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Curbing Domestic Violence in Botswana: An Analysis of the Domestic Violence Act

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Abstract

Domestic violence is an escalating societal problem which requires an effective solution such as legislation to curb its dominance. Although Legislation may not be a solution to all societal problems, it can to some extent act as a mechanism to curb a problem such as domestic violence. To be an effective solution legislation need be crafted in a manner which, even if it does not totally eradicate the problem, at least contains measures which are not only implementable but do curtail the problem. The civil justice and criminal justice systems cannot effectively address domestic violence separately. The two systems need to co-exit in the fight against domestic violence and the relationship should be backed by legislative provisions created specifically for addressing domestic violence cases.

A. Introduction

The family has always been a sort of sacred enclave. We have historically been reluctant to invade it. It is the essential core of societal organization; yet it can encompass child abuse, incest, violence against parents, and murder. The epidemic of child thefts we seem determined to believe are occasioned by strangers. As we kick over the rock we are beginning to discover that the family can be a place of pure terror as well as the center of caring and nurturing.[1]

I. Domestic Violence as a Societal Problem

Domestic violence is a prevalent problem worldwide. There have been debates on the right terminology to afford to domestic violence and different terminologies have been used across jurisdictions.[2] Family violence, domestic abuse, spouse abuse, woman abuse, battered wives and battered women have all been used

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1 A. Bouza, *Responding to Domestic Violence*, *in* M. Steinman (Ed.), Woman Battering: Policy Responses 191, at 192 (1991).

2 When discussing violence against women, many social science researchers, policy makers and the media have used terms such as family violence, intimate violence or domestic violence. D. Kurz, *Old Problems and New Directions in the Study of Violence Against Women*, *in* R. Kennedy Bergen (Eds.), Issues in Intimate Violence 197 (1998).

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interchangeably to describe the same phenomenon.[3] Though the term has been criticised,[4] 'domestic violence' has become widely accepted to refer to violence within a domestic or family setting.[5] For purposes of this article the term domestic violence will be used.

Reports have shown that violence in the family setting usually occur more against women than men,[6] and many studies on domestic violence have focused on violence against women. Though violence occurs mostly against women than men, for purposes of this article domestic violence will encompass everyone, both men and women, in the family setting.

Domestic violence has over the years been regarded as a private matter where the state could not interfere in the private lives of individuals as family violence was construed as a private and unregulated realm.[7] The distinction between the private/public dichotomies "correlates to the regulation or non regulation, by the state, of particular components of society."[8] The "law constructs and sustains power relations within private life through both active regulation of private life (by such means as social welfare and taxation systems) and by the *failure to regulate other conduct in private life*,"[9] such as violence within the family. Within the national sphere, public dichotomy has been attributed to the regulated sphere of government, politics, and economics whilst the family has been attached the private dichotomy, a sphere which cannot be regulated.[10] Charlesworth notes that:

> if violence against women is understood not just as aberrant "private" behaviour but as part of the structure of the universal subordination of women, it can never be considered a purely "private" issue: the distinction between "public" and "private" action in the context of violence against women is not a useful or meaningful one.[11]

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[3] L. J. F. Smith, Domestic Violence: An Overview of the Literature 1 (1989).

[4] Tadros argues that the use of 'domestic' is unfortunate as it is not particularly a private matter, but the subject of political concern, and that privacy exits only because the relationship may be said to be private. V. Tadros, *The Distinctiveness of Domestic Abuse: A Freedom-Based Account*, *in* R. A. Duff and S. P. Green (Eds.), Defining Crimes: Essays on the Special Part of the Criminal Law 119, at 123 (2005); the term 'domestic' has been criticized as it seems to make the violence 'cosy'. N. Lacey, C. Wells & O. Quick, Rethinking Criminal Law: Texts and Materials 630 (2003).

[5] R. Alexander, Domestic Violence in Australia: The Legal Response 2 (2002).

[6] Smith, *supra* note 3, at 15; The Law Reform Commission, 'Domestic Violence' (Report No.30) (1986), at 8.

[7] C. Moore, *Women and Domestic Violence: The Public/Private Dichotomy in International Law*, 7 (4) The International Journal of Human Rights 93, at 95 (2003).

[8] Moore, *supra* note 7, at 95; historically the public private dichotomy has been used to avoid prevention of domestic violence through criminal prosecution. M.M. Dempsey, *What Counts as Domestic Violence? A Conceptual Analysis*, 12 William and Mary Journal of Women and the Law 301, at 312 (2006).

[9] D. Sullivan, *The Public/Private Distinction in International Human Rights Law*, *in* J. Peters & A. Wolper (Eds.), Women's Rights Human Rights: International Feminist Perspectives 126, at 128 (1995). Author's emphasis.

[10] Moore, *supra* note 7, at 95.

[11] H. Charlesworth, *Human Rights as Men's Rights*, *in* J. Peters & A. Wolper (Eds.), Women's Rights Human Rights: International Feminist Perspectives 103, at 107 (1995).

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Certainly, there is no need to distinguish between the public and private arena, as domestic violence has become endemic to all societies[12] and needs to be addressed by states and the international community through legislation or international instruments. Domestic violence has been addressed in the international sphere by introduction of various international instruments[13] all with an aim to see its eradication. States have taken legislative measures to deal with the problem, and reports, articles and campaigns indicate that violence within the home is no longer a private matter, but is in the public arena.[14] Alexander states that where a member or members of a family are constantly bashed, there is a need for the State and those with responsibility to stop it and provide protection and support of the victims.[15] Hoyle on the other hand points out that domestic violence is recognized as a real crime, and the fact that it occurs in the home does not deflect from its status as a criminal offence.[16] Domestic violence is not a private affair, but a crime and a social problem where all governments and society must share the responsibility to eliminate it.[17]

II. Domestic Violence in Botswana

I wish however to state quite emphatically, that the law does not and will not recognize what is alleged to be an accepted custom in Botswana – that a husband may physically assault his wife if she incurs his discipline. I mention this because Counsel for the State, of all people, appears to have thought that there was nothing wrong with this alleged custom.[18]

Domestic violence in Botswana has, as in many jurisdictions, been considered an unacceptable practice. The courts have declared that the practice of wife battering cannot be condoned. It must be noted that domestic violence in Botswana has broadly been discussed in the arena of violence against women. A research conducted by the Women's Affairs Department reports that ninety five and a half per cent (95.5%) of respondents consider violence against women as a problem in their communities.[19] Most violence against women in Botswana occurs in domestic settings and is perpetuated by culturally based perceptions of resource provision and male authority.[20] After participating in the Beijing Platform,[21] the Government of Botswana and the Women's NGOs Coalition

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12 Moore, *supra* note 7, at 95.

13 For example, the UN Convention on the Elimination of Discrimination and Violence Against Women, Beijing Declaration and Platform for Action (1995).

14 Alexander, *supra* note 5, at 9.

15 *Id*.

16 C. Hoyle, Negotiating Domestic Violence: Police, Criminal Justice and Victims 1 (1998).

17 T. Don, An Introduction to the Ontario Association of Interval and Transition Houses 8 (1986).

18 *Losang v. The State* (Practice Direction), 1985 BLR 281 (CA), at 282.

19 Women's Affairs Department, Ministry of Labour and Home Affairs, *Inception Report for The Study on the Socio-Economic Implications of Violence Against Women in Botswana* (February 1999) at 4.4.

20 G. Mookodi, *The Dynamics of Domestic Violence Against Women in Botswana,* 18 Botswana Journal of African Studies 55, at 59 (2004).

21 Conference held in Beijing in 1995 where all forms of discrimination against women were

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developed six critical areas which were to be of national concern, one of which was violence against women, including human rights.[22] The National Gender Programme Framework "notes that gender violence is increasing in Botswana"[23] and identifies three forms of violence. Amongst these forms of violence is the "physical, sexual and psychological violence occurring in the family, such as battering, abuse of female children, marital rape, non spousal violence and violence related to exploitation."[24] Violence against women in general has been dealt with in the general area of criminal law relating to assault,[25] as it was not specifically legislated for.[26] The findings of a task force on police response to cases of domestic violence confirms that the police regarded domestic violence as a non legal term since it was not found nor defined in any of the offences in the statute book.[27] The state laws were found to be inadequate as the Penal Code does not define and prescribe punishment for domestic violence or family violence and thus women were not afforded sufficient protection from domestic violence by the existing laws.[28] A Report on a Review of all Laws affecting the Status of Women in Botswana recommended that:

> A special statute or provisions on domestic violence should be passed to specifically make domestic violence a criminal offence, providing stiff penalties for violators, and giving Magistrates jurisdiction to issue restraining orders in domestic violence cases.[29]

Women's NGOs coalition have been active in the move to legislate for domestic violence and as a result produced a draft domestic violence Bill which they proposed to be passed as an Act of Parliament. The task was, however, taken up by the then member of Parliament, Ms. Gladys Kokorwe, with the assistance of the Women's NGOs and the Attorney General's Chambers, drafted and introduced the Bill into Parliament as a Private's member's Bill in October 2007. The Bill has been passed as an Act of Parliament[30] and entered into force on 15 August 2008.

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discussed and States made a decision to embark on eradicating all forms of discrimination and violence against women.

22 The Government of Botswana, National Gender Programme Framework (August 1998), United Nations, at 3.

23 Inception Report, *supra* note 19, at viii; *See also* Women's NGO Coalition and SARDC WIDSAA, Beyond Inequalities 2005: Women in Botswana, (WNGOC/SARDC, 2005), at 41.

24 The Government of Botswana, *supra* note 22, at 27.

25 A. Molokomme, *Women's Law in Botswana: Laws and Research Needs*, *in* J. Stewart & A. Armstrong (Eds.), The Legal Situation of Women In Southern Africa 7, at 33 (1990).

26 Department of Women's Affairs, Ministry of Labour and Home Affairs, *Report on a Review of All Laws Affecting the Status of Women in Botswana* (September 1998) Government of Botswana, Gaborone, at 33.

27 Mookodi, *supra* note 20, at 62.

28 Women and Law in Southern Africa, Chasing the Mirage: Women and the Administration of Justice 60 (1999).

29 Report on a Review of All Laws, *supra* note 26, at 38.

30 Domestic Violence Act, Act No. 10 of 2008 (Botswana).

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III. Justification of Research

The former President of Botswana, Mr Festus G. Mogae, in the State of the Nation Address said, "on a sombre note, violence and abuse against women remain high. Addressing this scourge calls for more public education and proactive law enforcement, as well as legislative measures, such as those envisaged in the proposed Domestic Violence Bill."[31] As with the expectations of the then President, the nation welcomed the Domestic Violence Act as the long awaited solution to the lack of legislation that addresses domestic violence. The question, however, remains whether the law addresses all the issues that were raised in the numerous studies carried out in Botswana and whether it will effectively address the problem of domestic violence as anticipated. The law has been drafted using the civil approach and remedies to address domestic violence. The study and analysis of the Act, with the benefit of reports from other jurisdictions, will help establish whether Botswana has taken the right approach for legislating of domestic violence, and whether the approach taken by the Act will adequately curb domestic violence and meet the expectation of the Women's Coalition NGOs and the nation at large.

IV. Hypothesis

This article shall conclude that the civil approach used by the Botswana Domestic Violence Act is appropriate but limited to provide protection to victims of domestic violence. The Act lacks some factors that may assist in adequately and effectively affording protection to victims of domestic violence. Furthermore, there is a need to reinforce or amend legislation that deals with the criminal factor of domestic violence. Domestic violence needs to be recognized as an offence in order for it to be curbed within the society. There is a need to align the current Domestic Violence Act which provides for civil remedies with the criminal legislation and a need to reinforce or amend the Penal Code in order to afford full protection to victims of domestic violence in the society.

V. Methodology

The method used in this article is a comparative analytical method. The method employed will be to compare and analyze legal responses from different jurisdictions. An analysis and comparison of the legal responses and legislation from different jurisdictions will identify the impact they have in curbing domestic violence in their respective societies, and will assist in identifying the best practise and legislative model to be used to curb domestic violence. This will make clear whether the approach used by the Botswana Domestic Violence Act

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[31] Republic of Botswana, *State of the Nation Address by His Excellency Mr. Festus G. Mogae, President of the Republic of Botswana To the Opening of The Fourth Session of the Ninth Parliament: Achievement, Challenges and Opportunities* (5 November 2007), para. 65 http://www.gov.bw/docs/sotn-2007.pdf last accessed on 8 August 2008.

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is best practise and will highlight critical areas that need to be dealt with to align the Botswana Act with what is considered to be the best. Testing the Act against the selected drafting rules will establish whether the Act has been drafted in line with the acceptable drafting rules and falls within the scope of best drafted legislation. The jurisdictions compared are selected because they are part of the Commonwealth and have common law as part of their legal system,[32] as in the case of Botswana. In Africa, domestic violence legislation that will be examined is that of South Africa and Namibia. In addition to their similar legal systems[33] both jurisdictions have been selected because of their geographic proximity to Botswana. Both countries share a boarder with Botswana and to an extent have a similar culture and domestic violence incidences in both countries represent what is experienced in Botswana. Further, both countries are amongst the first to enact specific legislation to deal with domestic violence. Experiences from the different approaches provided by both jurisdictions will assist in taking the best legal response established in the region. The other legislation that shall be examined is that of Australia (South Australia) and the United Kingdom ('the UK'). These two countries are selected because they are amongst the first in the Commonwealth to have had reform in the area of domestic violence and have enacted legislation that deals with the same. The UK in this context will refer to those laws that apply to England and Wales. South Australia is selected from amongst the territories of Australia as it was one of the first of the Australian territories to address domestic violence through legislation using the civil approach. However, this does not limit the writer from using materials and lessons learnt from other countries as well.

VI. Sources

A considerable amount of studies and research on family violence and domestic violence have been carried out in most jurisdictions. A wealth of sources however has been found in the United States of America ('the USA') as research on the prevalence of violence and the legal responses started earlier in the USA than in other jurisdictions. Scholarly articles, books, law reform reports, research reports conducted on domestic violence, legislation and its impact on society will be used in the article. Of these reports the more useful are those that investigate the legislative measures taken and their impact on domestic violence in the community. Other sources will be taken from jurisdictions such as Australia, the UK, Namibia and South Africa which have conducted law reforms and studies on the legal response to domestic violence and evaluated the impact of legislation that has been enacted in their respective jurisdictions. Materials from Botswana

[32] J. Smits, The Making of European Private Law: Toward a *Ius Commune Europaeum* as a Mixed Legal System 74 (2002).

[33] Both South Africa and Namibia have a mixed legal system which has an influence of the Roman-Dutch and English Common Law. They also have customary law in their system. They are comparable to Botswana since it also has the influence of Roman-Dutch and English Common Law, as well as customary law in the legal system. Smits, *supra* note 32, at 134-137; C. G. Merwe & J. E. Du Plessis, Introduction to the Law of South Africa, (2004), at ix, xi, 12, 41; J. Kiggundu, Company and Partnership Law in Botswana 55 (2000); Arts. 66 & 140 Constitution of Namibia.

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will be used to show the prevalence of domestic violence in Botswana, however, not much material is available to indicate the legal responses to domestic violence in the country and reliance will be sought from sources derived from the jurisdictions listed above. All sources used in this article are materials written from varying perspectives.

VII. Structure

This Section lays out and introduces the background and reasons for the article. Section B will examine the definition of domestic violence and how it influences whether the civil approach or criminal approach is used in various jurisdictions. It will also examine the guidelines given by the United Nations Legislative Framework on Domestic Violence and establish the best legislative approach to deal with domestic violence. Section C will compare legislation from four different jurisdictions and will examine the approach used by each jurisdiction and highlight essential elements required in legislation and legal response to domestic violence. Section D will examine the legal response used to curb domestic violence in Botswana. It will examine the Domestic Violence Act and consider whether it is comprehensible to the users. It will also consider whether there are any constitutional issues in the Act and highlight the criminal remedies that exist to deal with domestic violence. Section E will summarise and conclude the discussions made in the different sections and lay out the conclusions and recommendations of the article.

B. Legal Response to Domestic Violence

Law is part of the human odyssey and achievement. It is a dynamic process but it has to be in tune with, and where possible lead, the ever-changing needs and values of a society: failing which individuals suffer, victims emerge and the social fabric is damaged.[34]

I. Definition of Domestic Violence

Violence against women is a global problem and occurs in diverse forms and across cultures that it cannot be narrowly defined.[35] The term domestic violence "has a multiplicity of meanings to different people in different contexts."[36] It can be seen in different forms, either physical assault, sexual abuse, threats or psychological

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[34] Mr Justice Gillen, *Domestic Violence – In What Direction?*, 4 International Family Law Journal 194, at 198 (2005).

[35] H. Charlesworth, *Violence Against Women: a Global Issue*, *in* J. Stubbs (Ed.), Women, Male Violence and the Law (1994); There are different perceptions of Domestic Violence and it seems that there is no single definition of Domestic Violence that everyone agrees with. M. J. D. Aphane *et al.,* Multiple Jeopardy: Domestic Violence and Women's Search for Justice in Swaziland 9 (2001).

[36] M. Burton, Legal Responses to Domestic Violence 1 (2008).

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abuse.[37] In Ghana, the view is that definition of domestic violence may be complicated by defining the domestic relationship, as the act is usually attached to the perpetrator.[38] However, some have resorted to defining it as violence within the family, a hidden crime.[39] To a woman, the general definition that she gives to domestic violence is "being unable to avoid becoming involved in situations and, once involved, being unable to control the process and outcome."[40] This depicts the power relationship that is argued by some researches to be the third element to qualify domestic violence.[41] The underlying factor is that there is a structural inequality in the home, where violent illegitimate[42] acts are conducted by those considered to hold power.[43] Davies notes that the term 'domestic violence' may be used to label violence against women, or it may be used generally to cover any violation where the victim and perpetrator have some form of personal relationship or where they have had such form of relationship.[44] The key element in this account is that, for an act to qualify as domestic violence there has to be or have been a relationship between the parties. In the UK, the legal definition given to domestic violence provides that domestic violence means, "any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality."[45] From a legislative point of view, the main elements of defining domestic violence are the act itself and the domestic relationship.[46] The third element of patriarchy power and control advanced by feminists[47] will not be considered as an element in this article as

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[37] D. Lockton, Domestic Violence 7 (1997).

[38] R.O. Ofei-Aboagye, *Domestic Violence in Ghana: An Initial Step*, 4 Columbia Journal of Gender and the Law 1, at 3 (1994).

[39] S. Rawstorne, *England and Wales*, *in* R.W. Summers and A.M. Hoffman (Eds.), Domestic Violence: A Global View 25 (2002).

[40] J. Hanmer, *Women and Violence: Commonalities and Diversities*, *in* B. Fawcett, B. Featherstone, J. Hearn & C. Toft (Eds.), Violence and Gender Relations: Theories and Interventions 7, at 8 (1996).

[41] Violence between parties occurs when there is an extreme imbalance of power relations. J. Pickering, *Australia*, *in* R. W. Summers & A. M. Hoffman (Eds.), Domestic Violence: A Global View 1, at 7 (2002); M. M. Dempsey, *Toward a Feminist State: What Does 'Effective' Prosecution of Domestic Violence Mean*, 70 (6) Modern Law Review 908, at 917 (2007).

[42] In order for the concept of domestic violence to be correctly applied, the act in question must be illegitimate (i.e., unjustified), Dempsey, *supra* note 8, at 332.

[43] Dempsey, *supra* note 8, at 318; The power and inequality rule is advanced by feminists who advocate that there is an inequality between males and females where women are subordinated and as a consequence, the power exercised by the man over them constitutes an act of domestic violence. Lockton, *supra* note 37, at 30.

[44] M. Davies, *The Hidden Problem: Domestic Violence*, *in* M. Davies (Ed), Women and Violence 2 (1994).

[45] The government definition of domestic violence provided by the Home Office http://www.crimereduction.homeoffice.gov.uk/dv/dv01.htm last accessed on 5 August 2008; Crown Prosecution Service, *Domestic Violence: Policy for Prosecuting Cases of Domestic Violence*, (February 2005), Policy Directorate, at 4; S. Walby & J. Allen, Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey 4 (2004).

[46] The domestic account emphasizes the role of the domestic relationship as the crucial element in understanding what counts as domestic violence. Dempsey, *supra* note 8, at 324.

[47] Dempsey, *supra* notes 41 and 42.

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it has been established in Section A that domestic violence will be considered to be any act conducted by or against any family member, and not be limited to acts perpetrated by men against women.[48] The extent of the act of violence and domestic relationship varies across jurisdictions and these are expressed in the various legislation. This Section will not discuss the domestic relationship in detail, as this will be discussed in Section C.

Most of the definitions have been provided by social science researches and feminists. It is observed that these definitions have influenced the legal definition of domestic violence. From the various accounts, it is submitted that the legislative definition of domestic violence should not only encompass physical violence, but may include sexual, emotional, psychological, economic and financial abuse. It includes all acts that deem to pose a threat to another person, whether they pose a threat to the physical and mental state, or whether it is to their property or financial well being. It is established that domestic violence encompasses the act and must be within a domestic relationship. The legal definition of domestic violence varies across jurisdictions as they illustrate the extent to which the legislators intend to legislate. The distinction of the definition of domestic violence is seen in the various definitions provided in different statutes and an analysis of these definitions is essential. This is illustrated in the table below:

Table 1

Country	*Definition*
Botswana	'domestic violence' means any controlling or abusive behaviour that harms the health or safety of the applicant and includes – (a) physical abuse or threat thereof; (b) sexual abuse or threat thereof; (c) emotional, verbal or psychological abuse; (d) economic abuse; (e) intimidation (f) harrassment (g) damage to property; (h) where the applicant and the respondent do not stay in the same home, entry into the applicant's home without his or her consent; (i) unlawful detainment; or (j) stalking;[1]

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Country	*Definition*
South Australia	…a defendant commits domestic violence – (a) if the defendant causes personal injury to a member of the defendant's family; or (b) if the defendant causes damage to property of a member of the defendant's family; or (c) if in two or more separate occasions – (i) the defendant follows a family member; or (ii) the defendant loiters outside the place of residence of a family member or some other place frequented by a family member; or (iii) the defendant enters or interferes with property occupied by or in the possession of, a family member; or (iv) the defendant – A. gives or sends offensive material to a family member or leaves offensive material where it will be found by, given to, or brought to the attention of a family member; or B. publishes or transmits offensive material by means of the internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of, a family member; or
South Australia	(iva) the defendant communicates with a family member, or to others about a family member, by way of mail, telephone (including associated technology), facsimile transmission or the internet or some other form of electronic communication; or (v) the defendant keeps a family member under surveillance; or (vi) the defendant engages in other conduct, so as to reasonably arouse in a family member apprehension or fear of personal injury or damage to property or any significant apprehension or fear.[2]

[1] Domestic Violence Act (Bots n 30), section 2; *See also* The South African definition at section 1 of the Domestic Violence Act, 1998. The definition is similar, almost verbatim to that of Botswana, where the acts listed have further been defined solely.
[2] Domestic Violence Act, 1994 (Reprint No.4), Section 4 (2) (South Australia); the Namibian Act also expresses the domestic relationship within the definition of domestic violence, Combating of Domestic Violence Act, 2003, section 4.

The common factor in all definitions is that domestic violence encompasses physical, emotional, psychological, sexual, financial or economic abuse. Though the Botswana and South African definitions do not expressly cover it in the context of a domestic relationship, the Acts separately define domestic relationship and this completes the definition of domestic violence to be within a domestic relationship and places all jurisdictions on the same wavelength, as all the key elements of domestic violence are present. The definition of domestic violence may vary depending on the context. It may vary when used in the context of civil law, and when used in the context of criminal law.[49] The context in which it is defined influences the kind of legislation that is to be drafted to deal with domestic violence.

[49] Burton, *supra* note 36, at 2.

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II. Criminal Approach *v*. Civil Approach

Historically, the first legal intervention for domestic violence was through the criminal justice system, where States moved from limiting it to a private family matter and created offences, albeit general offences of assault.[50] The lack of an adequate legal response to domestic violence has been attached to the lack of a specific offence that distinguishes domestic violence from other acts.[51] Moore also argues that practices of domestic abuse are facilitated among others, by lack of specific legal provisions curtailing the acts. Tadros points out that the historic failure to properly curb domestic violence may be rectified by creating an offence of domestic violence, distinct from the normal criminal offences where it has normally been dealt under.[52] He concludes that dealing with domestic violence in the criminal justice system may be effective as the act will be recognized as a public wrong.[53] Burton argues that a separate domestic violence offence will not be easier to prove, and if its non existence should interpret to mean it is a less serious offence, then the educative value of the criminal law will be overstated.[54] Some jurisdictions in Europe, like Sweden and Belgium, have created specific domestic violence offences.[55] Tadros further states that if there are other effective methods to deal with this problem outside the criminal justice system, these may be resorted to, but he cautions that if domestic violence is not recognized as an offence, it may create a perception that the act is less serious than other kinds of assaults.[56]

Observably, there is a need for legislation to address domestic violence.[57] The crucial decision a lawmaker must make is to establish which direction between the two available legal remedies the legislation should take, in order to effectively curb the problem.[58] The central question is, which role, if any, should the criminal

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50 J. Inciardi, E. S. Buzawa & C. G. Buzawa (Eds.), Domestic Violence: The Criminal Justice Response 29 (1996). .

51 Tadros, *supra* note 4, at 120; The practices of domestic abuse are facilitated by lack of specific legal provisions; in the UK, there is no specific offence of domestic violence in the Criminal law, and this has proven to be problematic. Burton, *supra* note 36, at 59.

52 Tadros, *supra* note 4, at 122.

53 Tadros, *supra* note 4, at 139.

54 Burton, *supra* note 36, at 68.

55 L. Kelly, *Moving in the Same or Different Directions? Reflections on Recent Developments in Domestic Violence Legislation in Europe*, *in* W. Smeenk & M. Malsch M (Eds), Family Violence and Police Response: Learning From Research, Policy and Practice in European Countries 83, at 84(2005).

56 Tadros, *supra* note 4, at 139; "Civil protection orders are sometimes seen as a 'soft response' to criminal behaviour and as sending a message that abuse is less serious than non stranger violence." P. Finn, *Civil Protection Orders: A Flawed Opportunity for Intervention*, *in* M. Steinmann (Ed.), Woman Battering: Policy Responses 155, at 181 (1991).

57 The Committee on the Elimination of Violence Against Women recommends that the measures to overcome family violence should include criminal penalties where necessary or civil remedies in the case of domestic violence; General Recommendation No.19 (11th session, 1992), para. 24(r)(i). (http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#top), last accessed on 20 August 2008.

58 The challenge faced in Europe which direction to take was the enactment of anti-stalking

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justice system play in the management of domestic violence?[59] The other question to ask is what role should or does the civil justice system play in the fight against domestic violence?

The proponents for the criminal justice system insist that violence within the family is a crime and should receive the same deterrent and protective properties provided by the criminal law, as is the case with other offences.[60] In contrast those who favour the civil legal system argue that the criminal law is inappropriate as it does not consider the welfare of the victim.[61] The emphasis on either the criminal or civil system varies across jurisdictions, where most countries have legislation that protects victims of domestic violence using the civil justice system while the general criminal legislation is left to deal with the offence. Some jurisdictions have resorted to align the two systems and have introduced separate legislation dealing with domestic violence in the criminal justice system.[62] Where such separate legislation has not been introduced, the jurisdictions have reinforced the existing criminal law by including measures for dealing with domestic violence related situations. In South Australia, South Africa and the UK the two systems work parallel to each other. In South Australia, domestic violence instances are still dealt with under the general criminal law,[63] and the criminal law intervenes in domestic violence only where there is a breach of a protection order and there is no recourse for the act in the criminal law.[64] Alexander notes that most instances of domestic violence constitute criminal offences, which are dealt with under the criminal law, but some types such as harassment, emotional or verbal abuse are beyond the reach of the criminal law, and these are dealt with through protection orders provided in legislation throughout the Australian territories.[65] This same view is held in the USA where Finn expresses that the advantage of civil protection orders is that they "enjoin borderline criminal behaviour such as harassment and intimidation which state criminal codes may not define as 'arrestable' offenses."[66] This view demonstrates the significance and impact of the definition of domestic violence and its influence in the legislative approach that is to be taken. In the domestic violence legislation, a breach of a protection

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legislation, where the definition of stalking influenced whether the legislation should be broached in the civil or criminal context. M. Malsch & W. Smeenk, *Legislation on Family Violence and Stalking*, *in* W. Smeenk and M. Malsch (Eds.), Family Violence and Police Response: Learning From Research, Policy and Practice in European Countries 223, at 227 (2005).

[59] Davies, *supra* note 44, at 8; J. Connors , *Government Measures and The New Law: Government Measures to Confront Violence Against Women*, *in* M. Davies (Ed.), Women and Violence 182, at 184 (1994).

[60] L. Ohlin & M. Tonry, *Family Violence in Perspective*, *in* L. Ohlin & M. Tonry (Eds), Family Violence, Vol. 11, 1 at 6 (1989); Connors, *supra* note 59, at 184.

[61] Connors, *supra* note 59, at 184.

[62] In the USA, Criminal Statutes have been passed to punish specific types of family violence. E. Pleck, *Criminal Approaches to Family Violence, 1640-1980*, *in* L. Ohlin & M. Tonry (Eds), Family Violence 19, at 21 (1989).

[63] Alexander, *supra* note 5, at 24 & 30

[64] Alexander, *supra* note 5, at 31; the same is found in South Africa, Domestic Violence Act (South Africa), *see* Table 1, note 1, section 17.

[65] Alexander, *supra* note 5, at 31.

[66] Finn, *supra* note 56, at 180.

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order becomes a domestic violence offence as opposed to the act itself.[67] This is evidenced in most Australian jurisdictions, including South Australia and the Australian Capital Territory where, in South Australia, the Domestic Violence Act creates an offence if there is a breach of the order.[68] A diversion is seen in the Australian Capital Territory where the Act[69] provides measures for acts of domestic violence, creates an offence in the event of breach of a protection order,[70] and in addition creates and lists domestic violence offences listed in Schedule 1,[71] and those in other Acts listed under the section.[72] An examination of the relevant provisions indicate that the Act has been drafted in a cross referential manner. The Schedule 1 offences are cross referenced to the Crimes Act 1900, which provides in Section 212(5) that domestic violence offences are those listed in the Domestic Violence Protection Orders Act 2001. The criminal aspect of domestic violence is dealt with under the general criminal law. The same method is employed in the Namibian Act, where the Act provides for civil remedies and creates an offence in the event of a breach,[73] and where it has integrated criminal provisions and created domestic violence offences.[74] Additionally, the criminal justice system plays a role in the enforceability of the protection orders. Australian territories vary in the extent to which they integrate the criminal justice system into domestic violence issues. The areas that have been impacted by legislation are the police powers of entry and arrest. In the Australian Capital Territory the police are empowered to arrest a person without a warrant if they suspect him of having committed a domestic violence offence.[75] In some territories, like Queensland, the power of the police to arrest is included within the specific Domestic Violence legislation[76] and Part 6 of that Act provides the functions and powers that the police have, in order to deal with domestic violence. In the UK, South Africa and the USA, just like in South Australia, the criminal justice system works parallel to the civil justice system. In the UK the latest Act[77] dealing with domestic violence attempts to integrate essential factors into a single piece of legislation. The Act works parallel to existing legislation in dealing with domestic violence. For instance, the offence of breaching a non-molestation order under the Family Law Act is

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[67] Domestic Violence Act (South Australia), *see* Table 1, note 2, Section 15; Also in the USA, "violation of a protection order can be classified as a misdemeanour, contempt (either civil or criminal), or a felony depending on, among other things, the provision that was violated." L. Dugan, *Domestic Violence Legislation: Exploring its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 Criminology and Public Policy 288 (2003); "Some countries in Europe have linked the criminal law with the civil law, by making the breach of a protection order an offence." Malsch & Smeenk, *supra* note 58, at 226.

[68] Domestic Violence Act (South Australia), *see* Table 1, note 2, Sec. 15

[69] Domestic Violence and Protections Order Act 2001, (Australian Capital Territory).

[70] DVPOA, *supra* note 69, Sec. 9(a).

[71] DVPOA, *supra* note 69, Sec. 9(b).

[72] DVPOA Act, *supra* note 69, Sec. 9 (2) (c-e).

[73] Combating Domestic Violence Act (Namibia), *see* Table 1, note 2, Sec. 16.

[74] CDVA, *see* Table 1, note 2, Sec. 21 & First Schedule

[75] Crimes Act 1900 (Australian Capital Territory), Sec. 212(2).

[76] Domestic Violence Family Protection Act 1989, Sec. 69 (Queensland).

[77] Domestic Violence, Crimes and Victims Act, 2004 (UK).

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created.[78] The new UK Act, as opposed to that of Namibia, has brought all the amendments of relevant measures that deal with domestic violence under one Act. The Act amends existing legislation that deals with domestic violence, amongst them the Family Law Act 1996 which provides for protection through civil orders for married persons or cohabitants and the Protection from Harassment Act 1997, which deals with the criminal aspect of domestic violence. Though the Domestic Violence, Crimes and Victims Act 1994 amends the existing Acts, positive remarks given to it are that it brings under one umbrella all laws that deal with domestic violence. The users of the Act are at an advantage as they will be able to locate all legislation relevant to domestic violence in the UK. A detailed discussion and comparison of the different pieces of legislation will be dealt with in Section C.

It is clear that the opinion held across jurisdictions is that neither the civil nor the criminal justice system can separately deal with domestic violence. From the point of view of drafting, there is a need for legislation that addresses both systems. As illustrated by Finn, "enforcement is the Achilles' heel of the civil protection order process because an order without enforcement at best offers scant protection and at worst decreases the victim's safety."[79] The civil justice system cannot exist on its own as it would not afford the full protection anticipated by the legislators, and the same holds true for the criminal justice system.[80]

III. Best Practice

The criminal law alone is wanting in providing protection to victims of domestic violence, and it cannot be effective on its own.[81] The requirement to prove an offence beyond reasonable doubt limits its impact, if any, on affording protection to victims of domestic violence,[82] and in other jurisdictions, the criminal law does not provide for non-criminal conduct such as emotional abuse or harassment.[83] There is a need for other legal measures to protect against domestic violence, such as civil protection orders.[84] Hoyle observes that the tendency in the 1990s

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[78] DVCVA, 2004, *supra* note 77, Sec. 1.

[79] Finn, *supra* note 56, at 187.

[80] Both criminal sanctions and protection orders are promoted as complementary responses to domestic violence. Department of the Prime Minister and Cabinet Office of the Status of Women National Committee on Violence Against Women, The Effectiveness of Protection Orders in Australian Jurisdictions (1993), at 6; C. Hoyle & A. Sanders, *Police Response to Domestic Violence: From Victim Choice to Victim Empowerment?*, *in* M. Natarajan (Ed.), Domestic Violence: The Five Big Questions 411, at 423 (2007); though civil protection orders in the USA are found to be the most effective legal response, they are not entirely separate from the criminal justice system, which takes the role of criminal enforcement. S. F. Goldfarb, *Reconceiving Civil Protection Orders For Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29(4) Cardozo Law Review 1487, at 1504 & 1509 (2008); S. Edwards, Reducing Domestic Violence: What Works? Civil Law Remedies 3 (2000).

[81] Alexander, *supra* note 5, at p.54.

[82] *Id.*

[83] *Id.*

[84] *Id.*

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in the UK was to increase criminal response to domestic violence, and she concludes this is unrealistic as it does not respond to the wishes of the victim, nor does it align with the restorative justice found in other jurisdictions.[85] Civil remedies have been proven to help victims to feel safer, and they work, in terms of deterring any further abuse, but their effectiveness depends largely on a power of arrest.[86]

Mr Justice Gillen[87] observes that across the Commonwealth, various measures have been taken to deal with domestic violence and in some it is found in numerous pieces of legislation. His sentiments are expressed in the following words:

> The level of violence throughout the Commonwealth is a stain on the fabric of our whole society and until it is understood and approached in a broad conceptual and philosophical basis it will never be eradicated by piecemeal populist reactions from time to time.[88]

The United Nations urges that "States should enact comprehensive domestic violence legislation which integrates criminal and civil remedies rather than making marginal amendments to existing penal and civil laws."[89] Namibia has followed the recommendation of the United Nations and emphasizes the need of "a single comprehensive statute covering civil and criminal approaches, police duties and support services."[90] They underline that criminal provisions aimed at combatting domestic violence side-by-side with protection orders will help prevent misunderstandings about the relationship between the two.[91] It will emphasize that they are equally valid alternatives which can be utilized simultaneously.[92] Connors also states that in order to have an effective legal response to domestic violence, there should be an integration of legal approaches, service provision and training, and education measures.[93] Schollenberg and Gibbons in their comparative review concluded that the problem of multiple Acts which deal with domestic violence in England show that a comprehensive 'code'

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85 Hoyle, *supra* note 16, at 228-229.

86 A. L. Robinson, *Improving the Civil-Criminal Interface for Victims of Domestic Violence*, 46(4) The Howard Journal 356, at 367 (2007); "Unless there are legal, ethical, or practical reasons to prefer some other intervention arrest remains a viable option." R. A. Berk, *What the Scientific Evidence Shows: On the Average, We Can Do No Better Than Arrest, in* R. J. Gelles & D.R. Loseke (Eds.), Current Controversies on Family Violence 323, at 332 (1993); S. M. Edwards, Policing 'Domestic' Violence: Women, the Law and the State 61 (1989).

87 Noted as a Judge of the Supreme Court of Northern Ireland in the paper.

88 Mr Justice Gillen, *supra* note 34, at 196; *See also* Connors, *supra* note 58, at 183, who expresses that most legal systems have not displayed a synthetic approach to the problem and as a result different forms of such violence are located in different legal remedies and texts.

89 United Nations, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences: A Framework for Model Legislation on Domestic Violence*, E/CN.4/1996/53/Add.2, Art. 4.

90 D. Hubbard & D. Wise, Domestic Violence: Proposals For Law Reform (Legal Assistance Centre, Law Reform & Development Commission) September 1998, at 15.

91 *Id.*

92 *Id.*, at 16.

93 Connors, *supra* note 59, at 187.

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for the procedure should be presented in one statutory enactment.[94] In the USA, a Model Code on Domestic Violence and Family Violence has been drafted.[95] The Code has brought the civil, criminal and other procedures that are to be used by the community to identify, protect, treat and intervene in instances of domestic violence.[96] It should be noted that this is a Code that has brought all forms of remedies and services that may be used to deal with domestic violence under one single code. At this point, the distinction of normal legislation and a codification is essential. A code is a comprehensive statute which reproduces systematically, with or without modification, the current principles, rules and other provisions of that area of law, whether they derive from common law, statute, or any other source.[97] Acts of Parliament are drafted by various people at different times and the result may be a duplication, contradiction, ambiguities and obscurities.[98] The Namibian Report supported the legislative approach they took with the United Nations Model Framework and the USA Model Code. From the point of view of drafting, the drafter submits that the draft taken by Namibia is neither integration nor a code, as the Act cross references to other Acts. This will further be discussed in Section C. The answer to the question of which is the best practise and legislative approach to use can be drawn here. A code is an ideal approach for any state; it is a legislative style[99] which every jurisdiction needs to decide whether to bring aboard or not. If taken aboard, a drafter may conclude that the code would be the best practise. However, since most jurisdictions, especially in the Commonwealth are not in a habit of codifying legislation, the best legislative approach for purposes of this article will be taken to be, as illustrated earlier, that which will deal effectively with domestic violence. It has been shown that neither the civil nor the criminal legislative approach is effective on its own. It is established, that the best practice is the one that has specific domestic violence legislation which deals both through the criminal and civil law remedies. It is also best practise to create domestic violence offences in specific domestic violence legislation, rather than leaving it to the general criminal law which has been criticised for its ineffectiveness in dealing with domestic violence cases.

IV. Non Legal Responses

"However important innovative legal measures may be, they of themselves do not provide the solution: they are merely the backdrop to other measures that may

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[94] E. Schollenberg & B. Gibbons, *Domestic Violence Protection Orders: A Comparative Review,* 10 Canadian Journal of Family Law 191, at 235 (1991-1992).

[95] Conrand N Hilton Foundation, Family Violence: A Model State Code (National Council of Juvenile and Family Court Judges, Reno, Nevada, 1994)

[96] *Id.*, at v-vi.

[97] F. Bennion, Bennion on Statute Law 75 (1990); V. C. R. A. C. Crabbe, Legislative Drafting 191 (1993).

[98] R. Dickerson (Ed.), Professionalizing Legislative Drafting: The Federal Experience 62 (1973).

[99] Crabbe, *supra* note 97, at 192.

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be more effective."[100] "The law is just one of many possible forms of intervention which may not be appropriate for all forms or incidents of men's abuse."[101] As stated by Connors above, effective response to domestic violence should integrate legal responses with service provisions and education measures.[102] By providing services and training to the victims and those involved in the fight against domestic violence, the chances of enforceability and effectiveness of the legislation are increased, as opposed to when the legislation is left to work on its own.[103] Where such services or (non legal interventions) are integrated in the legislation as proposed, this may elevate the chances of enforceability. Lewis concludes that other factors that might buttress the legal interventions are providing for rehabilitation programmes, as rehabilitation can be a more effective measure, than deterrence provided by legal sanctions.[104] In Europe, 'soft laws' in the form of guidelines for police and prosecution have been drafted to promote a stricter enforcement of the law.[105] The non legal responses may be included in principal legislation, subsidiary legislation or other legal documents. The direction a jurisdiction will take will be determined in light of their respective drafting style and method.

C. Comparison of Legislation from Different Jurisdictions

Effective legal protection is vital to those who experience domestic violence. However, the outcome of law reform aimed at achieving that end cannot be pre-determined, and its effectiveness in practise cannot be presumed and should not be taken for granted. Where law reform is undertaken it is essential that the reform process, implementation and outcome be closely monitored and evaluated.[106]

In the previous Section, we discussed the different approaches used by jurisdictions in order to curb domestic violence through legislation. It was established that most jurisdictions have used both the criminal and the civil approach to address the problem, and that both approaches have to work jointly in order for domestic violence to be effectively curbed. This Section will consider and compare legislation from South Australia, Namibia, South Africa and the

[100] Connors, *supra* note 59, at 185; S. Choudhry & J. Herring, *Righting Domestic Violence*, 20 International Journal of law, Policy and the Family 95, at 96 (2006).
[101] R. Lewis, *Making Justice Work: Effective Legal Interventions for Domestic Violence,* 44 British Journal of Criminology 204, at 221 (2004).
[102] Connors, *supra* note 59, at 187.
[103] The effectiveness of the criminal law is not simply about its substantive components but the practices of those charged with implementing it on a day-to-day level. Burton, *supra* note 36, at 87.
[104] "Rehabilitation is the most relevant long-term goal. If there is deterrence without rehabilitation, the offender may simply assault another victim." E. S. Buzawa & C. G. Buzawa, *The Scientific Evidence is not Conclusive: Arrest is No Panacea*, *in* R. J. Gelles & D. R. Loseke (Eds.), Current Controversies on Family Violence 337, at 347 (1993).
[105] Malsch & Smeenk, *supra* note 60, at 229.
[106] Department of the Prime Minister and Cabinet Office of the Status of Women National Committee on Violence Against Women, *supra* note 80, at 3.

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UK and observe the different approaches taken by each jurisdiction.[107] It will consider the influence of the definition of domestic relationship in the direction the legislation has taken, and will consider the drafting techniques, style and approach employed in the legislation. It will also consider the extent to which the legislation has been effective in the given jurisdictions.

The questions that will be addressed to all jurisdictions are:

1. To what extent does the legislation define the domestic relationship and how does it reflect on the definition of domestic violence and the family context?
2. Has the legislation taken the civil or criminal approach and is it apparent from the way the Act has been drafted which approach it has legislated?
3. To what extent has the legislation worked against the fight against domestic violence?

I. To What Extent Does the Legislation Define the Domestic Relationship and How Does it Reflect on the Definition of Domestic Violence and the Family Context?

Buzawa states that in the USA, the common usage of domestic violence has been in the context of past or present intimates, but observes that states have moved from this adopted definition and have extended the domestic relationship.[108] Statutes have moved from the adopted definition of violence between two adults, married and unmarried, partners and ex-partners, and taken a broader definition which encompasses anyone residing in the house or any type of family relation and in some instances covers violence between parents and children, and by siblings.[109]

Smith observes that problems of definition arise in respect of which relationships are defined as ‘domestic’. She states that the legal definition of domestic relationship may be restricted to legally married couples living together, but acknowledges that some studies have included cohabiting couples, separated or divorced couples and even both homosexual and ‘dating relationships.[110] From a legislative point of view, it is essential for the definition of relationships to be extensive, as limiting it would exclude a significant population of sufferers and possibly hamper the effectiveness of the legislation.[111] It goes without saying, that the definition given in all the legislation across these jurisdictions has encompassed a ‘domestic’ or family setting that has moved from the customary definition. Namibia and South Africa explicitly refer to the relationship as a ‘domestic relationship’, and include in its meaning, persons who:

[107] Legislation to be compared from the different jurisdictions are – Combating of Domestic Violence Act, 2003(Namibia), Domestic Violence Act, 1994 (South Australia), Domestic Violence Act, 1998 (South Africa) and Domestic Violence, Crimes and Victims Act, 2004 (UK); These Acts will be referred to in this Section by their country names, for example, the ‘South African Act’.

[108] E. S. Buzawa & C. G. Buzawa, Domestic Violence: The Criminal Justice Response 14 (2003).

[109] Buzawa & Buzawa, *supra* note 108, at 15.

[110] Smith, *supra* note 3, at 7.

[111] Bouza, *supra* note 1, at 194.

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(i) are or were married to each other, including a customary marriage or a religious marriage;

(ii) live or lived together in a relationship equivalent to marriage, even though they were not, are not, or will not get married (note that in South Africa the definition extends to people of the same sex or opposite sex, whilst in Namibia, it is only people of the opposite sex. This is because South Africa has recognised same sex relationships[112], whilst Namibia has not);

(iii) would be family members related by consanguinity or affinity if the cohabitants[(ii) above] were married;

(iv) are parents of a child or have shared parenting responsibility, or expecting a child together (in Namibia, this does not include a child conceived as a result of rape or artificial insemination where the parties had no other relationship);

(v) family members related by consanguinity, affinity or adoption (in Namibia it further provides for those family members who stand in the same position due to foster arrangements);

(vi) were engaged, dating or in a customary relationship, including an actual or perceived romantic, intimate or sexual relationship;

(vii) share or recently shared the same resident;[113]

In the UK, the relationship is found in the expression 'associated person' and 'relevant child'.[114] The relationship is also extensive as it includes all the types of relationships[115] provided by the South African and Namibian Act.[116] The South Australian Act does not extensively incorporate the relationships specified in the UK, South Africa and Namibia, but it does provide for the key relationships provided in other jurisdictions. The South Australian Act refers to the relationship as being that of a "member of the defendant's family" or "family member" and includes spouses or formers spouses (spouses include persons of the opposite sex who are cohabiting as the husband or wife de facto of the defendant); a child in the custody or guardianship of the defendant or spouse; a child who resides with the defendant or spouse.[117]

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[112] Civil Union Act, 2006 (Act No. 17 of 2006) (South Africa). The Act provides for civil unions, by way of marriage or civil partnership; legal consequences of civil unions and any matters incidental thereto.

[113] Combating of Domestic Violence Act, 2003 (Namibia), Sec. 3(1); Domestic Violence Act (South Africa), Sec. 1(vii). In the Namibian Act, Sec. 3(2) further provides that if the relationship is based indirectly or direct on a past marriage, engagement, cohabitation or any intimate relationship, the domestic relationship will be deemed for the purpose of this Act to continue two years after its dissolution, unless extended by the courts , Sec. 3(3).

[114] Family Law Act, 1996 (UK), Sec. 42 (1)

[115] Family Law Act, (n 116), Sec. 62.

[116] It is important to note that some writers feel that the extension of associated persons is misguided and that the amendment of the Act has over extended the domestic relationship, H. Reece, *The End of Domestic Violence*, 69 (5) Modern Law Review 770, at 791 (2006).

[117] Domestic Violence Act (South Australia), *see* Table 1, n. 2, Sec. 3.

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The definition of domestic relationship given by all jurisdictions extends from the normal definition of a domestic setting. The definition of the relationship in all jurisdictions is tied to the act of domestic violence as all domestic violence occurrences are committed against a person with whom one is in a domestic relationship or is a family member to. The nature of the relationship between the parties may be considered as a valid factor in evaluating criminal behaviour of either party and may also affect who is actually identified as the 'victim' or 'offender'.[118] The definition of the relationship and the occurrence plays a major role in identifying the approach taken by the legislation, as illustrated in all the jurisdictions, where the first direction taken by all the Acts is to afford protection through civil or non molestation orders which are provided for in all legislation from the various jurisdictions.

From the drafting point of view, a definition performs the function of avoiding ambiguities and avoidance of tedious repetition of the definition within the Act.[119]All the jurisdictions have followed this drafting principle and have explicitly provided what to them, a family member or domestic relationship means. They are different types of definitions and the one that the drafter observes to be in use across the jurisdictions is the enlarging definition.[120] This type of definition usually includes meanings that are outside the ordinary meaning of the term.[121] In South Africa, Namibia and the UK, the people included under the definition of the domestic relationship are not ordinarily in the context of a family as understood, for example, "cohabitants and people with whom one is in or was in an intimate, sexual or romantic relationship." The South Australian definition includes cohabitants, but the definition of family member is more limited as compared to that of other jurisdictions. Arguably, one may rule out the definition provided in the South African Act to be a delimiting definition[122] as it opens with the term 'means' as opposed to 'includes' which many legislative drafting authors have attached to be the ideal term to be used in an enlarging definition.[123] However, it is argued that, despite using the term 'means' to define

[118] *See* Buzawa, *supra* note 108, at 149; the nature of the relationship, its privacy connotation as it relates to intimates and family; its special symbolism of affection within a family setting, and its contrast with physical violence, explains the relevance of the relationship in conceptualizing domestic violence. Dempsey, *supra* note 8, at 313-314; Tadros, *supra* note 4, at 129.

[119] G.C. Thornton, Legislative Drafting 145 (1996); Crabbe, *supra* note 97, at 105.

[120] F. Bennion, *Threading the Legislative Maze 6*, 162 Justice of the Peace [JPN] 856, at 857 (1998). http://www.francisbennion.com/pages/02/legalwritings.htm last accessed on 25 August 2008.

[121] Also referred to by Thornton as "extending definitions." Thornton, *supra* note 119, at 146; to enlarge a definition means retaining the ordinary meaning of a word and adding a meaning to it that the word does not ordinarily has. Crabbe, *supra* note 97, at 108; ordinary meaning is the natural meaning which appears when the provision is simply read through; the meaning actually understood by the reader on first glance of the word, is associated with the meaning that the reader is customarily associated to or attaches to the word. R. Sullivan, Sullivan and Driedger on the Construction of Statutes 19-21 (2002).

[122] E. A. Driedger, The Composition of Legislation; Legislative Forms and Precedent 45 (1975).

[123] 'Means' restricts or limits the definition to what is provided, where 'includes' expands the definition. *See* Bennion, *supra* note 120, at 857; Crabbe, *supra* note 97, at 109; Driedger, *supra* note 122, at 46; Thornton, *supra* note 119, at 144-149

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the term in the South African Act, all factors considered, the definition provided is an enlarging definition as it has included relationships that are ordinarily out of the ordinary meaning of domestic. The same is observed in the Namibian and UK Acts, where the Namibian Act provides that "for purposes of this Act a person is in a domestic relationship with another person if …"[124] and that of the UK, "for the purposes of this Part."[125] The definitions do not commence with either the terms 'means' or 'includes' but lists and includes relationships outside the ordinary meaning of 'domestic'. It is important to note that where the South Australian and South African definitions are found in the interpretation section of the Act, the definitions of the Namibian and the UK Acts are found in the body of the Act in separate sections. This brings yet another essential element to the fore, the significance and importance of placing definitions within an Act. Thornton states that the general rule for definitions in an Act is that they should be assembled where they may be easily located by the reader.[126] Most legislation has an interpretation section where all the definitions of words used in the Act are placed. Some interpretation sections are located at the beginning and some at the end of the Act; it depends on the direction the jurisdiction has chosen.[127] The South African Act and South Australian Act both have interpretation sections where the definition of domestic relationship, even that of domestic violence, is placed. The Namibian Act also has an interpretation section, but it is highlighted that though the term domestic relationship is listed amongst other words in the interpretation section, the full definition is provided for in Section 3 of the Act. The same has been done with the definition of domestic violence. One may ask why the drafter of the Namibian Act did not fully define the term in the interpretation section, and place it in another section within the Act, especially where the term has been used in other sections of the Act than the one defined in. Thornton accepts that a word may be defined in a section if it is used only in that section, and the right way to do that is to have mentioned it in the interpretation section.[128] Noticeably, the term domestic relationship has not been used in the one section which defined it, but has been used in other sections in the Act. This view alone raises doubt as to whether the drafter of the Namibian Act considered the rules of drafting definitions in an Act.[129] Having considered all, and reading Section 3 in its entirety, the writer acknowledges that the drafter of the Namibian Act may have considered the rules for drafting definitions. A definition should not include substantive matter.[130] The Namibian Act illustrates the point where

[124] Namibian Act, *see* Table 1, n. 2, Sec. 3(1).

[125] Family Law Act, *supra* note 114, Sec. 62.

[126] Thornton, *supra* note 119, at 152.

[127] No standard or widely used method has emerged in the British Commonwealth and the placing of definitions is still a debatable matter. B. H. Simamba, *The Placing and Other Handling of Definitions*, 27(2) Statute Law Review 73 (2006); placing of definitions can be at beginning or end of Act, at 74; the practice of where to place a definition lies in the particular jurisdiction, at 76.

[128] Thornton, *supra* note 119, at 153; the definition would be placed at the end of that definition. Simamba, *supra* note 127, at 79.

[129] Simamba emphasises that any use of that term in a second or further section dictates the moving of the term to be with the definitions relating to the whole Act. Simamba, *supra* note 127, at 79, 81.

[130] Thornton, *supra* note 119, at 150; Crabbe, *supra* note 97, at 117.

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the definition concerns a substantive matter, and the need for it to be provided in a separate section than the interpretation section. However, it is still pointed out that the drafter of the Namibian Act should have considered the fact that the term will be used in other sections and rightly decided where to place the definition of domestic relationship. The writer submits that a term used in different parts of an Act belongs in the interpretation section of the whole Act and that the substantive parts of that definition should have been drafted as a separate section within the Act. The Family Law Act (UK) places its definitions at the end of every Part. This is the method used in UK Acts, where the interpretation section is usually placed at the end of the Act, rather than at the beginning as in the other jurisdictions illustrated.

II. Has the Legislation Taken the Civil or Criminal Approach and is it Apparent from the Way the Act Has Been Drafted Which Approach it Has Legislated?

The South African and South Australian Domestic Violence Acts have taken the civil approach and this is reflected within the Acts. The long title of the South African Act provides that the Act is "to provide for the issuing of protection orders with regard to domestic violence; and for matters connected therewith," whilst that of South Australia provides that it is "An Act to provide for restraining orders in cases of domestic violence; and for other purposes." Thornton states that every Act begins with a long title which has a function of stating the general purposes of the Act.[131] Thornton argues that a long title should be drafted in terms wide enough to embrace the whole contents of a Bill.[132] It should not serve as a label, as that is the prerogative of the short title, a long title should be more informative.[133] Crabbe states that it should comprise the main theme, the pith and substance of a Bill.[134] At the onset, both pieces of legislation indicate that the intention of the Act is to deal with domestic violence only through the civil justice approach. The Acts are therefore clear on the approach they take. On the other hand, the Namibian long title indicates an integrated approach.[135] The UK Act provides a more lengthy long title in which it provides for both the civil and criminal approach.[136] It is important to note that the long title of the UK Act indicates that

[131] Thornton, *supra* note 119, at 193.
[132] Thornton, *supra* note 119, at 194; Crabbe, *supra* note 97, at 120.
[133] Thornton, *supra* note 119, at 193.
[134] Crabbe, *supra* note 97, at 120.
[135] "An Act to provide for the issuing of protection orders in domestic violence matters; to provide for matters relating to domestic violence incidents; to amend the Criminal Procedure Act, 1977; and to provide for incidental matters." (Namibian Act)
[136] "An Act to amend Part 4 of the Family Law Act 1996, the Protection from Harassment Act 1997 and the Protection from Harassment (Northern Ireland) Order 1997; to make provision about homicide; to make common assault an arrestable offence; to make provision for the payment of surcharges by offenders; to make provision about alternative verdicts; to provide for a procedure under which a jury tries only sample counts on an indictment; to make provision about findings of unfitness to plead and about persons found unfit to plead or not guilty by reason of insanity; to

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the UK Act does not only provide for an integrated criminal and civil justice system in regards to drafting, but it also provides for an integrated court system where domestic violence cases either civil or criminal will be heard in one court; this is the same system advocated and followed in the USA.[137] From a drafting point of view, the Namibian Act and the UK Act do not provide for an integrated system as recommended by the UN model framework[138] nor the code found in the USA.[139] Though the Namibian Act provides for criminal provisions,[140] some of the offences listed in the First Schedule are cross referenced to other Acts. Further, the enforceability of the provisions is linked to provisions in the Act.[141] Section 21(2) of the Namibian Act provides that "any person found guilty of a domestic violence offence is liable on conviction to the penalties ordinarily applicable to the offence in question." The Act does not provide penalties for offences it creates, and the dependence on other Acts for penalties indicates that the Act has not integrated the civil and criminal approaches as criminal recourse is still sought in other Acts. The same is seen with the UK Act, which in one Act, makes amendments to all the Acts, civil and criminal which deal with domestic violence. The approach used by both Acts is not integration, as the Acts are at the same level as that of South Africa and South Australia Acts. Rather than an integration and though specific domestic violence legislation has been enacted, domestic violence is still dealt with through different pieces of legislation using the civil or criminal approach.[142] Best practice in all jurisdictions is fulfilled in addressing the problem through separate legislation, but not in one as anticipated by the UN Model Framework and the USA Model Code.

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make provision about the execution of warrants; to make provision about the enforcement of orders imposed on conviction; to amend Section 58 of the Criminal Justice Act 2003 and to amend Part 12 of that Act in relation to intermittent custody; to make provision in relation to victims of offences, witnesses of offences and others affected by offences; and to make provision about the recovery of compensation from offenders." (UK Act)

[137] An integrated court system has already developed in the UK, *e.g.*, in Croydon cases, in which both directions have begun to be heard. Robinson, *supra* note 87, at 357; M. Burton, *Case Commentary: Lomas v Parle – Coherent and Effective Remedies of Domestic Violence: Time for an Integrated Domestic Violence Court?*, 16 (3) Child and Family Law Quarterly 317, at 328 (2004).

[138] UN Model framework on domestic violence legislation, *supra* note 89.

[139] US Model State Code, *supra* note 95.

[140] CDVA (Namibia), *see* Table 1, n. 2, Part III (Secs. 21-25); First Schedule.

[141] CDVA (Namibia), *see* Table 1, n. 2, Sec. 21(2) provides that any person found guilty for any offence of domestic violence in the Act is liable to conviction and penalties ordinarily applicable to that offence. This indicates that the Combating of Domestic Violence Act itself has not provided for conviction and sentencing for the offences it has created as these are enforced by other legislation.

[142] South Australia Act makes reference to the Summary Procedure Act 1921, which provides for the criminal offences and proceedings under the criminal justice system. *See* Table 1, n. 2, Sec. 19; South African Act provides that a member of the police service (Section 2(b)) or a clerk of the court (Sec. 4(2)) must inform a complainant of the legal remedies available under the Act and a right to lodge a criminal complaint, if applicable. *See* DV Act, *see* Table 1, n. 1.

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III. To What Extent Has the Legislation Worked Against the Fight Against Domestic Violence?

A report in South Africa indicates that the Domestic Violence Act has not been fully effective. Some of the problems arising from the enforcement of the Act have been associated to language, service of protection orders and the time given for service of protection orders. South Africa has eleven official languages and the language barrier has negatively impacted on the enforcement of the legislation. The report indicates that the language used in the law, English and Africans, has caused barriers in enforcement where the system is not fully equipped with translators to assist complainants to make an application under the Act.[143] Service of protection orders has been difficult and the requirement for a proof of service to be acquired before getting a warrant of arrest and ultimate protection have been futile, as in some cases, there are difficulties in locating the respondent. This same problem has been faced in Namibia where lack of knowledge of the remedies available in legislation and understanding the procedure has hampered the effectiveness of the legislation. Another hindrance is the life span of the protection orders, which is short and the problems of effective service are hampered by this life span which usually expires before the respondent is located.[144] Other problems associated with the legislation have been the professional or personal interface where the Act is seen not to have clearly addressed the different roles to be played by the users of the Act.[145] "The infrastructure within the police and court systems is a fatal flow to the effective and efficient enforcement of rights of the complainant."[146] The balance of the civil and criminal approach in the legal system has proven to be a challenge as the police being the key implementers are overwhelmed with the different tasks they have to play in the two separate systems. Despite the problems in enforceability, one of the "cornerstones of the success for the Act has been observed to be the systemic intersectoral approach to the problem where other sectors such as health, welfare, housing, transport are drawn into the ambit of the solution."[147]

In the UK, an enquiry conducted by the House of Commons Affairs Select Committee in January 1998 on domestic violence revealed that the Domestic Violence, Crime and Victims Act 2004 still had gaps in enforceability as some of the provisions had not entered into force.[148] Further remarks were that the

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[143] P. Parenzee, L. Artz & K. Moult, Monitoring the Implementation of the Domestic Violence Act: First Research Report 78 (2001).

[144] Parenzee, *supra* note 143, at 79-80.

[145] *Id*., at 105.

[146] *Id*., at 110; one of the greatest challenges of the legislation is that it requires empathic understanding on the part of those who administer it. A great deal of sensitivity and awareness is required from the police and court officials to assess the subtleties of human interaction within a violent environment, at 107; In order to implement it successfully, the police should be trained properly on how to deal family violence cases and consider complaints of domestic violence as a serious and urgent matter. A. E. Van der Hoven, *South Africa*, *in* R. W. Summers & A. M. Hoffman (Eds.), Domestic Violence: A Global View 125, at 140 (2002).

[147] Parenzee, *supra* note 143, at 114.

[148] E. Walsh (Ed.), *Newsline Extra: Domestic Violence Commons Inquiry*, 38 Family Law 269 (2008).

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choice of whether to use the civil orders provided in the Family Law Act or the criminal justice system left gaps in implementation of the Act, as the choice to commence a matter lay with the applicants, who were at times reluctant to invoke provisions of the Act.[149] This same problem is faced in the Australian jurisdictions and a report indicates that some victims have stopped seeking recourse from the available legislation as they were overwhelmed by the negative outcomes of the order, where orders were not enforced because of a lack or arrest.[150] Another problem faced in the UK was the lack of training by those who provided legal aid to the victims and the lack of relevant skills negatively impacted on dealing with domestic violence through the Act. Though the effectiveness of the Act has not been measured completely as some of its provisions came into force in July 2007, Gore is of the opinion that the police need to be in tune with the amendments that have been made and be able to address the criminal approach brought by criminalizing a breach of non molestation orders.[151] The police need to understand and be ready to enforce the provisions brought through the Acts.[152] Gore also observes that there is a need for a parallel amendment to the Protection from Harassment Act 1997 by creating a statutory definition of harassment as this will settle the doubt as to what constitutes harassment and will make the Act more effective.[153] Where previously the legal remedies available in the UK were criticized for lack of enforceability and for being strewn in different Acts, the enactment of the Domestic Violence, Crimes and Victims Act 2004 is considered a positive step to addressing domestic violence through legislation.

D. The Botswana Approach to Domestic Violence

The previous Sections explored the problem of domestic violence, the concept of domestic violence and the domestic relationship. They explored the different approaches taken by various jurisdictions in dealing with domestic violence through legislation and laid out what the writer feels is the best legislative approach. Taking aboard all the findings of previous Sections, this Section will consider the approach taken by Botswana and will analyse the Domestic Violence Act (to be referred to in this Section as 'the Act')[154] and establish whether it has taken the best approach and will effectively curb the problem of domestic violence in Botswana. It must be noted, however, that some of the shortcomings

[149] Remarks made by Chief Constable Moore and District Judge Mornington, Walsh, *supra* note 148, at 269-270; gaps in responses to domestic violence through the criminal and civil remedies are created, in the criminal law by lack of adequate response by the police and prosecution to such cases. Choudhry, *supra* note 100, at 99.
[150] Department of Prime Minister, *supra* note 80, at 10.
[151] S. Gore, *In Practice: The Domestic Violence, Crime and Victims Act 2004 and Family Law Act 1996 Injunctions*, 37 Family Law 739, at 744 (2007).
[152] DVCA, *supra* note 77; Family Law Act, *supra* note 114.
[153] Gore, *supra* note 151, at 741.
[154] The Act is attached as Annex 'A' for reference.

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of the Act are likely due to the fact that, as the Bill was introduced by a Private Member of Parliament, it did not go through the intense government consultative process to afford all affected Ministries and stakeholders to give their input.

I. Influence of Acts from Different Jurisdiction (Legal Transplants?)

An in-depth look at the Act indicates an influence from other Acts. Clearly, the Act has been drafted in the spirit of the South African and the South Australian Acts. The question is whether, if this is a case of transplants in legislation, whether the Act has taken aboard factors that apply to Botswana?

A legal 'transplant' involves the 'implant' in a certain legal system of a rule or doctrine from another legal system.[155] Borrowing legal ideas from another jurisdiction has become the most common form of legal change.[156] Legal transplants in legislation are seen as a means of promoting and developing legislation quickly and effectively.[157] The problem of domestic violence has been tackled by various jurisdictions, all with lessons to learn from each other, that it is sensible to borrow ideas from legislation in other jurisdictions. Evidently, the similarity of the approach given in legislation from the studied jurisdictions indicates that the similarities in each are largely a result of legal transplants.[158] Xanthaki states and concludes that the crucial determinative of establishing which legal system to compare or borrow from is not the similarity of its characteristics with that of the receiving legal order, but the functionality of the proposal.[159] Therefore policy choices, concepts, terms and legislative solutions can be borrowed not only from neighbouring legal systems, but from afar, as long as they function well in the receiving jurisdiction.[160] Zhuang on the other hand emphasizes the need for the receiving country to create corresponding systems to make sure the transplanted laws will work effectively in the receiving country.[161] Notably, the same results received in the country of origin from the legislation in question can not be the same as those that might arise in the adopted country.[162] Thus a country has to observe the effects received in the country of origin; where it will improve from the mistakes learnt from that other system and create corresponding systems to those which were successful.[163]

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[155] Smits, *supra* note 32, at 60.
[156] A. Watson, Legal Origins and Legal Change 73 (1991); J. Fedtke, *Legal Transplants, in* J. M. Smits (Ed.), Elgar Enclyclopedia of Comparative Law 434 (2006).
[157] H. Xanthaki, *Legal Transplants in Legislation: Defusing the Trap*, 57 International and Comparative Law Quarterly 659, at 659 (2008).
[158] Smits, *supra* note 32, at 60
[159] Xanthaki, *supra* note 157, at 662, 673.
[160] *Id*., at 673.
[161] S. Zhuang, *Legal Transplantation in the People's Republic of China: A Response to Alan Watson,* 7 (1/2) European Journal of Law Reform 215, at 232 (2006).
[162] *Id*.
[163] Legal transplantation is a massive systems engineering project, it is not simply transplanting a single law or institution, but also creating the circumstances and the legal framework to make sure that the transplanted law can perform successfully. Zhuang, *supra* note 161.

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Though it has been established that the system from which one borrows a legislative idea is not crucial, the Act has drawn mostly from Commonwealth countries, and it can be said that in transplanting, the drafters of the Act considered similar systems. The approach used by the Act, is seen in most of the jurisdictions discussed in this article. The Act is still fairly new and therefore the success of the transplant is not recorded. However, the writer acknowledges the need for Botswana to create corresponding systems within Botswana to aid the effectiveness of the legislation.

II. Is the Act Appropriately Drafted for the Users?

One of the elements of effectiveness of legislation is its ability to communicate to the users. Legislation communicates to its users, their rights, obligations, powers, privileges and duties.[164] Successful communication depends on the reception of what is transmitted to the users or the people to whom the legislation seeks to communicate to.[165] It is also dependent on whether communication is relayed to the relevant people. Thornton lists the relevant people to be lawmakers, persons who are concerned with or affected by the law and members of the judiciary.[166] For the purpose of this Section, the relevant persons will be taken to be the persons concerned and affected by the law and members of the judiciary. The rationale is that the law has already passed through the lawmakers, being the members of Parliament and waits to be used by the remaining users.

To consider whether the Act does communicate and is appropriately drafted for the users, the drafter will consider two rules from the drafting rules formulated by Thornton. The two rules to consider are:

1. Write simply but precisely. (Rule 1)
2. Test the draft in relation to comprehensibility. (Rule 8)[167]

1. Write simply but precisely

Thornton states that for simplicity and precision to be fulfilled in legislation, at the completion of the draft, the drafter must assess whether what has been said means exactly what was intended or more less as intended.[168] Simplicity and precision together must be understood to mean that legislation must only contain essential elements, and unnecessary words should not be used, but the words chosen should express accurately and unequivocally the meaning intended to be communicated.[169]

An examination of the Act reveals that most part of the Act is simple and precise and communicates its intention to the users. An exception is seen at Section 9(1) where the expression "*interim order ex parte*" is used instead

[164] Crabbe, *supra* note 97, at 27.
[165] Thornton, *supra* note 119, at 47.
[166] *Id*.
[167] *Id*., at 53-56.
[168] *Id*., at 55.
[169] *Id*.

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of '*interim order*' which is used throughout that section. The Act provides in Section 7(1)(a) that one of the orders that an applicant can make is an *interim order*, but has not provided for an *interim order ex parte*. An *interim order* is one that has to be granted where the respondent has been given notice, as is provided in Section 9(4), and an *interim order ex parte* is granted without serving notice to the respondent. The Act is not clear as to whether its intention is to avail only an *interim order* to the applicant or it also provides for an *interim order ex parte*. The words *interim order ex parte* appear only in Section 9(1) and from the way they are used, it seems the drafter of the Act did not appreciate the distinction between an *interim order* alone, and an *interim order ex parte*. In this regard the Act has failed to be precise.

2. Draft for the users with their various standpoints in mind

Legislation must be capable of being understood by those to whom it applies. Different individuals and groups will have different levels of understanding according to their familiarity with the subject-matter. Lawyers and judges are part of that audience. The most that can be said is that those who draft legislation, and the legislatures that enact it, should endeavour to reach as many users as possible without compromising the effectiveness of instruments they create.[170]

The users are firstly, those people who are personally affected by the legislation[171] in this instance, the applicants (being the people to whom the respondent is in a domestic relationship with)[172] and the respondents. The Act defines applicant to mean "any person who alleges to have been subjected to an act of domestic violence"[173] and respondent to mean "any person who is or has been in a domestic relationship with the applicant and against whom the applicant seeks to obtain or has obtained an order under this Act."[174] Both the applicant and respondent are involved in the application process and it is observed that the Act does no provide for any aid to be given to the applicant to bring an order or select the relevant remedy except only if the applicant is a minor, mentally

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[170] G. Tanner (QC), *Confronting the Process of Statute-Making*, *in* R. Bigwood (Ed.), The Statute Making and Meaning 65, at 74 (2004).

[171] Thornton, *supra* note 119, at 48.

[172] Domestic Violence Act, 2008 (Botswana), Sec. 2 (to be referred to as 'DV Act'). The definition of domestic relationship is extensive and means a relationship between an applicant and the respondent in any of the following ways –

> they are or were married to each other;
> they are or were cohabiting;
> they are a child of the applicant or respondent;
> they are family members;
> they would be family members related by affinity if the persons referred to in paragraph (b) were, or could be married to each other;
> they share or shared the same residence; or
> they are or were in an engagement, dating including an actual or perceived romantic, intimate or sexual relationship.

[173] *See* DV Act, *supra* note 30, Sec. 2.

[174] *Id.*

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challenged, unconscious or under the influence of alcohol.[175] It also does not aid the respondent to understand the contents of the order served on him or how to act.[176] The question to address at this point is whether the Act does communicate to the applicant. In the previous section it was established that apart from the exception identified, the Act is clear and precise and clearly communicates to its users. However, though the language is precise and does communicate, in this section, communication will not be measured by the language, simplicity or precision of the Act, but by the understanding of the users. The applicant is directed to make an application in which he or she is to choose the nature of the order to apply for.[177] Not all the people who will lodge applications are educated, and the fact that the Act leaves the option of lodging and choice of which order to apply for, to the applicant hampers the effectiveness of the legislation. How is communication to be effected where the language of the law is left to mere people without any legal assistance to invoke the provisions of the Act? This highlights one of the problems reported in the South African Act, and cautions the lawmakers of the Botswana Act to foresee a possibility of ineffectiveness due to language barrier.[178] The same problem applies to the second group of users who have been charged to administer and enforce the Act.[179] Among these are the police, clerk of the court, deputy sheriffs, social workers, teachers and District Commissioners.[180] These users are also charged with making an application on behalf of the victims and serving documents to the respondents. The problem of language, knowledge of the relevant procedure and relevant training to implementers is addressed in the UK and South Africa and is an apparent problem to Botswana. The administrators are not that knowledgeable in the language of the law and the writer views that the procedure as laid out is not clear to these users. For example, neither an applicant nor the police without relevant training would understand what an *interim order* or restraining order is, as this has not been defined in the Act. However, there is room for it to be rectified through drafting of subsidiary legislation, where the detailed procedure can be laid out, as the practice in drafting in Botswana is to leave the details to subsidiary legislation.[181] The Act, however, is clear on what the occupancy or tenancy orders are,[182] but whether it communicates to the third parties to the occupancy or tenancy orders,[183] is also dependant on whether these parties will understand the language of the law. The law does communicate to those in the legal profession as they will understand the language of the Act, but the Act has not provided that applicants or respondents may have legal representation but has laid down procedures to be followed by the ordinary users.[184] Where the users

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[175] *Id.*, Sec. 7(5).
[176] *Id.*, Sec. 9(4).
[177] *Id.*, Sec. 7(1)(d).
[178] *See* Paranzee, *supra* note 143.
[179] Thornton, *supra* note 119, at 48.
[180] DV Act, *supra* note 30, Secs. 5(a), 7(6), 9(a),
[181] O.K Dingake, Administrative Law in Botswana: Cases, Materials and Commentaries 7 (1996).
[182] DV Act, *supra* note 30, Secs. 10 & 11.
[183] *Id.*, Secs. 14 & 15
[184] *Id.*, Section 6(2) The Act provides that any party in the proceedings may request the presence of any specified person. It is questionable whether this provision may include a legal representative

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cannot afford legal assistance, they would not have the benefit of communication of the law in the language they understand.

III. Constitutional Issues

An enactment is void from the beginning if it is inconsistent with the Constitution.[185] In countries with a written Constitution and those that uphold constitutional supremacy the rule is that every Act of Parliament must be drafted within the limits of the Constitution. In Botswana the same principle is upheld and the drafter when drafting a piece of legislation must consider constitutional issues and ensure that the Act drafted does not conflict with the Constitution.[186] Section 86 of the Constitution of Botswana provides that all laws drafted in Botswana shall be subject to the Constitution.[187] The Botswana Legislative Drafting Manual lists among the factors to be considered for constitutionality:

1. Right to fundamental rights in the Constitution (in this article focus will be given to the protection of deprivation of property[188]).
2. Civil procedure; each person is entitled to a fair procedure before a determination is made whether or not to deprive the person of a substantial liberty or property right.
3. Legislative proposal should give each person equal protection of the law (every person is entitled to impartiality and fair treatment by the law).[189]

The law in providing protection to victims of domestic violence should also consider the rights of the respondent. The measures, in this matter the civil justice process and the orders available to the victim of domestic violence should not take away the rights of the respondent. The Act should both afford protection to victims of domestic violence and should equally consider the constitutional rights of the respondent.

The questions to be addressed in this section are:

(i) Whether the Act lays down a fair procedure both to the applicant and respondent before granting an order?

(ii) Whether the orders provided do not take away the rights of the respondent to protection from deprivation of property and hence provide equal protection of the law to both the applicant and respondent?

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and if so, the Act only makes mention of this in regard to proceedings. Though, in practise legal presentation may be sought, the fact that this Act has provided for an instance where the applicant can lodge an application without legal representation indicates that one may be without legal representation. To those who can afford legal representation, the Act would have fully communicated to them, but to those without, it is doubtful whether the communication will be effected.

[185] Crabbe, *supra* note 97, at 57.

[186] Attorney General's Chambers, Legislative Drafting Manual (2005), Ch. 1, at 2.

[187] "Subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good government of Botswana." Constitution of Botswana, Sec. 86.

[188] Constitution of Botswana, Sec. 8.

[189] Attorney General's Chambers, *supra* note 184, Ch. 1, at 3.

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1. Whether the Act lays down a fair procedure both to the applicant and respondent before granting an order?

Section 7(7) of the Act requires that an application for an order under the Act should be served personally to the respondent at least three days prior to the hearing. Section 5(a) mandates that any documents of the court should be served to the respondent. Section 9(4) of the Act requires that in the case of an interim order, the order should be served personally upon the respondent and should provide for a return date where the respondent may be heard. Section 13 of the Act provides that both the applicant and respondent may make an application to vary or revoke the order, and in the case where the application is made by the applicant, that the respondent should be served with a notice.

From the examination of these provisions it is evident that a fair procedure exists. The court may not proceed with an application without having given the respondent notice and a chance to respond or be heard on the matter before granting an order. The only exception would be where the Act was clear about whether a court can grant an *interim order ex parte* as discussed above. However, since the intention of the Act in this regard is not clear and a reading of that section presupposes that what the Act actually referred to is an interim order, the issue of an order without giving notice to the respondent does not seem to arise. Even if the Act did provide for an *interim order ex parte*, practise in the courts and that of Botswana is that such order is given with restraint as the court will have to be satisfied that serious risk or harm exits.[190] The points for consideration are made in Section 9(1) of the Act, but it is still doubtful whether they refer and apply to an *interim order ex parte* or to an *interim order* as provided by the section.

2. Whether the orders provided do not take away the rights of the respondent to protection from deprivation of property and hence provide equal protection of the law to both the applicant and respondent?

In some jurisdictions, the constitutionality of protection orders has been questioned. In the UK, in the earlier days, the courts described the impact of removing someone from their home as 'draconian'[191] and resisted granting ouster exclusion orders,[192] an equivalence of occupancy orders provided in the Botswana Act. In the USA the question of constitutionality of the order arose when the courts and the police cautioned that protection orders afforded to victims were constitutionally permissible.[193] As in the UK, the courts were reluctant to grant

[190] "Ex parte orders are anomalies in the common law system of justice and the granting on an ex parte injunction … is a matter of discretion for the court not to be exercised lightly." R. Alexander, *The Response to Commonwealth Law to Wife-battering*, 2(3) Australian Journal of Family Law 240, at 245 (1988).

[191] Schollenberg, *supra* note 94, at 203.

[192] Edwards, *supra* note 86, at 57; *see also Davies v Johnson,* [1978] 1 ALL ER 1132, at 1152.

[193] Finn, *supra* note 56, at 157.

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protection orders with the fear of infringing the respondent's constitutional rights, but this has decreased as legislation with more specific procedure has been passed and the courts are now interpreting domestic violence broadly than narrowly.[194]

The contentious orders to consider in Botswana are the occupancy order provided in Section 10 and the tenancy order in Section 11. The occupancy order gives the applicant an exclusive or non exclusive right to live in the residence occupied or belonging to the applicant, respondent or to both for a specific or indefinite period of time. The effect of this order is that it directs the respondent to leave the residence belonging to him or her or to live in a section of the residence, as the order will provide. The tenancy order also grants the same conditions, but in this regard it relates to property that is rented in the name of the respondent and directs the respondent to leave such property, but also to pay rent as is reasonable and for a stipulated time. The consequence of both orders is that they have an element of depriving the respondent of their property. However, in reading the constitutional provision as a whole, such deprivation does not exist. The Constitution at Section 8(5)(a)(iv) provides that the right to protect one from deprivation of property may be limited by an execution of judgement or an order of the court. This is an incidence of constitutional limitations. Further, Section 12 of the Domestic Violence Act provides that an order shall remain in force unless it expires or is revoked under Section 13. Having considered these factors, it is evident that the Act has considered the constitutional rights of the respondent and equally provides protection to both the applicant and respondent. The Act does not infringe nor is in contravention of the Constitution.

IV. Criminal Remedies Available in the Penal Code

As stated in Section A, before the enactment of the Domestic Violence Act, most domestic violence related offences were dealt with under the general criminal law. An examination of the Penal Code reveals that the offences provided under the Penal Code are not specific to a domestic setting, but apply generally to every person in the community. Of the offences against morality which include rape, indecent assault, defilement, none of these are specific to a domestic setting.[195] Section 168 which deals with incest, is the only provision which may be closely linked to a domestic setting. As regard rape, even if victims under the Domestic Violence Act were to seek recourse through criminal proceedings as provided under Section 17 of the Act, if they are a married couple, they would not receive full recourse of the law as marital rape has not been declared a crime in Botswana.

The Penal Code provides a vast number of offences which a person who has suffered under these offences can seek recourse under the criminal law. The problem of recourse under the criminal law as discussed in Sections A and B is that the burden of proof required under the criminal law is high and victims of such offences at times do not receive the recourse anticipated in the law.[196] The

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194 *Id.*

195 Penal Code (Cap. 08:01), Secs. 141, 146, 147.

196 Molokomme, *supra* note 25.

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criminal law does not afford full protection to the victims of domestic violence and the fact that the police in Botswana have been reluctant to deal with offences committed in a domestic setting because of lack of a specific domestic violence offence and non cooperation by the victims of domestic violence, is yet another indicator that the criminal law as it currently stands is not a sufficient tool to deal with domestic violence.[197]

E. Conclusions and Recommendations

Legislative tinkering by lawmakers unexposed to the brutal mundaneness of abused people's lives can produce little more than a law to appease the conscience that recoils from the horror of cruelty to women and children. It is not sympathy that battered women need. Nor is it their goal to become the symbol of extent to which a particular government cares for the disempowered. They need safety.[198]

I. Importance of Addressing Domestic Violence through Legislation

"Family Violence is a wrong that needs righting in every state … The key is community commitment to recognize, address and prevent such violence. Effective and enabling legislation is the cornerstone."[199]

The problem of domestic violence has been dealt with under many spheres, but there is a need for legislation to deal with this problem. Domestic violence in Botswana and in many jurisdictions has been dealt with under the general criminal law. There is a need for specific legislation that addresses domestic violence. Every government has a responsibility to ensure that it enacts legislation specific to address the crisis of domestic violence. This legislation should be drafted with the intention of being effective, as the society and victims seek a law that will protect them and not one that will serve as window dressing to appease the horrors they face. The legislation should be drafted using what is considered to be the best practice and should aim to be effective.

II. Integrated Approach to Domestic Violence is Significant for Legislative Effectiveness

The need for an integrated piece of legislation to address domestic violence can not be overemphasized. The ideal approach and best practice to deal with domestic violence through legislation is one that integrates the criminal remedies and civil remedies available to curb domestic violence. The best practise is to have one integrated Act or a code which encompasses both the civil and criminal remedies

[197] Women and Law in Southern Africa, *supra* note 28.
[198] J. Fedler, *Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993 – An Evaluation After a Year in Operation*, 112 South African Law Journal 231, at 251 (1995).
[199] Conrad N Hilton Foundation, Model Legislation, *supra* note 95, at iv.

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in one. Where an Act or code can not be enacted due to time limitations or country preference, jurisdictions are encouraged to introduce clear, accessible and well-integrated legal provisions, appropriate to the particular country situation.[200] These integrated provisions may be drafted in two separate pieces of legislation, where one addresses the criminal faction of domestic violence and the other, the civil factor. The integration though not in the ideal single piece of legislation will be made where there are two pieces of legislation which specifically address domestic violence. The improvement to be made is that both pieces of legislation would be specific. There is a need for jurisdictions which have addressed domestic violence only through the civil approach and remedies to re-enforce the criminal law and make domestic violence a specific offence. The civil remedies cannot be enforced effectively without the involvement of the criminal law and its agencies. The criminal law has been criticized for its aggressiveness, but "laws must aggressively pursue domestic violence offenders without compromising the victims' safety."[201] There is a need for specific domestic violence offences as domestic violence is becoming more widely accepted to belonging to the criminal arena[202] and this plays a major role in the effectiveness of the law.[203] The criminal law on its own cannot protect the victims as it has not succeeded in deterring offenders from further abusing their partners.[204] "Deterrence should not be the centrepiece for a strategy of containing domestic violence,"[205] protection through the civil procedure is also a necessity.

III. Definition of Domestic Violence and Domestic Relationship to be Broad

Domestic violence is extensive and its occurrences vary depending on each jurisdiction. However, there is a need for a broad definition of domestic violence and domestic relationship. Having wider laws of violence and extending the domestic relationship outside the arena of the adopted definition of family violence will make statutes more effective as they would protect more victims against the various domestic violence occurrences.[206] An extension in the acts of domestic violence is essential and domestic violence legislation must include all the acts reported under the relevant countries as the definition of domestic violence. This will enlarge the scope of the legislation and will respond effectively to domestic violence as seen in the relevant communities.

[200] Connors, *supra* note 59, at 185.
[201] Dugan, *supra* note 67, at 305.
[202] Lewis, *supra* note 101, at 214.
[203] Hubbard & Wise, *supra* note 90, at 30.
[204] Hoyle & Sanders, *supra* note 80, at 423.
[205] Buzawa, *supra* note 104, at 346.
[206] Connors, *supra* note 59, at 191; *see also supra* note 111; Bouza, *supra* note 1.

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IV. The Botswana Domestic Violence Act

The Botswana Domestic Violence Act is a welcome move in the fight against domestic violence in Africa and the world in general. Botswana has joined the few countries in Africa who have enacted legislation specific to curb domestic violence.[207] The nation as indicated by the speech of the former President of Botswana mentioned in Section A of this article anticipate that this Act will address the social problem of domestic violence in Botswana. The Domestic Violence Act as it stands has a limited element of protection. The civil procedure direction which it provides is a sufficient element of protection as illustrated by the countries with specific domestic violence legislation that uses the civil approach. However, with the benefit of experiences from countries such as South Africa, the protection it affords is only good on paper and will need more than the provisions of the current Act to effectively curb domestic violence. There is a need for Botswana to reinforce the criminal remedies of domestic violence legislation. The current criminal law being the Penal Code, currently provides for general offences committed against any person and does not specifically address a crime committed in a domestic setting. There is a need for specific domestic violence offences and legislation that deals with domestic violence. The ideal model to employ is one recommended by the United Nations Domestic Violence Model framework, to have the criminal remedies and civil remedies integrated under one Act. This is the first recommendation that is made. If the country does not enact such a piece of legislation, the second recommendation is that specific domestic violence legislation that creates domestic violence offences and lays down the procedure to be followed should be enacted. If this option still fails, the quickest option that should be made is to amend the Penal Code to address domestic violence specifically. The Domestic Violence Act, without the backing of the criminal law will not be effective. It is emphasized however, that the method that the writer chooses is the one of an integrated Act as anticipated by the UN or the Code as in the USA.

An examination of the Act has revealed that the Act is not clear as regards the remedies available to the victims. The language of the law is complex for people outside the legal profession and the Act, when measuring it from the level of the normal users and their understanding, does not communicate effectively and completely. The Act should be made clearer, either by amending it or by enacting subsidiary legislation which clearly communicates to the users the orders available to them and their consequences. This piece of legislation should also provide a clear and precise procedure that shall aid the applicants, respondents and those called to assist them.

The Act has considered the constitutional rights of both the applicant and the respondent and has not unnecessary taken away the rights of the respondent. However, this is subject to implementabilty and the courts are cautioned to fairly follow the given procedures and consider the facts before granting an order. They should ensure that both parties will be given equal recourse under the law.

[207] South Africa, Namibia, Ghana, Mauritius and Lesotho and others.

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Another issue which is still a major debate in Botswana is the issue of marital rape. This is an incidence of domestic violence and has been recognized as such in countries like the UK. Botswana should also consider this as a crucial element of domestic violence, because, as long as this matter is not addressed, not all the problems of domestic violence would be resolved and a gap will remain in addressing domestic violence as seen by the community. The definition and extent of domestic violence should reflect and be seen in the eyes of the victims. The Act has, however, provided for an extensive group of people as it adequately defines the domestic relationship. The domestic violence acts should be aligned and be as extensive as the relationship. When all this has been done, the Act will succeed in fully protecting the victims of domestic violence.

F. ANNEX A

DOMESTIC VIOLENCE ACT, 2008

No. 10 of 2008

ARRANGEMENT OF SECTIONS
SECTION

PART I – Preliminary
1. Short title
2. Interpretation
3. Jurisdiction of courts
4. Lodging and hearing of application
5. Service of documents
6. Nature of Proceedings
PART II – Orders
7. Application for an order
8. Consideration of application
9. Interim order
10. Occupation order
11. Tenancy order
12. Validity of order
13. Variation and revocation of order
PART III – General
14. Third party interest in property subject to order
15. Effect of order on interest in property
16. Use of furniture, household effects, etc
17. Rights not diminished by Act
18. Appeals
19. Offence and penalty
20. Register of applications, etc.
21. Regulations

An Act to provide for the protection of survivors of domestic violence and for matters connected therewith.

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Date of Assent: 25th April, 2008
Date of Commencement: 15 August 2008
ENACTED by the Parliament of Botswana.

PART I – Preliminary

Short title

1. This Act may be cited as the Domestic Violence Act, 2008 and shall come into operation on such date as the Minister may, by Order published in the Gazette, appoint.

Interpretation

2. In this Act, unless the context otherwise requires –
"applicant" means any person who alleges to have been subjected to an act of domestic violence;
"child" includes biological, adopted, step or any child in the care or custody of the applicant or respondent;
" court" means a magistrate's court of any rank, and includes a customary court which has been authorised, by Statutory Instrument, to hear a matter under this Act;
"domestic relationship" means a relationship between an applicant and the respondent in any of the following ways –
(a) they are or were married to each other;
(b) they are or were cohabiting;
(c) they are a child of the applicant or respondent;
(d) they are family members;
(e) they would be family members related by affinity if the persons referred to in paragraph (b) were, or could be married to each other;
(f) they share or shared the same residence; or
(g) they are or were in an engagement, dating including an actual or perceived romantic, intimate or sexual relationship;
"domestic violence" means any controlling or abusive behavior that harms the health or safety of the applicant and includes –
(a) physical abuse or threat thereof;
(b) sexual abuse or threat thereof;
(c) emotional, verbal or psychological abuse;
(d) economic abuse;
(e) intimidation;
(f) harassment;
(g) damage to property;
(h) where the applicant and the respondent do not stay in the same home, entry into the applicant's home without his or her consent;
(i) unlawful detainment; or
(j) stalking;
"economic abuse" means –
(a) the deprivation or threat thereof of economic resources to which the applicant is entitled under the law, or which the applicant requires out of necessity, including household necessities for the applicant and any child, and mortgage bond repayments or rental payments of the residence; or
(b) the disposal, alienation or threat thereof of household effects or other property in which the applicant has an interest;

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"emotional, verbal or psychological abuse" means the systematic and deliberate breaking down or destroying of an applicant or child's mental well-being by using verbal or physical forms of communication such as but not limited to –

(a) insults, ridicule or name calling;
(b) threats to cause emotional pain; or
(c) the exhibition of obsessive possessiveness or jealousy which is such as to constitute a serious invasion of the applicant's privacy, liberty, integrity or security;

"harassment" means engaging in a pattern of conduct that constitutes fear of harm including –

(a) loitering outside of or near the building or place where the applicant resides, works, carries on business, studies or happens to be;
(b) making telephone calls or inducting another person to make telephone calls to the applicant, whether or not a conversation ensues; or
(c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the applicant's home or work;

"intimidation" means uttering, conveying or causing any person to receive a threat, which induces fear;

"Minister" means the Minister on whose portfolio the Act falls under; "order" means an interim order, restraining order, occupation order or tenancy order;

"residence" means the premises where the applicant and the respondent have been living together in a domestic relationship;

"respondent" means any person who is or has been in a domestic relationship with the applicant and against whom the applicant seeks to obtain or has obtained an order under this Act;

"sexual abuse" means but is not limited to any sexual conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the applicant;

"stalking" means conduct which is intended to create apprehension of imminent or future bodily harm or death to the applicant or a member of the family of the applicant, or an intimate partner of the applicant;

and

"unlawful detainment" means confining a person without the person's consent.

Jurisdiction of Courts

3. (1) A court shall have jurisdiction to grant an order under this Act within the area in which –

(a) the applicant resides, carries on business or is employed;
(b) the respondent resides, carries on business or is employed; or
(c) the cause of action arose.

(2) The court shall not require a minimum period in relation to an action lodged under subsection (1) (a) or (b).

Lodging and Hearing Application

4. (1) An application for an order under this Act –

(a) may be brought outside ordinary court hours or on a day which is not an ordinary court day; and
(b) shall be heard within 7 days from the date it was lodged.

(2) Without prejudice to the generality of subsection (1) (b), an application for an interim order under this Act shall be heard on the same day it is made.

Service of Documents

5. Service of any documents of the court under this Act, shall be –

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(a) effected by the clerk of the court, member of the Botswana Police Service, member of the Local Police or a Deputy Sheriff who shall deliver a certified copy of the documents to the respondent; and
(b) at the expense of the State.

Nature of Proceedings

6. (1) Proceedings under this Act shall be heard –
(a) as a civil case between the parties and each party shall be free to call witnesses; and
(b) in camera.
(2) Without prejudice to the generality of subsection (1) (b), a party to the proceedings may request the presence of any specified person during the proceedings.

PART II – Orders

Application for an Order

7. (1) An applicant may make an application to the court in such form as may be prescribed, for –
(a) an interim order;
(b) a restraining order;
(c) a tenancy order; or
(d) an occupancy order.
(2) An application in terms of subsection (1) shall be accompanied by an affidavit of the applicant in which shall be stated –
(a) the nature of the relationship between the applicant and the respondent;
(b) the facts on which the application is based;
(c) the existence of an immediate threat of danger to the applicant or property;
(d) the nature of the order applied for; and
(e) the name of the Police Station at which the applicant is likely to report any breach of an order made under this Act.
(3) Where the clerk of the court is satisfied that the application meets the requirements of subsection (1), he or she shall forward the application to a presiding officer.
(4) An application made under subsection (1) may be supported by an affidavit sworn by a person who has knowledge of the matter or any material aspect thereof.
(5) An application under this section shall be brought by the applicant, except in circumstances where the applicant is –
(a) a minor;
(b) mentally challenged;
(c) unconscious; or
(d) under the influence of an intoxicating substance.
(6) Notwithstanding the provisions of subsection (1) and (5), the application may be brought on behalf of the applicant by a counsellor, health service provider, member of the Botswana Police Service, Local Police, social worker, teacher, District Commissioner or any other person, with leave of the court.
(7) An application under this section shall be served personally on the respondent at least three days prior to the hearing.

Consideration of Application

8. In considering an application for an order under this Part, the Court may require oral evidence which shall be recorded.

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Interim Order

9. (1) The court shall issue an *interim order ex parte* where it is satisfied that –
(a) domestic violence has occurred;
(b) there is a serious risk of harm being caused to the applicant or child; or
(c) the order will ensure immediate protection of the applicant.
(2) An interim order may –
(a) direct a member of the Botswana Police Service, Local Police or Deputy Sheriff to –
(i) remove, immediately or within a specified time, the applicant, a child or the respondent from the residence; or
(ii) accompany, within a specified time, a specified person to the residence to supervise the removal of personal belongings of the applicant, child or the respondent;
(b) prohibit the respondent from –
(i) committing an act of domestic violence;
(ii) entering specific parts of the residence;
(iii) entering the applicant's residence, work place or any other place of safety or refuge; or
(iv) communicating with or contacting the applicant or other specified persons; or
(c) make any other provision that the court considers necessary to provide for the immediate protection of the applicant or child.
(3) Without prejudice to the generality of subsection (2), the court may authorize the issue of a warrant of arrest of the respondent where it is satisfied that the applicant or child is under imminent danger from the respondent.
(4) An interim order shall be served personally upon the respondent and shall provide for a return date upon which the respondent may be heard.

Occupation Order

10. An occupation order shall grant the applicant or child the exclusive or non exclusive right to live in the residence occupied or belonging to the applicant, the respondent or to the applicant and the respondent, for a specified or indefinite period.

Tenancy Order

11. A tenancy order shall grant the applicant or child the exclusive or non exclusive tenancy of the residence occupied by the applicant, the respondent or by both the applicant and the respondent, with such order as to payment of rental or mortgage as shall be just.

Validity of Order

12. An order issued under this Act shall remain in force unless it expires or is revoked under section 13.

Variation and Revocation of Order

13. (1) An applicant or respondent may make an application in such form as may be prescribed, to vary or set aside an order made under this Act.
(2) An application made in accordance with subsection (1) shall be served on the respondent.
(3) The court shall, where it is satisfied by oral evidence that the application —
(a) is made freely and voluntarily; and
(b) in the best interest of the parties and children, vary or revoke an order made under this Act.

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PART III – General

Third Part Interest in Property Subject to Order

14. Where a person has an interest in the property which is subject to an order under this Act, the person shall be given notice of the application and shall be entitled to appear and be heard in the matter as if he or she were a party to the application.

Effect of Order on Interest in Property

15. (1) An order made under this Act shall not affect the title to or an ownership interest in any real or personal property jointly held by the parties or solely held by one of the parties.
(2) Where a lease agreement to a residence is in the name of the respondent, and the applicant, who is not party to the agreement is granted an occupation or tenancy order, the landlord shall not evict the applicant on the basis that the applicant is not party to such lease agreement.
(3) Unless the court direct otherwise, where an order is granted and before the order was made, the respondent was responsible for the payment of mortgage or the rent, he or she shall continue to be so responsible.

Use of Furniture, Household Effects, etc

16. (1) The court may when granting an order under this Act, grant to the applicant for such period and on such terms and conditions as the court deems fit, the use of any –
(a) furniture, household appliances or household effects;
(b) vehicle;
(c) joint cheque book;
(d) bank cards;
(e) medical insurance cards;
(f) identification documents; or
(g) other personal effects in the residence to which the order relates.
(2) An order under this section may be varied or revoked in accordance with section 13.

Rights Not Diminished by Act

17. An order under this Act shall not diminish any other action against the respondent.

Appeals

18. The provision in respect of appeals contained in the High Court: Cap. 04:02 Act and the Customary Court Act shall apply to proceedings in terms of this Act: Cap. 04:05.

Offence and Penalty

19. A person who contravenes an order issued under this Act shall be guilty of an offence and is liable to a fine not exceeding P5 000 or to imprisonment for a term not exceeding 2 years or to both.

Registrar of Applications, etc.

20. The registrar of the court shall maintain, in such form as may be prescribed, a register of all applications filed under this Act and all orders made thereunder.

Regulations

21. The Minister may make regulations for any matter which is required to be prescribed or for the better carrying out of the provisions of this Act.

PASSED by the National Assembly this 8th day of February, 2008.
E.S. MPOFU,
Clerk of the National Assembly.

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