides for application and affidavits that are lodged with the clerk of the court, who submits them to the court.



### 3.2.9. Holding proceedings in camera

During the SALRC's processing of comments that was carried out in April 1999, one of the evaluations by the committee was that proceedings should be held behind closed doors, except in those circumstances where the court on good cause directs otherwise. The main purpose of this is to protect the interests of victims of domestic violence.<sup>89</sup> The Act however, does not make a provision for the proceedings to be held in camera. This could be discouraging the victims as they may feel that their privacy is being put out to the public. Due to the nature of the domestic violence, certain matters cannot be discussed in full public view. The failure of the Act to make such a provision is costly to the victims in that victims are expected to narrate their private and sensitive matters of their lives in full view of the public.

## CHAPTER 4

### 4. Conclusion and Recommendations

There is no doubt that the high rate of domestic violence, is an issue which demands the attention of law-makers. As it has been indicated by Hunter, law is a valuable source that can bring about social change<sup>90</sup>. It is therefore important that when victims turn to the law for assistance, the law should be in a state that it will render assistance to the victims. The South African Law Reform Commission (SALRC) has been requested to look into the issue, and at the time of submission of this article, there had not been any response. We can hope that if there is progress in the future, the shortcomings that existed even prior to the passing of the Domestic Violence Act 116 of 1998 would be properly dealt with under no hasty situations. Subsequently it is the victims that have put their confidence in the law that suffer.

The Act came into effect in 1998, and according to the Human Rights Watch of 1995, it was indicated that South African women are likely to be the victims of domestic violence.<sup>91</sup> This article makes a conclusion that the Act needs to be amended, as per the comparisons done against the Act. The article used the Declaration on the Elimination of Violence Against Women (DEVAW), The Protocol to the African Charter on Human and People's Rights on Rights of Women in Africa and the Handbook for Legislation on Violence Against Women as measures to make a comparison of whether

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<sup>89</sup>"Research Paper on Domestic Violence." South African law Commission. April 1999. Para 6.6.7.

<sup>90</sup>Hunter C (2006) *The Master's tools Revisited: can law contribute to ending violence against women*, vol 37, 57-68.

<sup>91</sup>*Violence Against Women in South Africa- State Response to Domestic Violence and Rape*. New York: Human Rights Watch, 1995.44.

the Act is comprehensive and inclusive enough for it to be effective. It is my opinion that the Act is a good initiative by the government to fight domestic violence however, the existence of a legislation has to be backed up by its efficiency and effectiveness. This study recommends the following amendments to the Act:

- Domestic violence has to be gender sensitive. No doubt women, children, disabled and older people are the most vulnerable to domestic violence, therefore the Act has to be sensitive and express its protection towards the victims that need protection. The Act should not be gender blind to this. Domestic violence is no doubt a gender based crime.
- The prevalence of domestic violence should make it a necessity for it to be recognized as a crime on its own and not fall under the crimes of assault, assault with the intent to do grievous bodily harm, in that way statistics will be kept and monitored. This will also assist with regard to research to determine where there is need for improvement. The Act itself should therefore be amended in such a way that it stipulates that domestic violence is a crime on its own.
- The Act has to recognize threat of economic abuse. The Act has to be as comprehensive as it can be to ensure there is no room left for any type of violation that will subsequently result in domestic violence. It took attorneys for the previous Act to be amended, which was a time consuming exercise and had financial implications for the State, and that should not be the case now. In addition to the amendment of this, the definition of the word respondent should be amended to being any person who commits or threatens to commit any such conduct defined as being domestic violence. In this way, threat of any act of domestic violence will be covered in the definition as well.
- Subsequent to an application for a protection order, affidavits by the complainants should be allowed as evidence in certain circumstances, other than having a victim give testimony in court, in the presence of the perpetrator. Victims should be protected at all costs. The admission of affidavits as sufficient evidence for the courts to make a ruling on the application for a protection order, necessitates the training of officials who take down the statements, to avoid the necessity of oral evidence as a result of poor quality statements. The admissibility of an affidavit will also serve to preserve time for granting the protection order and also protect the victims.

- There should be provision for the courts to have discretions that safeguard against allowing perpetrators to purchase, sell, use or possess a firearm during and after the applications for protection orders. This can have dire consequences for the victims. No monetary value should be placed upon any dangerous weapon, perpetrators should be disarmed.
- Protection should be awarded to victims against perpetrators that can go to places that the victim frequents. That way the victim cannot feel under threat, cannot be home bound and the victim is not put at a risk of being persuaded by the perpetrator to withdraw the charges if the victim comes into contact with the perpetrator. The research conducted by Mosaic, a non-government organization and the Gender, Health and Justice Research Unit of the University of Cape Town in 2008/9 referred to in the literature review confirmed that victims sometimes withdrew cases because of the threats that they receive.
- The Act should further make a provision for children to be able to apply for protection orders without assistance since they also form part of the vulnerable groups. Children should be protected against domestic violence perpetrated by their parents, therefore their active engagement and involvement in the Act is necessary.

The high incidents of domestic violence oblige the government to take measures that are efficient. Much as this study acknowledges the contribution by the government to eliminate violence, the government has to observe its constitutional duties and duties placed by the international fundamental rights conventions and one of the ways of doing that is by way of legislation. It took a critical evaluation and assessment of the Act to realize the deficiencies in the Act, and the revelation has proven that the deficiencies can have dire consequences. My view is that the recommendations above should be implemented to bring about significant change and decrease in domestic violence.

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