
THE DRAFT DOMESTIC VIOLENCE LAW

WHAT WILL IT DO?

Mario Gomez

Introduction

In 2000 the Women & Media Collective initiated an exercise to draft a new law on domestic violence. For many years women in Sri Lanka have been discussing the possibility of enacting a law on domestic violence. The discussion has looked at two possible models. While some favoured an amendment to the criminal law to include specific provisions on domestic violence, others favoured the enactment of a separate law that would combine both civil and criminal remedies.

The draft law published by the Women and Media Collective favours the second approach.¹ The law has been modelled largely on the South African Domestic Violence Act and the model legislation proposed by the Special Rapporteur on Violence Against Women.² A draft law on domestic violence produced by some women's groups in India also had a bearing on the draft legislation produced by the Women & Media Collective.

The draft law recognizes the right of every woman, man and child, to be free from all forms of domestic violence and provides four forms of relief:

1. Interim Protection Orders.
2. Protection Orders.
3. Other forms of relief such as the payment of compensation, access to the family home and the payment of punitive damages.
4. A warrant of arrest where the Protection Order is breached.

The draft brings together both civil and criminal procedures. It allows the victim or someone on her behalf to initiate legal proceedings and then seeks the assistance of the police to enforce the order of the court, in situations where the order is breached.

The main purpose of the draft law is to prevent further violence or threatened violence. It allows a victim to access the family home, bank accounts, medical care and have access to the children, where these remedies are appropriate. It also enables the victim to have access to a counsellor and to a shelter where she or he so wishes. It gives space to the victim to reflect on the relationships and the options that may be available to him or her. It does not prevent the victim from initiating criminal proceedings, divorce proceedings or an action for the custody of the children.

Ideally the criminal law should be amended to include the offence of domestic violence defined in identical terms to this draft law. The draft law contemplates that judges hearing divorce or custody proceedings will be able to consult with the judge hearing an application for a protection order under the domestic violence act.

The Right to be Free from all Forms of Domestic Violence

The law recognizes right of every woman, man and child to be free from all forms of violence. The law takes a broad approach to domestic violence encompassing physical, sexual, psychological and economic abuse. Domestic violence is defined by the draft law to include³:

1. Physical Abuse
2. Sexual Abuse
3. Emotional, verbal and psychological abuse, which would include patterns of degrading or humiliating conduct towards a woman, such as repeated insults, repeated threats to cause emotional pain, and the repeated exhibition of obsessive possessiveness or jealousy.
4. Economic abuse, which would include the unreasonable deprivation of economic or financial resources which a victim requires, such as household necessities, mortgage payments and rent payments, and the unreasonable disposal of household effects or other property, in which the victim has an interest.
5. Intimidation
6. Harassment, which would include repeatedly watching or loitering outside a building where the victim resides, works, studies or carries out a business, repeatedly making telephone calls, sending faxes, electronic mail, or packages which induce fear in the victim.
7. Stalking
8. Damage to Property
9. Entering a victim's residence where the abuser and victim do not share a common residence.

10. Any other controlling or abusive behaviour where such conduct harms or may cause harm to the safety, health or well being of the victim.

Domestic Relationships

The draft law covers the husband-wife relationships, same sex relationships, non marital relationships, relationships with former spouses, parent-children relationships, and extended family relationships such as aunts, uncles, cousins, grandparents and other relations living in the same household or sharing the same residential facility. Household workers have been excluded from the provisions of the draft law.

The Remedies Contemplated in the Draft Law

The draft law provides for four broad types of relief: Interim Protection Orders, Protection Orders, other forms of relief such as emergency monetary relief and compensation, and an order of arrest where the protection order is breached by the abuser.

1. Interim Protection Orders

An Interim Protection Order will provide the victim protection from threatened or further violence. It is given in an emergency context where there is a possibility that the victim will be subject to abuse.

Under the draft law a victim could make an application before a Magistrate for an order to restrain the abuser from committing or attempting to commit any act of violence.

A third party may also apply to court on the victim's behalf. However, in this case the written consent of the victim should be obtained, to prevent the law from being abused. The victim's consent would not be needed where the victim is a minor or is mentally retarded or is unconscious.

Where the victim or the third party establishes a *prima facie* case that the abuser has committed an act of domestic violence and that hardship may be caused to the victim if a protection order is not given, then the Magistrate must issue an Interim Protection Order. Where an act of violence is threatened too the potential victim may apply for an Interim Protection Order.

In terms of the draft law the Interim Protection Order must be accompanied by a warrant of arrest, which is suspended. If the abuser breaches the terms of the Interim Protection Order then he or she could be arrested under this warrant and without having to resort to the legal process again.

The Interim Protection Order may be obtained *ex parte*, that is in the absence of the abuser. The main objective of the Interim

Protection Order is to provide an easily accessible and immediate remedy against the violence.

In applying for an Interim Protection Order the applicant would need to show that there is *prima facie* evidence of an act of domestic violence or that such violence is threatened or imminent. Where a *prima facie* case is established the Magistrate's Court *must* issue an Interim Protection Order even though the perpetrator may not have been heard at this stage. In issuing an Interim Protection Order the Magistrate may seek the opinion of a counsellor, social worker or medical officer.

As a general rule if a court gives an order without hearing the other side it is violating one of the law's most sacred rules: the rules of natural justice. According to the rules of natural justice decisions cannot be made without hearing the other side. However, the law also recognizes that there are exceptions to this rule. In certain situations where the urgency of the situation requires an immediate order then the rules of natural justice need not be observed at that point. They can be observed at a later point. The imminent danger of harm is clearly one situation in which the rules of natural justice could be overlooked for the moment.

That is why the Protection Order is an interim order. It will be possible at a later date for the abuser to come to court and argue that he or she did not engage in violence or argue to have the Interim Order set aside. The rules of natural justice are thus not disregarded completely. Their observance is only postponed because of the imminent threat of violence that the victim faces.

The Interim Protection Order is a temporary one and is reviewed by the Court at a subsequent hearing. The abuser is heard at this subsequent hearing and the Court may make a more permanent order at this hearing.

The law permits a victim to access a Magistrate even during weekends and after hours to be able to obtain an Interim Protection Order.

2. Protection Orders

A Protection Order is a permanent order, made at a subsequent stage, directing the abuser to refrain from acts of violence. It may be accompanied by other forms of relief.

The law provides that the police must bring the Interim Protection Order to the notice of the abuser. It must be served on the abuser and requires him to appear before Court on a specified date but not later than two weeks from the date the Interim Order was issued.

The abuser is heard at this stage and it is possible for the abuser to argue that he or she did not engage in the violence or seek to have the terms of the Interim Protection Order modified. Protection Orders may be varied by the court in appropriate circumstances

and both the victim and the perpetrator may make an application in this regard.

The draft law lays down that the Magistrate cannot refuse to issue a Protection Order on the basis that only a single act of violence has been committed or a single threat issued.

What does an Interim Protection Order or Protection Order entail?

In the case of both Interim Protection Orders and Protection Orders the Magistrate can prohibit the abuser from committing an act of violence or enlisting the help of any other person to commit an act of domestic violence. The judge may prohibit the abuser from entering a residence shared by the victim or entering a specified part of the victim's residence where the interests of the victim require this. Committing acts of violence against any other person, whether it be a relative, friend or social worker, who may be assisting the victim, may also be prohibited by way of an Interim Protection Order or Protection Order.

The Magistrate may prohibit the abuser from entering the victim's place of employment or telephoning or in any other way attempting to establish contact with the victim. The Magistrate may also prevent the abuser from interfering with the victim's use of the family car and restraining the abuser from selling jointly-owned family assets or assets, which although they are in the abuser's name, are assets in which the victim has an interest.

Other Forms of Relief

In addition to these prohibitions the law permits the Magistrate to order other types of relief that will permit the victim to go on with his or her life with the least possible disruption. This includes the payment of emergency monetary relief and the payment of rent or mortgage payments. The quantum of monetary relief may take into account the cost of dental or hospital expenses incurred by the victim. The court may also order that a friend, social worker, counsellor or medical officer monitor the relationship between the victim and perpetrator. Where the abuse is severe, the court may order the payment of punitive damages in addition to other forms of monetary relief.

Rights of Children

Where the victim of the abuse is a child, the draft law requires the court to make an order keeping in mind that the child's interests shall be the paramount consideration. Where the perpetrators of the abuse are the parents or those exercising parental responsibility, it may be possible for the court to prevent contact between the child and the perpetrators, if the court considers this appropriate.

Standard of Proof

At the initial stage the victim would have to make out a *prima facie* case that an act of domestic violence has been committed or is likely to be committed. Where the victim establishes this and shows that he or she would suffer hardship if an Interim Protection Order is not given, the Magistrate must issue an Interim Protection Order.

In granting the Interim Protection Order the Magistrate must set a return date no later than two weeks. When the matter is taken up again and where the respondent does not oppose the granting of the Protection Order, the Magistrate must issue a Protection Order. Where the respondent contests the application the Magistrate must proceed to conduct a hearing into the matter. Upon the completion of a hearing the court must issue a Protection Order if it finds that on a balance of probabilities the respondent has committed or is committing an act of domestic violence.

Duties of Police Officers

The draft law obliges the police to act swiftly when an act of domestic violence is brought to its notice. The police should act in a way so as to prevent further violence and help the victim in finding shelter and medical assistance where such assistance is required.

The police are also given the power to arrest the abuser without a warrant where there is a reasonable suspicion that an act of domestic violence has taken place.

The draft law obliges the police to provide information to a victim on the rights and the remedies that are available. Ideally a statement of victim rights should be available in all police stations in all three languages and the police should be obliged to read and explain this statement of rights to every victim. This requirement, however, is not there in the draft law.

The police are also required to contact a counselling organization, a social service organization, a women's shelter or other group whenever a victim makes a complaint of domestic violence, according to the draft law. This is to help the victim access medical, emotional and psychological support that she may need, but that the law may not be able to provide.

Where an Interim Protection Order or Protection Order has been issued, the police should make every attempt to serve the order on an abuser. Where a person violates the terms of an Interim Protection Order or a Protection Order, then the police are required to arrest such a person.

Annual Report on Domestic Violence

The draft law requires the Inspector General of Police to publish every year a domestic violence report. The report should provide details on the number of complaints of domestic violence reported to the police, the number of breaches of protection orders and the response of the police to those breaches. Steps that the IGP took during the past year to raise awareness on the provisions of the law among the police force should also be documented in the report. According to the draft law the report must be submitted to Parliament, the Ministry of Women's Affairs, the Women's Bureau, the National Committee on Women, the Human Rights Commission and the National Child Protection Authority. Any member of the public would be entitled to purchase a copy of the report.

This reporting process allows civil society groups and other institutions to monitor the police and to interact with the police in implementing the provisions of the law.

Using International and Comparative Law

The draft law specifically allows courts to use international and comparative law in interpreting the provisions of the Act. Higher courts do use comparative law sometimes and recently a number of courts have begun to use international standards in interpreting and developing domestic law. The laws on domestic violence in many countries have been influenced significantly by international developments and there is a strong case for using international norms in developing the Sri Lankan law in this area.

Pursuing Other Remedies

Obtaining relief under the domestic violence law should not prevent a victim from making a complaint to the police against the abuser. The police should then investigate the complaint and proceed to prosecute the abuser, under the criminal law, where a *prima facie* case exists.

There is a need for the existing criminal law to be reformed to recognize the offence of domestic violence. The offence should be defined in the same terms as the proposed law and should recognize that women are subject to violence because they are women. Sentencing could include punitive damages or community service.

Obtaining relief under the domestic violence law should not prevent the victim from pursuing any other legal remedies, including a civil action, a fundamental rights action or proceedings for divorce.

Sri Lanka's International Obligations

Sri Lanka has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The Convention requires ratifying states to pass legislation to eliminate discrimination and achieve equality. Violence against women is a form of gender-based discrimination and passing a law on domestic violence would be one step towards eradicating discrimination against women.

Sri Lanka is also a member state of the UN. The Declaration on the Elimination of Violence Against Women (DEVAW), although not binding law, obliges member states to pursue policies to eliminate violence against women. It requires states to pass laws to prevent and punish gender-based violence and Sri Lanka would be acting in compliance with this obligation by enacting a special law on domestic violence.

Sri Lanka ratified the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1994. Article 2 of the Convention obliges a member state to take legislative, administrative, judicial or other measures to prevent torture within its jurisdiction. Writers argue that domestic violence is a form of torture and should be recognized by international law and sanctioned as such. If domestic violence is a form of torture or inhuman treatment, then Sri Lanka has an obligation to take steps to prevent torture and inhuman treatment in the home in accordance with its obligations under this Convention. A law on domestic violence would be one such step.

Sri Lanka's National Obligations

There are a number of provisions in the Constitution and in other domestic documents that place on the state an obligation to protect women from violence.

The Constitution prohibits discrimination on the basis of sex.⁴ It also guarantees equality and the equal protection of the law.⁵ Domestic violence affects women disproportionately and prevents women from enjoying many other human rights to which they are entitled. The state is obliged to foster and promote equality between men and women by enacting appropriate laws to prevent and respond to domestic violence. This includes a duty to enact laws that are effective and responsive. The laws should not subject victims to secondary victimization, by adopting unsympathetic, disbelieving and inappropriate procedures. The right to equal protection of the law and the right to non-discrimination on the basis of sex guaranteed in Article 12 are infringed when those who engage in domestic violence enjoy immunity. In addition, the Constitution explicitly permits the passing of laws or the adoption of policies for the advancement of women and this provision would also support the enactment of separate legislation on domestic violence.⁶

The Directive Principles of State Policy in Constitution, which although not legally enforceable, are meant to guide legislation and executive action, also support the enactment of separate legislation. The Directive Principles require the state to promote

equality of opportunity and to ensure that no citizen suffers any disability on the ground of sex.⁷ The Principles also require the state to ensure the full realization of the fundamental rights and freedoms of all persons.⁸

The National Plan of Action for Women in Sri Lanka envisages the passing of a law to deal with domestic violence.⁹ The Plan also envisages the establishment of regional crisis centres for women and children victims of violence that will provide support services to victims.

In 1993 the government adopted the Women's Charter. The Women's Charter, though, is not a legally binding document and cannot be enforced in a court. The Charter is meant to act as a guide in the formulation of law and policy. The state has an obligation under the Charter to take measures to prevent violence against women and legislative reforms are one such measure.

In relation to gender based violence the Charter observes:

The State shall take measures to prevent the phenomenon of violence against women, children and young persons in society, in the workplace, in the family as well as in custody, in particular such manifestation of it as rape, incest, sexual harassment and physical and mental abuse, torture and cruel, inhuman or degrading treatment.

Such measures shall include:

- (i) the promotion of legislative reforms not only in terms of the substantive law but also with regard to preventive and punitive measures which would clearly recognize the rights of the women victims of violence;
- (ii) the promotion of structural reforms within the law enforcement machinery and sensitisation of enforcement authorities so as to strengthen their capacity to deal with crimes of violence directed against women;
- (iii) provision of support to non-governmental organisations, community based organisations and programmes which provide support and counselling services to women victims of violence, including those affected by armed conflict and civil strife.¹⁰

Making the Law Work

The law itself can only have a limited impact in dealing with domestic violence. The setting up of 'shelters' which will provide a safe haven for victims, and the provision of counselling and other support services for victims need to be given priority. Changing public attitudes to this form of abuse is perhaps the biggest challenge and is likely to bring the biggest dividends. Yet the Sri Lankan law cannot continue to ignore this phenomenon. Legal recognition and regulation are part of a broader strategy to deal with abuse that takes place within a family or domestic setting.

The law can work in at least three ways. First, it can provide relief to those who are victims of domestic violence. It can prevent further violence and help a victim have access to the family home and her children. It will also provide a breathing space for victims to reflect on their relationship. Secondly, the law can be used as an educational tool to raise public awareness on domestic violence and help in changing public attitudes. This it does by defining domestic violence and by identifying it as a legal wrong. Thirdly, the law can help increase our understanding of the problem through well reasoned judicial decisions. These decisions in turn can help in mobilizing public awareness and in changing public attitudes.

Notes

1. The Draft Law on Domestic Violence has been published in 163 *LST Review* (May 2001).
2. See the South African Domestic Violence Act of 1998. See also the model legislation proposed by the Special Rapporteur on Violence Against Women, 'A framework for model legislation on domestic violence,' E/CN.4/1996/53/ADD.2 (2nd February 1996).
3. This definition has been adapted from the South African Domestic Violence Act of 1998.
4. Article 12(2) of the Constitution of Sri Lanka.
5. Article 12(1) of the Constitution of Sri Lanka.
6. Article 12(4) of the Constitution of Sri Lanka.
7. Article 27(6) of the Constitution of Sri Lanka.
8. Article 27(2)(a) of the Constitution of Sri Lanka.
9. p.18.
10. Article 16 of the Women's Charter (Sri Lanka). ■

Mario Gomez is a member of the Law Commission of Sri Lanka and Visiting Lecturer, Faculty of Law, University of Colombo.

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