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FINAL REPORT

Domestic Violence Act: Does it protect?

A review of literature surrounding the South African Domestic Violence Act focusing on the socio-economic and legal consequences of the legislation.

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Introduction

Violence against women and children has been an area of concern on the agenda of many developing countries. South Africa is rated as one of the countries with the highest incidence of domestic violence worldwide. Domestic violence in South Africa is regulated under the Domestic Violence Act (DVA) No. 116 of 1998. This law was created to give the victims of domestic violence the best possible assistance and protection. The DVA has come under heavy scrutiny due to its poor implementation and the recurring cases of domestic violence.

This report will present the literature which illustrates challenges with regard to the DVA. Its aim is to critically engage with the faults and gaps in the current legislation and make recommendations on how it can be improved. Additionally, this paper seeks to identify possible gaps in the research on domestic violence and ultimately to give effect to the desire to empower victims, especially women, through knowledge.

Methodology

The DVA, although theoretically sound, gives rise to a host of practical issues. It makes provision for protection orders and obliges the police to reasonably interfere in instances of domestic violence. What it fails to do is prescribe the ambit of reasonable interference and provide assistance for the interim period which lapses before the perpetrator is scheduled to be heard in court. The period is often uncertain and leaves the victim under the illusionary protection of a sheet of paper.

The practical inadequacies of the act are in need of remedy. The concept of domestic violence is laden with nuances which legislators seem to have been hesitant to expound on. Domestic violence is traditionally seen as an issue within the private 'domestic' environment. Interference is thus that much more complicated than if it were a threat to the public at large. It has been suggested that the main problem is that domestic violence is not a criminal offence in itself. The criminalization of domestic violence would mean that there would be harsher penalties for perpetrators which would in turn encourage a deterrence of such violence.

It is thus necessary that we focus on case studies of domestic violence so as to ascertain where reformed legislation would be able to remedy the gaps in the DVA as it stands. Furthermore, it is necessary to look critically at the DVA to draw insights into the processes that need to be complied with for the criminalization of such an offence.

Outline of Domestic Violence Act

The Domestic Violence Act specifies that a domestic relationship can be with anyone that you currently reside with or did in the past. It includes family members, intimate partners and others (Domestic Violence Act, No. 116 of 1998 [DVA], 1998: s1). The Act also highlights that the perpetrator of violence may be male or female. The DVA specifies that forms of violence include physical, sexual, emotional, economic, psychological and sexual abuse as well as intimidation, stalking, harassment and destruction of property (DVA, 1998: s1). A novel aspect of the DVA is the inclusion of individuals in same-sex relationships as opposed to focusing solely on those in heterosexual relationships.

Central to the DVA is the issuing of a protection order by the court against a perpetrator, which is outlined in Section 2. The complainant does not need to lay a criminal charge in order to get a protection order (Vetten, 2014). The complainant may wish to lay a charge as well as obtain a protection order. Since there is no crime termed domestic violence the complainant may also choose to lay criminal charge termed as 'assault' or 'attempt to do grievous bodily harm' (Vetten, 2014:2). The protection order ensures that the perpetrator of violence is arrested if there is an attempt of violence against the complainant (Naidoo, 2006). A third party is permitted to apply for a protection on behalf of a complainant as long as they have written consent, unless the individual is under 18 or mentally incapable of granting consent (DVA, 1998: s4:3). An interim order may be granted as a form of temporary protection before the final protection order is granted. In order for a final protection order to be granted, both parties must be present in court to provide the magistrate with sufficient information for a decision to be made (Naidoo, 2006). In the case that the respondent defaults and fails to appear in court, the case may be postponed to

ensure that they are given notice about the new court date (Naidoo, 2006). The respondent is not punished in any way for defaulting.

Section 2 of the DVA discusses the role that the South African Police Services (SAPS) play at an incident of domestic violence in informing a complainant of their rights. The police are also required by law to assist the complainant to find suitable shelter or medical assistance; serve the notice to the perpetrator to appear in court; remove weapons from the perpetrator and accompany the complainant to their house to remove personal items (Naidoo, 2006).

Section 7 of the Act explains that the order granted by the court prevents the perpetrator from, *inter alia*, entering the home or workplace of the complainant; committing an act of domestic violence against the complainant as well as arranging for another person to commit the act on their behalf. The perpetrator has the right to apply for a protection order which acts as a counter to the one previously issued (DVA, 1998: s7).

The extent of domestic violence in South Africa

Research reveals that it is difficult to get a fuller picture of the actual state of domestic violence from crime statistics (Vetten, 2005; Dissel & Ngubeni, 2003; Artz & Smythe, 2005). Some academics have begun to conduct research into the experiences of domestic violence in order to gather more information on how different women are faced with this issue. This research will be presented in this section.

In a study conducted by researchers at the University of Cape Town's Health Faculty set out to evaluate the implementation of the DVA five years since its introduction (Artz & Smythe, 2005). The research focused on farms in the Western Cape. In their analysis of protection orders, Artz and Smythe found that the applications were made mainly by married women against their husbands. 78% of the applications were made by women against men. An important finding presented by the researchers is that 14% of the applications were made by men against women; however, all of these applications were counter protection orders against their partner's original protection order (Artz & Smythe, 2005). This is consistent with findings from a study

by Parenzee et al. (2001). This finding alludes to one of the weaknesses of the DVA in the filing of counter protection orders which will be discussed in detail in the following section. Another finding from the research in Western Cape was that of 'structural dependency' (Artz & Smythe, 2005:205). The majority of female farm workers who were victims of domestic violence were afraid to involve the police because their employment was tied to the employment of the partners. This discourages women from applying for a protection order rendering the Act ineffective in this instance.

In another study which examined the implementation of the DVA using case files from the Johannesburg Family Court in 2004, found that in 30% of the cases the individuals concerned had a 'blood relationship' (Naidoo, 2006). Consistent with Artz & Smythe (2005), cases brought forward by women made up 70% of the sample. Only 4 out of the 32 cases in the research sample were granted final protection orders (Naidoo, 2006:85). The reason that protection orders were not granted in the other cases was by the default of at least one of the parties concerned.

There is no crime termed 'domestic violence', hence it is classified under other categories (Dissel & Ngubeni, 2003; Vetten, 2014). This makes it difficult to understand how extensive it has become in South Africa and how best it can be tackled. A study by a South African criminologist, Prinsloo (2007) aimed at obtaining more relevant information on domestic violence was conducted in the greater Johannesburg area. The main findings of the research highlighted the fact that many women are not familiar with legislation, in nearly half of the cases the matter was internally resolved and was not escalated to the police. In cases where the police were involved, the majority of victims reported that the police did not do enough to protect them (Prinsloo, 2007). This is concerning since Section 18 of the Act outlines the role of the SAPS officers very clearly. Another matter that is concerning from this particular study is the high number of cases that were not escalated to the police and in addition not recorded. This issue was highlighted by Vetten et. al (2009) in a case study of a rural community in Mpumalanga where out of 947 reports of intimate partner violence at a local police station only 6.7% were recorded as such in the statistics.

Major implementation issues

There is no argument that the DVA is a progressive form of legislation that has gone to great lengths to stipulate what constitutes domestic violence, domestic relationships and who has access to protection (Vetten, 2005). However there have been some gaps identified between what the Act sets out to do and what is actually happening. These shortcomings will be discussed in this section.

The role of the SAPS has been heavily scrutinised when it comes to the DVA. Several studies have focused on the failures of the police nationally (Matthews, 2012; Taranto et al., 2013; Vetten, 2014). Non-compliance was a major issue highlighted with regard to the reluctance of police officers to issue protection orders or make arrests (Taranto et. al., 2013). This means that justice is not served in these cases as the police are not fulfilling their duty as outlined in Section 2 of the Act. The discriminatory attitude of police officers was seen as a deterrent in reporting cases of domestic violence (Prinsloo, 2007). This relates to the lack of resources at police stations in failing to have victim friendly centres where trained officers are able to deal with cases in a friendly and helpful manner (Taranto et.al, 2013; Matthews, 2012). This is especially necessary when domestic violence occurs between same-sex partners. Naidu & Mkhize (2005) refer to the need for education in communities to make them aware that the law protects all individuals including those in same-sex relationships. Members of the LGBT community are often most vulnerable as they may not have equal access to protection due to the prejudiced perceptions of them by the police and medical professionals. Naidu & Mkhize (2005) allude to the fact that people with a homosexual orientation often experience violence from members of their own family and therefore need protection.

Artz and Smythe (2005) indicate the relationship between **economic repression** and domestic violence. Their findings highlighted that the Act does not fully recognise the effects and financial consequences suffered by victims of economic forms of abuse. This issue can be linked to the fact that the extent of domestic violence is not well known in terms of actual statistics, causes and experiences of those that have filed protection orders. The issue of access to justice is a pertinent one as it relates to those most vulnerable to violence (Vetten, 2005). This access is

encouraged by factors including but not limited to cheap and available transport services, speedy response of police and emergency services, and support structures in the form of accommodation and advice (Artz, 1999 as cited in Vetten, 2005:6). To this end Vetten (2005:11) said the following with regard to other forms of support that are required in order for legislation to work effectively: 'Laws cannot function in isolation from the other essential social support required by abused women.'

Vetten (2005) discusses the **lack of resources** in the criminal justice system as a whole. This includes human resources. In some instances, it was found that the process of applying for a protection order was long and arduous due to very few people being available at the magistrate's court to assist complainants (Naidoo, 2006). This would ultimately put the victim at risk as they do not have any protection by law from the perpetrator while waiting to make the application. Vetten (2005) explains how NGO's (many of which are funded by foreign donors), have taken over the brunt of the work which was entrusted by law to the police and the courts. This includes informing the victim about their rights and advising them on how the process of applying for a protection order is carried out. It also includes helping the victim find alternate accommodation and other support services (Vetten, 2005:7). This indicates a failure by the Department of Justice and the SAPS as they are unable to fully carry out the duties which have been mandated to them by law.

Gaps in the literature

1. A gap in the literature was found by Artz & Smythe (2005). The authors allude to the issue of **other court orders** that may interfere with the effectiveness of the protection order. These include custody agreements as well as other protection orders. This has not been well documented in literature and its effects are not well understood.
2. Another area identified is the **lack of research on police interventions**. As highlighted earlier much of the support work that is provided for victims is offered by NGO's. This gap in the literature may be an indication of the lack of support that is offered by the SAPS.

Recommendations

Nearly all of the studies that have evaluated the implementation of the DVA, have also presented some **recommendations** on ways to improve it. These recommendations are as follows:

1. Firstly, scholars point out that **domestic violence must be recognised as crime** on its own in order to tackle it effectively. Police perceptions of domestic violence have impeded the effective implementation of the Domestic Violence Act. According to Parenzee et al. (2001) the unwillingness to intervene in what is perceived as intractable interpersonal conflict has remained pervasive amongst police officers. The problem is thus one of progressive legislation combined with unprogressive attitudes. Victims of domestic violence have consequently turned to NGOs or remained in their position of disadvantage.

In a study done in the USA it was suggested that the burden of deterring domestic violence has fallen unfairly on the police (Fagan, 1996). This is relevant to the South African condition in which it has been found that provisions of the DVA cannot be implemented due to the lack of limited or non-existent resources. Since the hasty enactment of the DVA, there has been an increase in all components of legal work without the correlative increase in personnel. This is reflected in statistics evidencing the incompetency of the police to deal effectively with domestic violence cases encumbering subsequent court processes.

The criminalization of domestic violence is therefore necessary not only to alter the perception about domestic violence but also to alleviate the assumed burden of deterrence placed on the police and to ultimately guarantee victim protection. The DVA criminalizes the breach of an order but does not go as far as criminalizing the act of domestic violence itself, thereby offering a form of protection but no actual remedy for the problem.

Domestic violence is distinguished from other crimes for its nuanced, abstract nature and is therefore resistant to conventional legal controls. Domestic violence is characterized by a domestic relationship between the victim and

perpetrator that often involves feelings of love, trauma and dependency. Moreover, domestic violence is recurrent and manifests in ordinary, daily contact. Victims and perpetrators share living spaces and resources which makes it increasingly difficult to follow through with deterrent threats given the context of ongoing, unguarded contact between the victim and perpetrator. Victims are often left to weigh up these considerations and compromise on the social and emotional aspects of their existence in return for protection (Vetten, 2005).

Despite these nuances, domestic violence is undeniably a violation of the rights afforded to all South Africans in the Bill of Rights. Section 10 of the Constitution of South Africa (The Constitution) states that everyone has the inherent right to human dignity while sections 12(1) and (2) enshrine the right to freedom and security of the person.

- (1) *Everyone has the right to freedom and security 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, inhumane 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.*

South Africa has also ratified a number of international conventions and treaties such as the Convention on Elimination of All Forms of Discrimination Against Woman that demand the protection of the human rights of woman (Himonga, 2005). Articles 3 and 5 of the Convention require that parties take appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms and to eliminate prejudices 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 men and women (The United Nations, 1988).

Furthermore, section 39(1)(b) of the Constitution states that 'when interpreting the Bill of Rights, a court, tribunal, or forum...must consider international law' and the court in *S v Baloyi* (2000) affirmed that the Constitution imposes a direct obligation on the state to protect the right of all persons to be free from domestic violence. As such, the South African criminal justice system seems to have faulted in discharging its domestic and international obligation of providing adequate protection for victims, especially women, of domestic violence by neglecting to criminalize domestic violence in hesitation of dealing with all of its nuances.

2. A second recommendation is that **resources should be well managed at all levels of implementation**. This includes human resources, training and education as well as financial resources (Naidoo, 2006). This intervention is necessary for the improvement of police skills and comprehension of the DVA, broadly, for the effective implementation of the Act.
3. Another recommendation would be to have **specialised domestic violence courts** that deal solely with domestic violence issues. This suggestion was made by Naidoo (2006) in comparison to the 'problem-solving' courts that were established in the United States (Naidoo, 2006:87). The introduction of a specialised court would greatly reduce the problems of time delays and other issues related to the application of protection orders.
4. Additional **research on the psychology underlying domestic violence** is also necessary. While there has been a wealth of literature on the formal aspects of domestic violence the subjective psychology seems to have been neglected.

Conclusion

This paper aims to address the question of whether or not the Domestic Violence Act does actually protect. Through the review and presentation of various research conducted in South Africa, the paper outlines some of the gaps in legislation as well as failures in the implementation of the Act. Recommendations have been summarised and presented to inform policy makers on some of the relevant issues that may not have existed in 1998.

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