



WOMEN & HUMAN RIGHTS DOCUMENTATION CENTRE

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SUBMISSIONS MADE TO THE SOUTH AFRICAN LAW COMMISSION ON THE DOMESTIC VIOLENCE DISCUSSION PAPER

**SPECIAL FOCUS
ON
DOMESTIC VIOLENCE**

THE PROCESS FOLLOWED

Heléne Combrink

Lecturer: Department of Public and Adjective Law (UWC)

The Women and Human Rights Project recently participated in the compilation of comments on the Domestic Violence Bill proposed by the South African Law Commission and the recommendations informing this Bill. The compilation of these comments was undertaken in collaboration with Rape Crisis (Cape Town) and the ANC Parliamentary Women's Caucus, and specifically focused on international and constitutional human rights jurisprudence.

After completion of a first draft, a workshop was held in conjunction with the Law, Race and Gender Unit (UCT) to invite comments and to discuss contentious issues. Participants in this workshop included the Gender Policy Unit of the Department of Justice, magistrates with extensive experience in presiding over domestic violence cases, and members of service-providing non-governmental organizations. Suggestions made at this workshop were incorporated in the final document.

The final document was circulated to a number of individuals and organizations, and was eventually endorsed by numerous organizations,

including the Western Cape Regional Network on Violence Against Women. Members of the research group also made a presentation to the Justice Portfolio Committee on 6 June 1997.

This project provided an opportunity to collaborate with service-providing organizations and state agencies in devising legislative intervention as well as policy proposals, and

emphasized once more, the need for practice-oriented research to inform the realization of human rights in the South African context.

This edition of the Newsletter focuses primarily on the submission to the South African Law Commission and seeks to offer some insight into certain contentious issues contained therein.

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CONSTITUTIONAL JURISPRUDENCE RELEVANT TO DOMESTIC VIOLENCE

Karrisha Pillay

The constitutionality of the South African Law Commission's recommendations and the submission was assessed in the light of a substantive conception of the rights to gender equality and freedom from violence in the Constitution.

The Right to Equality

Section 9(3) of the Constitution provides that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender [or] sex'. In interpreting and applying the section, the recent decision in *President of the Republic of South Africa v Hugo* was referred to, and in particular, the court's acknowledgement that the goal of 'equal treatment on the basis of equal worth' will not necessarily be achieved by the identical treatment of different social groups in all circumstances. The court expressly noted that '[T]he impact of the discriminatory action upon the particular people concerned [must be considered in order] to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context'.

The court's emphasis on the differential impact of an impugned law on different social groups is, like the Canadian social context test for equality, premised on a substantive conception of gender equality that avoids the use of a male comparator to determine disadvantage. For example, in *Egan v Canada*, the court took the view that the purpose of the right to freedom from discrimination, includes the prevention or reduction of distinctions that may exacerbate the circumstances of those who were previously disadvantaged. It stressed that a consideration of the effects of differential treatment must be taken into account. The potential impact of the

South African Law Commission's recommendations was accordingly assessed in the light of it contributing to the existing gender disadvantage so as to ensure compliance with the right to gender equality.

The Right to Freedom from Violence

Section 12(1)(c) of the Constitution was also referred to, which expressly provides for the right to freedom and security of the person, including the right to freedom from all forms of violence from either public or private sources.

'A classification which is unfair in one context may not necessarily be unfair in a different context'.

Section 7(1) of the Constitution provides that the Bill of Rights '[a]ffirms the democratic values of human dignity, equality and freedom'. It was argued on the basis of this provision read with Section 9(3) of the Constitution, that the right to equality is the foundation of all other rights in the Bill of Rights, including the right to freedom from violence. Since a substantive conception of the right to equality was advocated, and equality forms the basis of the right to freedom from violence, it was contended that the right to freedom from violence be substantively interpreted.

It was stressed that a substantive conception of the right to freedom from violence, not only demands the prevention of gender-based violence, but also the eradication of the harmful effects of such violence on women.

Furthermore, Section 7(2) of the Constitution, requires the state to '[r]espect, protect, promote and fulfill the rights in the Bill of Rights'. This provision, when read with Section 12(1)(c), imposes a positive duty on the state to prevent and punish acts of gender-based violence. Support for this interpreta-

tion is enhanced by South Africa's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women and its acceptance of the provisions of the Beijing Platform for Action.

Furthermore, Section 39(1)(b) of the Constitution provides that a court, when interpreting the Bill of Rights 'must consider international law'. Attention was accordingly drawn to international human rights jurisprudence in terms of which, states have certain positive duties to prevent, investigate and punish any violation of protected rights. In addition,

where possible, they are obliged to attempt to restore the right which was violated as well as to provide compensation for damage resulting from such violation. These duties are embodied in several human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women, the Beijing Platform for Action and the Women's Declaration.

In the context of domestic violence, it was stressed that the state duty to provide protection from violence includes the duty to ensure that the substance and procedure of the law governing interdict applications and contraventions provide adequate protection for women who are subjected to violence. In addition, the duty to provide protection also imposes an obligation on the state to effectively implement any legislative or other measures that may have been taken to ensure the protection of women from violence. Failure by the state to comply with these duties, it was argued, will result in a violation of the state's obligations in terms of international law as well as the constitutional rights to gender equality and freedom from violence.

APPLICATION OF DOMESTIC VIOLENCE LEGISLATION: GENDER-SPECIFICITY

Karrisha Pillay

It was suggested that the gender-neutral definition of a 'domestic relationship' proposed by the Law Commission obscures the reality that the majority of survivors of domestic violence are women. In support of this reality, the Law Commission was alerted to the fact that only 1.7% of applicants for interdicts in the Western Cape during the 6 month period following the inception of the Act were male. A gender-neutral Bill ensures little more than formal gender equality and, ignores the need for legal measures in order to eradicate the effects of gender disadvantage. In support of a gender-specific approach, the decision in *President of the Republic of South Africa v Hugo* was referred to again, and, in particular, the court's acknowledgement that gender-specific

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provisions which may constitute unfair discrimination in one social context may not necessarily be unfair in another social context. It was stressed that in the context of violence in which the abused women lives, a gender-specific Bill that regulates domestic violence does not constitute unfair discrimination. International instruments and the law of comparable jurisdictions were also referred to in support of a gender-specific approach.

However, in taking account of the reality that there are persons in certain other relationships who are also susceptible to domestic violence, it was suggested that the Bill also apply to such relationships. Given the potential for abuse in the context of same-sex relationships, abuse of men by women, as well as elder abuse and the abuse of young boys by their family members, it was submitted that the Bill also apply to these relationships.

Although these relationships are also, clearly in need of legal protection, it was acknowledged that the focus of such legal protection is open to debate. On the one hand, the inclusion of all these categories of persons in a single gender-neutral statute will conceal the reality that the majority of survivors of domestic violence are women. On the other hand, the enactment of separate legislation to cater for these categories is cumbersome and will require additional research and drafting. In addition, it is difficult to demarcate the exact boundary between a statute that regulates violence

against women in relationships and a statute that regulates other forms of domestic violence. The exclusion of same-sex couples from the former and their inclusion in the latter, for example, may provoke complaints of unfair discrimination.

It was finally decided that the definition of domestic relationships be gender-specific and that the Bill be entitled 'Violence Against Women in Relationships'. However, in realizing

that there are other groups who are also clearly in need of such protection, as well as the problems inherent in drafting separate legislation, it was suggested that the legislation should also be made applicable to violence in same-sex relationships, violence by women against men and violence between persons who live in the same household but are not in a sexual or dating relationship.

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TRAINING

It was proposed that domestic violence legislation provide for mandatory training for all criminal justice personnel. Training programmes are likely to reveal the causes and effects of domestic violence, thereby reducing the secondary victimization of survivors of domestic violence.

THE RIGHT TO LEGAL REPRESENTATION

Karrisha Pillay

The Law Commission is of the view that although the democratic values of freedom and equality dictate that legal representation for the applicant and the respondent should be allowed at all stages of the process, the fact that the current law clearly allows for such representation, it argues, renders it unnecessary to enact specific legislation to this effect. Although it is acknowledged that the Magistrates Courts Act does make provision for legal representation, the reality is that in

The South African Law Commission is of the view that since the provisions of Section 35(3) of the Constitution applies only to accused persons, parties in civil proceedings do not have the right to legal representation at state expense as this would infringe the respondent's right to equal benefit of the law.

practice, certain magisterial districts in the Western Cape, for instance, indicate that since the Prevention of Family Violence Act makes no provision for this right, the applicant in interdict proceedings is sometimes denied the right to legal representation. Given the detrimental consequences of such denial, as well as the need to ensure clarity and certainty in the law, it was suggested that the Bill expressly provide for the right to legal representation for both parties.

The Law Commission also takes the view that since the provisions of Section 35(3) of the Constitution

It was argued that state funded legal representation does not constitute unfair discrimination on the respondent, but instead, actually rectifies the structural imbalance of power that exists between the parties.

applies only to accused persons, parties in civil proceedings do not have the right to legal representation at state expense, as it argues that this would infringe the respondent's right to equal benefit of the law. It accordingly suggests that the applicant make use of the services of the Legal Aid Board or assistance analogous to that provided by maintenance officers to applicants in the maintenance court.

The Law Commission's Reasoning was Opposed on 2 Grounds:

■ Firstly, Section 7(2) of the Constitution imposes a duty on the state to respect, protect, promote and fulfill the rights in the Bill of Rights. As was noted in the section dealing specifically with the constitutional right to freedom from violence, this provision, when applied to the right to freedom from violence, imposes a positive duty on the state to prevent and punish domestic violence. Furthermore, as was also noted, the right to freedom from violence, substantively conceived, requires the state not only to prevent the instances of domestic violence, but also to reduce its harmful effects on the applicant. It was contended that these harmful effects clearly include participation in protracted and traumatic interdict proceedings. In order to reduce this trauma, the applicant undoubtedly requires legal representation. If he or she cannot afford such legal representation, it should, as part of the state's duty to reduce the effects of domestic violence, be provided at state expense.

■ Secondly, it was contended that the Law Commission's argument

that the appointment of a legal representative for the applicant at state expense infringes the respondent's right to equal benefit of the law is based on a misconception of the right to equality. Once again, the case of *President of the Republic of South Africa v Hugo* was referred to, and the court's emphasis that the award of a benefit to one class of persons to the exclusion of another does not, if placed in the social context in which the benefit is given, necessarily constitute unfair discrimination. Since, state funded legal representation to an abused woman in interdict proceedings is clearly founded on the need to reduce the effects of gender-based violence, it does not, it was submitted, constitute unfair discrimination on the respondent. By contrast, it actually rectifies the structural imbalance of power that exists between the parties.

TASK FORCE

In order to ensure that the present legislation is effectively interpreted, applied and implemented by all members of the criminal justice system, it was suggested that a task force be set up by the Department of Justice to investigate and propose reforms to state policy concerning domestic violence. Alternatively, it was suggested that it be legislatively constituted as the National Committee on Violence Against Women and Children.

THE SERVICE OF INTERDICTS

Karrisha Pillay

The Law Commission specifically invited comments concerning the desirability of interdicts being served by the South African Police Service (SAPS). From the recommendations of both SAPS and various other organizations contained in the Discussion Paper, it is evident that service by SAPS is a fairly contentious issue. After a consideration of the reasons informing the opposition voiced by SAPS on the one hand, and the urgency of domestic violence cases on the other, it was recommended that service should, in fact, be effected by SAPS.

Service to be Effected by SAPS is Based on the Following Factors:

■ Urgency:

In the context of domestic violence the question of urgency is one of the paramount considerations. The fact that the sheriff's office is inaccessible after hours and over week-ends and often even during office hours, was a strong motivating factor in favour of service being effected by SAPS. Furthermore, the daily contact that police have with magistrates offices is likely to improve communication and enhance efficiency in effecting service and filing returns of service. In the light of these considerations, it was suggested that service by SAPS would effect a substantial reduction in the delay that currently characterises service of domestic violence interdicts.

■ Financial Considerations:

The Law Commission's recognition that service by SAPS would obviate the need for service fees was acknowledged and supported, and was another motivating factor in favour of service being effected by SAPS.

■ Effectiveness:

Finally, it was argued that service by SAPS would ensure that the police are aware of the fact that an interdict is in force. For instance, practical experience, in the Western Cape indicates that many women find it difficult to persuade the police to act even if they are in possession of a warrant. Furthermore, support for service by the police is evident in the UN Model Legislation on Domestic Violence.

Opposition Voiced by SAPS was Based on the Following:

■ Duties and Powers of Police Officials:

In opposing the service of interdicts being effected by SAPS, the Police Service referred to the fact that the Act does not empower them to effect service. In response, the submission noted that this is a matter that can easily be addressed by legislative amendment.

■ Nature of Interdicts - Civil litigation:

The National Crime Investigation Service indicated in their recommendation to the Law Commission that the service of interdicts is a matter of civil litigation and within the realm of the private sphere. They accordingly suggested that it should not form part of the police functions. In response, it was pointed out in the submission that domestic violence is often relegated to the private sphere which not only obscures the causes and effects of domestic violence, but also perpetuates its incidence. The failure of police to concern themselves in issues of domestic violence, for instance, with regard to service, legitimises and exacerbates male violence. Furthermore, SAPS are obliged, in terms of both the Constitution and international law to participate proactively in the elimination of violence against women. It was contended that this obliges them to engage in service.

■ Personnel Implications for SAPS:

Practical experience suggests that the additional duty on police will cause only a marginal increase in the role of SAPS. If existing resources are insufficient to effect service, in line with the state's constitutional obligation to protect the right to freedom from violence, it is incumbent upon SAPS to ensure that adequate resources are allocated. Furthermore, the National Crime Prevention Strategy prioritises gender-based violence and emphasises that due to its prevalence and negative impact on the empowerment and rights of women, rape and domestic violence require a special focus. Resources and budget allocations must be adjusted in accordance with this priority.

It was also noted that service by the sheriff's office will also entail state expenditure. Finally, service by SAPS falls within the ambit of protective measures that must be taken by the state in terms of international law.

However, it was suggested that service not only be effected by SAPS but instead, *both* SAPS and the sheriff should be empowered to effect service, as this will increase accessibility. But, since service by SAPS is free and service by the sheriff is not, applicants with the means to pay would be disadvantaged if they approached the sheriff rather than SAPS. Hence, it was suggested that legislation clearly state that neither SAPS nor the sheriff may refuse to serve an interdict when approached to do so. In addition, the clerk of the court should be empowered to effect service of the interdict, if the respondent is present at court. Finally, Law Commission's acknowledgement that a requirement of personal service will defeat the object of the Act, was endorsed.

MAINTENANCE, CUSTODY AND ACCESS ORDERS

Karrisha Pillay

The Law Commission's recommendation that the court be empowered to grant interdicts coupled with maintenance, custody and access orders was supported. However, the inclusion of specific criteria to assist judicial officers to determine the best interests of the child was proposed.

As there are currently no South African statistics that document the effects of domestic violence on children, reference was made to American, Canadian and Australian statistics which indicate the harmful effects on children who witness their mother being abused by their father and, those children, who, in addition to witnessing such abuse, are themselves abused. In order to prevent the continuation of these harmful effects, it was contended that it is necessary to separate the child from the abuser.

In terms of Section 28(1)(d) of the Constitution, '*every child has the right to be protected from maltreatment, neglect, abuse or degradation*'. In addition, the right to freedom from violence also clearly applies to children. It was accordingly argued that a failure to protect children from being exposed to domestic violence constitutes an infringement of these rights.

Parental rights, on the other hand, it was noted, are not entrenched in

the Constitution. The Appellate Division in *B v S*, in the context of access rights noted that, '*[n]o parental right, privilege or claim as regards access will have substance or meaning if access will be inimical to the child's welfare*'. Since decisions to grant or refuse both access or custody are premised upon the child's best interests, this *dictum* applies equally to a parent's interest in being granted custody.

It was accordingly recommended that the Bill contain a presumption that custody be granted to the non-violent parent and that unsupervised access by the abusive parent not be permitted. In support of the recommendation, the Law Commission was referred to several American States which have statutory presumptions against awarding custody to abusive parent. Furthermore, the United States Congress has also endorsed such presumptions.

Supervised Access:

In order to alleviate the high costs of supervised access, it was suggested that the applicant be provided with the following options:

- A family member or friend may supervise such access at no cost.
- Supervised Visitation Centres should be established. Such a Centre has been introduced in Minnesota which provides for supervised

exchange, on site visits and monitored visits. Due to the cost implications of such Centres, it was suggested that South Africa follow the Minnesota example of using schools and child care facilities after hours. It was argued that although Supervised Visitation Centres will incur certain costs, these will be kept at a minimal due to the use of existing resources and personnel.

- The applicant may have the child's visits supervised by a suitable third party to whom he or she is referred by a social worker or a member of a non-governmental organization with proven experience and expertise in the area.

Once a supervisor has been chosen, the matter should be referred to the family advocate. However, if, for whatever reason, a supervisor is not selected by the applicant, the matter should be directly referred to the family advocate for an inquiry and a recommendation of a suitable supervisor.

Finally, it was recommended that, in granting an interdict, the court must appoint the person approved or recommended by the Family Advocate and agreed to by the applicant. Any costs that may be incurred by such supervised access must borne by the respondent.

AFRICAN CUSTOMARY LAW AND DOMESTIC VIOLENCE:

Reference to African Customary Law in the context of Domestic Violence is a fairly contentious issue. The one school of thought expressly refers to measures of intervention and mediation in African Customary Law whilst, an opposing school views African Customary Law as oppressive to women in itself, and therefore worthless in the fight for an end to violence against women.

Postal Address:

Women and Human Rights Documentation Centre
Community Law Centre
University of the Western Cape
Private Bag X17
Belville, 7535

Tel: (021) 959-3602(direct) or
(021) 959-2950

Fax: (021) 959-2411

E-mail: doccent@iafrica.com

THE CONTRAVENTION OF INTERDICT CONDITIONS

Heléne Combrink

Lecturer: Department of Public and Adjective Law (UWC)

The Law Commission recommends that contraventions of interdicts should be adjudicated in the ordinary criminal courts. This implies that the abused woman is denied legal representation and is excluded from active participation in the proceedings. For this reason, it was proposed that a procedure analogous to the German *Nebenklager* (ancillary prosecutor) be implemented. This will allow the woman to participate in the proceedings, and accords her procedural rights analogous to those of the prosecution and the defence. This would include the right to legal representation and the right to appeal against an acquittal.

However, since the introduction

of an ancillary prosecutor originates from an inquisitorial system, it may be an uneasy combination with South African criminal procedure. An alternative proposal was accordingly put forward. The alternative would entail a *sui generis* procedure based on concurrent jurisdiction of the civil and criminal court. In terms of the *sui generis* approach, the civil court has jurisdiction to decide the offence of contempt of court in the form of the contravention of the interdict, and the criminal court has jurisdiction to determine criminal liability for the domestic violence offence.

The difference between this model and the present system is twofold. First, the inquiry proceedings are conducted in the

form of a civil application procedure with the abused woman as an applicant, rather than in terms of section 170 of the Criminal Procedure Act. Secondly, provision is made for the compulsory referral to the prosecuting authority for a decision as to whether or not criminal proceedings should (also) be instituted.

It is acknowledged that this dual system may impose an additional burden of participation in two legal proceedings rather than one. Hence, it was suggested that in order to ensure an adequate representation of the woman's interests, the investigation of alternative options is required.

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SENTENCING

Heléne Combrink

Lecturer: Department of Public and Adjective Law (UWC)

In the context of domestic violence, and especially a conviction for the contravention of the conditions of the interdict, the purpose of sentencing has been said to include the objective of preventing further violence. In US legislation a distinction is drawn between the immediate need to stop violent acts (which arises in the proceedings dealing with the contravention of the interdict) and the punishment of the offender for the commission of a domestic violence offence.

In this context, two issues arise.

First, whether or not a suspended or postponed sentence (which is imposed most frequently in practice) or community service is appropriate to prevent further violence. The second issue involves the role of rehabilitative counselling.

It is doubtful whether suspended or postponed sentences, with limited opportunities to monitor or address abusive behaviour, are effective in the prevention of further acts of violence. Imprisonment may be of greater value, in the light of its directly preventive and po-

tentially deterrent effect. However, it should also be conceded that imprisonment *per se* may be insufficient to achieve these goals, and that the possibility of rehabilitative counselling should be considered.

Although the success of these programmes remains open to debate, experience in other jurisdictions, such as the Canadian province of British Columbia, should be examined in order to ensure compliance with the state duty to prevent further violence.

The following items represent some of the most recent acquisitions in the Women and Human Rights Documentation Centre. They are but a few selected publications out of many more new acquisitions in the Centre. The latest acquisitions list for March to June 1997 is available from the Documentation Centre.

Trafficking in Women in Africa:

A Regional Report

Florence Butegwa

Many factors have combined to make trafficking in women invisible in Africa to the extent that even leading women's rights organizations have not addressed the issue. Trafficking in women has been associated more with Asia, Eastern Europe and other countries. The activities are usually shrouded in secrecy because of their illegality, thus rendering it difficult for governments to act against the practice. The United Nations Special Rapporteur on Violence Against Women requested a global study of the Causes and Consequences on Trafficking in Women, which provided an opportunity for investigating the situation in Africa. The author coordinated the African study and produced this Report.

Violence Against Women in South Africa: The

State Response to Domestic Violence and Rape

Human Rights Watch/Africa, Human Rights Watch Women's Rights Project
New York : Human Rights Watch, 1995
1564321622

Human Rights Watch conducts regular, systematic investigations of human rights abuses in about 70 countries around the world. This publication is the result of a study of violence against women in South Africa. A key element of the new government in South Africa is a formal commitment to sex as well as gender equality. However, domestic violence and sexual assault, directed primarily against women, are still pervasive in South Africa. The state's response is still inadequate and problematic, for example, the response of the police and the judicial system. This Report emphasizes the need for the South African government to improve its response to domestic violence and rape. It presents recommendations on legal reform, improved police services, the medico-legal system and documentation of violence against women.

Making Her Rights a Reality:

Women's Human Rights and Development

Gillian Moon [ed]
Victoria, Australia : Community Aid Abroad, 1996
1875670245

This publication is based on a seminar held in Sydney, Australia, in 1995. The various papers explore how the rights which internationally agreed instruments set out, can become a reality for women in the developing world. Since the late 1980s a major change has taken place in relation to international human rights with the entry of non-government organizations into debates and lobbying. The papers look at gender and development, the influence of global conditions, and a human rights approach in practice.

Reporting on CEDAW: A List of Questions

for Government Departments

prepared by the CEDAW Working Group
[South Africa] : CEDAW Working Group, January 1997

The CEDAW Working Group was formed in January 1996 as a result of the December 1995 report-back meeting of the NGO secretariat. Included in this group are, amongst others, the Black Sash, the Centre for Applied Legal Studies, the Reproductive Rights Alliance and HURISA. The group drew up this manual which comprises a list of questions for each government department, as well as the Office of the President, to assist in the reporting process by government. It is also hoped that it be used by civil society in monitoring the process. It is not a final document, but open to suggestions and comments.

Women's Rights and Development: Vision and Strategy for the Twenty-first Century

A seminar organized by One World Action, Oxfam UK/I, the Gender Institute of the London School of Economics, and Queen Elizabeth House, University of Oxford.
Report compiled by Mandy Macdonald
Oxford : Oxfam; London : One World Action, 1995
085598340X

This seminar provided an opportunity for women's rights and gender and development specialists from European and Southern NGO's, as well as academic institutions, to move their attention from the process leading up to the Beijing Fourth World Conference on Women and to examine policy priorities for the next decade. Over the last 20 years the women's rights field has expanded its policy agenda and the challenge currently facing activists and researchers is to identify the policy areas still to be addressed, and build local, national and international alliances around these areas. The Report summarizes the inputs and discussions and provides an overview of strategies for achieving a women's rights policy agenda.