



Briefing Paper 544

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The Criminal Law and Perpetrators of Domestic Violence

"Everyone has the right to freedom and security of the person, which includes the right - ... to be free from all forms of violence from either public or private sources."

Section 12 of the Bill of Rights

1. Introduction

The South African Law Reform Commission (SALRC)¹ is presently considering submissions as to whether or not certain acts of domestic violence should be criminal offences. Domestic violence compromises the dignity, safety, physical integrity and mental health of the victim. It has physical, sexual, emotional, psychological and economic consequences, and it is compounded by gender inequality, poverty, and the abuse of alcohol or other addictive substances. Moreover, witnessing family violence as a child is a predictive factor of future abusive behaviour.²

The domestic sphere of the home is a sacred space where all within it should be safe, protected and loved.³ The Universal Declaration of Human Rights states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and state."⁴ However, whether or not perpetrators of domestic violence should receive sanction in terms of the criminal justice system is a conundrum which requires careful discernment.

2. The Signs of the Times

Since the publication of the *Pastoral Constitution of the Church in the Modern World* by the Second Vatican Council in 1965, the Catholic Church has

urged for the '*reading of the signs of the times*' and interpreting them in the light of the Gospel.⁵ It prioritizes respect for human life and dignity as well as a focus on the common good.⁶ *The signs of our times* show that domestic violence is endemic in South African society and that the home, for so many women, children and vulnerable groups, is the most dangerous place to be. It is clear that gender inequality (including issues around patriarchy) remains the dominant narrative. The trauma of domestic violence, which includes economic or financial abuse, casts long shadows into the future and devastates families and communities. According to a recent Institute for Security Studies (ISS) report, children who grow up in households where they are exposed to violence are more likely to use, or become victims of, violence later in life. What happens at home has serious implications for the larger society and for the future.⁷

The 1983 Vatican *Charter on the Rights of the Family* states that

"the rights of the person, even though they are expressed as rights of the individual, have a fundamental social dimension which finds an innate and vital expression in the family ...the family constitutes, much more than a mere juridical, social and economic unit, a community of love and solidarity, which is

uniquely suited to teach and transmit cultural, ethical, social, spiritual and religious values, essential for the development and well-being of its own members and of society. The family and society, which are mutually linked by vital and organic bonds, have a complementary function in the defence and advancement of the good of every person and of humanity”.⁸

In February 2021, Pope Francis released a video drawing attention to the issue of domestic violence and its many manifestations: “Psychological violence, verbal violence, physical violence, sexual violence... these abuses are acts of cowardice and a degradation of all humanity.”⁹ Furthermore, late last year Pope Francis commented that “the number of women who are beaten, abused in their homes, even by their husbands, is very, very high. The problem is that, for me, it is almost satanic, because it is taking advantage of the weakness of those who cannot defend themselves, can only block the blows. It is humiliating, very humiliating.”¹⁰

3. International Instruments of Human Rights

In addition to the Universal Declaration of Human Rights, the South African government has ratified the African Charter on Human and Peoples’ Rights (African Charter), the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Furthermore, the country has ratified the UN Convention on the Rights of the Child as well as the African Charter on the Rights and Welfare of the Child. As a signatory to these international instruments of human rights, South Africa is obliged to pass national laws to carry out its obligations imposed by these treaties in domestic law.

4. Emergency Response Action Plan (ERAP)

On 8th September 2019, amidst heightened public concerns and widespread media reporting of escalating incidents of violence against women in the country, as well mounting pressure from civil society and women's organisations for urgent action, President Cyril Ramaphosa unveiled the Government's ‘Emergency Response Action Plan’ (ERAP) on gender-based violence and femicide (GBVF).¹¹ ERAP set an ambitious six month target period for implementation of the plan. However,

the Commission for Gender Equality (CGE) found that, out of 81 targets across five thematic areas, only 17 (21.25%) were achieved within the ERAP's six-month time frame, and 12 (15%) were only partially achieved. The majority, 51 targets (63.75%), were not achieved within the six month period.¹²

Furthermore, the CGE encountered significant reluctance and very limited co-operation from some of the departments in terms of providing the necessary information. Among these were the South African Police Service (SAPS), Government Communication and Information Systems (GCIS), the South African Broadcasting Corporation (SABC), National Treasury, the Department of Public Service and Administration (DPSA), the Department of Public Works and Infrastructure (DPWI), the Presidency, and the Department of Rural Development and Land Reform (DRDLR).¹³ However, the Department of Basic Education (DBE) and the Department of Higher Education and Training (DHET) were the most responsive and illustrated some progress in implementing their aspects of the ERAP with regards to work on the prevention of GBVF.

Nevertheless, the CGE noted that some success was achieved with the drafting of the three gender-based violence Bills which have since been signed into law and will be useful tools in the fight against domestic violence.

5. The Advent of COVID-19

COVID-19 brought with it the realization that enforced isolation and confinement at home had rendered many women and children vulnerable to domestic abuse and/or increased the incidence of acts of violence within the home. President Cyril Ramaphosa stated: “At a time when the pandemic has left us all feeling vulnerable and uncertain, violence is being unleashed on women and children with a brutality that defies comprehension. These rapists and killers walk among us. They are in our communities. They are our fathers, our brothers, our sons and our friends; violent men with utterly no regard for the sanctity of human life.”¹⁴ It is abundantly clear that there remains a range of factors that perpetuate patriarchal attitudes. These may range from the language used in the media to attendant stereotypes and cultural traditions.¹⁵ Domestic violence was and is ‘the parallel pandemic’, and interventions thus far have not met with much success. It is an aberration in a society where the

dignity, corporal integrity and the equality of all are upheld in the Bill of Rights.

6. The Criminal Justice System

Domestic violence takes place in a private space and often those who may witness or suspect violence do not speak out, as they perceive it to be a private matter. However, speaking at the funeral service for business woman Dr Thandi Ndlovu, who had been a victim of femicide, her friend Kanye Chama succinctly stated that “you are not hanging dirty linen in public when you speak out and seek help from abuse. Your silence is the one that enables domestic abuse.”¹⁶

While the legislature may pass legislation which seeks to create greater equality, it is in the private and more intimate spaces where it remains most difficult for the law to be enforced. Often societal and familial collusion make meaningful interventions very difficult. Lack of awareness regarding the meaning of the right to equality and the right to bodily integrity make it almost impossible for women to assert and claim their rights. The dominance of male hegemony in many families is such that acts of domestic violence are accepted to be ‘the way things are’. Despite supposed sensitivity training for police, these attitudes continue to inform much of the practice of SAPS toward victims of domestic abuse, resulting in under-reporting by victims. Victims and witnesses choose not to come forward, after sharing their original experiences, for fear of further victimisation or in the belief that the pursuit of justice is too onerous and difficult. Amnesty International observes that “violence against women is the greatest human rights scandal of our times. From birth to death, in times of peace as well as war, women face discrimination and violence at the hands of the state, the community and the family. Violence in the family is endemic all over the world; the overwhelming majority of victims are women and girls.”¹⁷

This discussion regarding domestic violence is not the first time that violence in the home has been under scrutiny. The deliberations regarding the Children’s Act 38 of 2005 polarized the public on the issue of corporal punishment in the home. Child rights organizations advocated for the removal of the defence of ‘reasonable chastisement’¹⁸ when charged with assaulting a child. The issue was so controversial that it was excluded from Children’s Act and the debate

continued. The intersection of the ‘private/home’ and ‘public’ policy spheres is a difficult and often messy space. What is so apposite about this issue is the manner in which it was eventually resolved. It began with a single case. In 2017, in the case of [S v YG 2018 \(1\) SACR 64 \(GJ\)](#), the Gauteng High Court found that the defence of reasonable chastisement was unconstitutional as it infringed on (amongst others) section 12 of the Constitution, which protects the freedom and security of persons.¹⁹

The matter was taken on appeal and, on 18th September 2019, the Constitutional Court ruled that the common law defence of ‘reasonable and moderate chastisement’ was unconstitutional, effectively banning all corporal punishment of children. It declared the defence to be constitutionally invalid and, therefore, prospectively unavailable to parents charged with the offence of assault (common or with the intent to do grievous bodily harm) on their children. The Constitutional Court said it was adequate to say that any form of violence, including reasonable and moderate chastisement, has always constituted a criminal act known as assault.

Speaking at a conference on family law, High Court Judge Rayleen Keightley²⁰ explained that, while assault is defined as an unlawful intentional application of force to the person of another, a specific degree of force is not required. A charge of assault means that the matter enters the purview of the criminal justice system, which might well result in a prison term and a criminal record for the perpetrator.²¹ Any parent who hits a child faces the same potentially criminal treatment as if the victim had been an adult, regardless of the family’s belief or religion.²²

It is clear from the above that all forms of domestic violence are clearly criminal, and it is the responsibility of the criminal justice system to pursue the matter. However, there are other complicated considerations. If no witnesses are prepared to come forward then the burden of proof rests with the victim.²³ Imprisonment could result in the dismissal of the perpetrator from his place of employment, thereby disadvantaging the family. Furthermore, there are no remedial programmes in our correctional facilities that focus on domestic violence and how to avoid such behaviour in the future. Prisons are overcrowded, brutal and violent places. Hence, recidivism rather than reform might be the result. Moreover, there is frequently reluctance on the part of the victim to lay charges and follow them through the court

process. Imprisonment also results in the breakdown of the family, and makes family reintegration difficult.

7. The Restorative Justice Approach

At a recent webinar hosted by the SACBC Parliamentary Liaison Office some disquiet was expressed regarding using the criminal justice system as a solution to the high incidence of domestic violence when a restorative justice approach might be more effective. Restorative justice is a theory of justice that relies on reconciliation rather than punishment. The theory relies on the idea that “a well-functioning society operates with a balance of rights and responsibilities. When an incident occurs which upsets that balance, methods must be found to restore the balance.”²⁴ This would require the offender to accept responsibility for having caused harm to the victim. Furthermore, the victim must be prepared to negotiate and accept restitution for the perpetrator’s wrongdoing. “In essence, restorative justice aims as far as possible to ‘put right the wrong’. It is based on the idea that we are all connected, that crime is a violation of relationships, and that such violations create obligations.”²⁵ From a faith-based perspective this approach has much appeal. However, it is a process-driven approach and raises the question of what happens in the meantime? It is a sad irony that often it is the victim, rather than the perpetrator, who feels compelled to leave the family home.

8. The Failure of the Criminal Justice System

In the case of *S v Baloyi and Others*, the Constitutional Court found that “the ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic behaviour are normalised rather than combatted.”²⁶ Furthermore, there is an inter-generational aspect to domestic violence both in terms of those who perpetrate it and those who accept it as ‘normal’. The responsibility of the state to protect the dignity, corporal integrity and safety of its citizens does not stop at the front door of the family home.

Domestic violence is seldom a single incident, but rather a pattern of behaviour with law enforcement being called upon to intervene in cases of assault at the same address more than once. On occasion this may require the removal of the perpetrator by law enforcement. If there were a specific charge for domestic violence it would require SAPS to act more decisively and not dismiss the assault as a private matter. It would also require the keeping of a Domestic Violence Register. While the keeping of such a Register has been required for some time now, this has not been carried out in many instances.²⁷

The introduction of a specific crime of domestic violence may well result in a proliferation of assault cases against perpetrators. However, it does move the matter from the sphere of civil law to that of the criminal law where it can be prosecuted more effectively and with less reliance on the victim. It moves the matter from the private sphere to the public sphere and makes it everybody’s business. However, there are non-violent forms of domestic violence that are more difficult to discern. Those with no visible wounds endure psychological, emotional and economic abuse that are pernicious but which are much more difficult to prove, and which can certainly not be regarded as trivial.

9. The Economic Factor

Economically, women often endure abuse out of economic necessity. There are very few shelters in a position to take mothers with young children, especially children over the age of five. This effectively means that women in situations of domestic abuse of any kind, who do not have family and/or friends to provide accommodation for them, have nowhere to go. This has other consequences in that it divides families and may lead to older children being found in need of care and placed in either foster or institutional care.

Clearly, it is immensely difficult for a woman to leave her abusive partner, particularly when she is financially dependent on him, and even more so when there are children involved. There is a desperate need for support services including accommodation, access to social grants and/or other forms of financial support, trauma counselling, employment opportunities, legal advice and medical care. The provision of such services would enable women to “rebuild their lives with confidence that their human rights

abuses have been addressed with the necessary respect and appropriate protection.”²⁸

Unfortunately, “the government does not currently have an explicit legal obligation to provide long-term housing to women and children who have experienced violence. What is then created is the current situation that many women and children face, where they do not have an alternative place to live when finishing their short-term stay at a gender-based violence shelter, and will ultimately return to the abuser or become homeless.”²⁹

The CGE urges prioritisation of interventions that facilitate economic opportunities for addressing women's economic vulnerability. “This is clearly a long-term and potentially complex economic policy goal as it seeks to address the deep-rooted and structural causes of the economic vulnerability of women as a group and to find concrete ways of addressing them.”³⁰ Notably, the Department of Women, Youth and Persons with Disability has begun formulating long-term structural and systematic gender-responsive budget and project plans.

10. Strangulation as a Domestic Violence Offence

Female strangulation in South Africa occurs in a context of pervasive and often extreme violence perpetrated against women, and as such represents a major public health, social and human rights concern.³¹ Shanaaz Suffla's doctoral research findings demonstrate that “homicidal strangulation in the City of Johannesburg is a unique phenomenon that is distinct from overall homicide. As the fourth leading cause of homicide in the City of Johannesburg, fatal strangulation exhibits a marked female preponderance in victimisation.”³² Furthermore, she found that “homicidal strangulation suggests that, although a rare occurrence in the context of mortality, strangulation in fact presents as a relatively common mechanism of intentional fatal injury... and that fatal strangulation accounts for an estimated 10-20% of all homicide deaths in a range of countries, thereby constituting a significant proportion of violent deaths.”³³

Other research found that “stronger legislation aimed at protecting women; universal screening for strangulation injury in women assessed to be victims of intimate partner violence; community-level substance abuse and domestic violence

prevention programmes; and accessible and affordable support services and networks are some of the critical prevention initiatives that require development and support at both the local and national levels”.³⁴ There is definitely a case to be made that strangulation be regarded as a separate statutory offence, given its heinous nature and potential for long term neurological damage and premature death.

11. Changing Attitudes

Advocacy programmes must be targeted at changing both women's and men's attitudes towards gender relations. Engaging men and youth in the fight to reduce levels of gender-based violence is crucial. Fatherhood programmes such as those run by Sonke Gender Justice³⁵ should become common, and churches are well placed to develop and provide such programmes. Child care practitioners from Africa Tikkum,³⁶ an NGO which provides education, health and social services to young people and their families, suggest that “to solve the crisis of violence against women we need to look to boys' experience of childhood in South Africa. Behaviour disorders that lead to violence in later life are already present at the age of 10. This is not to say that all boys who experience abuse become violent. But if we want to heal our communities, we must turn our attention to cycles of abuse that begin at a very early age. [...] It is therefore crucial that the persistent nature of violence is recognised. If we want to improve safety of women, we must begin with the protection and safety of all children from harm as a matter of priority.”³⁷ The ‘Ntsika yeThemba’ (Pillars of Hope) Project teaches young men to redefine masculinity through mentorship in an outdoor-based education project. The whole aim is to form male activists who stand up for the rights of women, to create an equal society, and to create an entire generation of men who are changing the narrative. Their motto is “Pillars of hope, defenders of women, and leaders for an equal society.”³⁸

Jaco van Schalkwyk, founder of a mentoring programme for boys called ‘The Character Company’,³⁹ observes that “probably one of the biggest failures of our time is that we have neglected to prepare our sons for their role in being the stewards of the dream for our rainbow nation. Never before in our history have men found themselves at a crossroads quite like this, never before have we failed this badly, and the consequences will become our legacy.”⁴⁰

12. Conclusions and Recommendations

The criminal justice system is poorly equipped to prosecute and sentence perpetrators of domestic violence. However, the domestic violence crisis confronting our society is urgent. Failure to act decisively may have tragic consequences. The Istanbul Convention of 2011, which was issued by the Council of Europe,⁴¹ focuses on preventing and combating violence against women and domestic

violence. It is seen as the benchmark for international legislation on tackling gender-based violence, and rests on four pillars: prevention, protection, prosecution and c o-ordinated policies; all of which are apposite to the crisis confronting our society.⁴² They provide guidelines for a multi-faceted approach to domestic violence which, to repeat, Pope Francis has termed as ‘satanic’.

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¹ The role of the South African Law Reform Commission is to do research with reference to all branches of the law in order to make recommendations to government for the development, improvement, modernisation or reform of the law.

² A recent study by Gender Links found that the proportion of men who admitted to committing some form of violence against women in their lifetime was high: 78% in Gauteng; 48% in Limpopo; 41% in Kwa-Zulu Natal; and 35% in the Western Cape. Reported in ‘*Abuse Rooted in Patriarchy*’, Business Day 9th August 2019

³ While the term domestic violence generally refers to violence toward women by men, the term covers other forms of abuse in the home including that of child abuse; elder abuse; fraternal abuse, as well as violence by women on men. These forms of violence seldom happen alone.

⁴ ‘Universal Declaration of Human Rights’, Article 16, 1948

⁵ <https://mg.co.za/article/2017-10-19-high-court-strikes-down-corporal-punishment-defence-for-parents/o>

⁶ ‘Gaudium et Spes’, The Pastoral Constitution of the Church in the Modern World, 7th December, 1965

⁷ <https://issafrica.org/issa-today>

⁸ ‘The Charter of the Rights of the Family’ was “presented by the Holy See to all persons, institutions and authorities concerned with the mission of the family in today’s world” on 22nd October 1983

https://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html

⁹ <https://www.nytimes.com/2021/12/20/world/europe/pope-domestic-violence-almost-satanic.html>

¹⁰ <https://www.nytimes.com/2021/12/20/world/europe/pope-domestic-violence-almost-satanic.html>

¹¹ [https://www.google.com/search?q=Emergency+Response+Action+Plan+\(ERAP\)+on+Gender-based+Violence+and+Femicide+was+released+in&oq=Emergency+Response+Action](https://www.google.com/search?q=Emergency+Response+Action+Plan+(ERAP)+on+Gender-based+Violence+and+Femicide+was+released+in&oq=Emergency+Response+Action)

¹² <https://cge.org.za/wp-content/uploads/2021/04/CGE-Erap-Rprt-Web.pdf>

¹³ <https://cge.org.za/wp-content/uploads/2021/04/CGE-Erap-Rprt-Web.pdf>

¹⁴ <https://www.dailymaverick.co.za/article/2020-06-18-gender-based-violence-is-south-africas-second-pandemic-sa>

¹⁵ <https://theconversation.com/kenya-election-sexist-language-shows-that-patriarchy-refuses-to-give-way-1>

¹⁶ <https://www.dailymaverick.co.za/article/2019-09-01-honour-thandis-legacy-speak-out-about-domestic-abuse>

¹⁷ <https://www.amnesty.org/en/wp-content/uploads/2021/08/act770012004en.pdf>

¹⁸ This is called the “defence of reasonable chastisement”. This is a rule which says that if a parent is charged with assaulting his or her child, then the parent can raise a special defence – that he or she did hit the child, but that this was excusable because it was done as part of “reasonable chastisement”.

¹⁹ <https://www.golegal.co.za/reasonable-chastisement-children/>

²⁰ Justice Raylene Keightley handed down the High Court Judgement which was taken on appeal to the Constitutional Court.

²¹ <https://www.derebus.org.za/common-law-defence-of-reasonable-chastisement-discussed-at-clarks-family-law-conference/>

²² <https://mg.co.za/article/2017-10-19-high-court-strikes-down-corporal-punishment-defence-for-parents/>

²³ It is useful in this digital age for women to record acts of violence and take photographs of injuries or other damage.

²⁴ <https://www.westerncape.gov.za/general-publication/what-restorative-justice>

²⁵ <https://www.westerncape.gov.za/general-publication/what-restorative-justice>

²⁶ 2000 (1) BCLR 86 (CC). Quoted in the presentation by Lisa Vetten at the CPLO Roundtable on Gender-Based Violence, 20th June 2019

²⁷ During the Public Hearings for both the Gender Based Violence Bills and the Children’s Amendment Bill there was much discussion regarding the various registers required in legislation regarding domestic violence, sexual offences

as well as crimes against children. It became clear that the only register that was regularly updated was the Criminal Offences Register. It was suggested by some that it would be best to conflate all the Registers into one Criminal Offences Register.

²⁸ *'When I Call for Help'*, Pastoral Statement by the US Catholic Bishops Conference, 1994

²⁹ <https://www.groundup.org.za/article/women-are-being-evicted-shelters-street/>

³⁰ <https://cge.org.za/wp-content/uploads/2021/04/CGE-Erap-Rprt-Web.pdf>

³¹ <https://bmcpublichealth.biomedcentral.com/articles/10.1186/1471-2458-8-363>

³² https://uir.unisa.ac.za/bitstream/handle/10500/20065/thesis_suffla_s.pdf?sequence=1&isAllowed=y

³³ https://uir.unisa.ac.za/bitstream/handle/10500/20065/thesis_suffla_s.pdf?sequence=1&isAllowed=y

³⁴ <https://www.news24.com/health24/Lifestyle/Woman/News/Strangulation-shock-for-SA-20120721>

³⁵ Sonke Gender Justice (Sonke) works in all of South Africa's nine provinces and in more than twenty countries across Southern, East, Central and West Africa to prevent domestic and sexual violence, reduce the spread and impact of HIV and AIDS and promote gender equality and human rights.

³⁶ 'Africa Tikkum' seeks to provide education, health and social services to young people and their families in South African townships. Their main goal is to create a sustainable future for the youth of South Africa.

³⁷ <https://www.dailymaverick.co.za/article/2018-09-12-the-protection-of-womens-rights-begins-with-childhood/>

³⁸ <https://www.one.org/international/blog/gender-based-violence-ngo-cape-town-2/m>

³⁹ The aim of 'The Character Company' is to effect change in South Africa's current culture of violence and abuse through an initiative for boys helping them to grow into good men by instilling honourable values.

⁴⁰ Presentation at UWC Faculty of Community Health Sciences 'Child and Family Studies' (CFS) and 'Parenting in Africa Network' (PAN) Conference on 'Strengthening Families Through Parenting', May 2017

⁴¹ <https://eige.europa.eu/gender-based-violence/what-is-gender-based-violence>

⁴² <https://www.coe.int/en/web/istanbul-convention/home>

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