
# The Influence of Non-Legal Research on Legal Approaches to Ex Parte Domestic Violence Protection Orders in New Zealand

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*Ex Parte Domestic Violence Protection Orders arguably breach numerous provisions of the New Zealand Bill of Rights Act 1990 (BORA) — ss. 13, 17, 18, 19(1), 27, and possibly also s. 25(a)-(f) — unless BORA s. 6 can be used to interpret the Domestic Violence Act 1995 (DVA) in a BORA-consistent way. Their most egregious breach, however, is their breach of s. 22 — the protection against arbitrary arrest or detention. Although Parliament is the most obvious place to seek a solution, recourse could be had to the Human Rights Committee, which, operating as it does under the International Covenant on Civil and Political Rights 1966, is not bound by BORA s. 4, which allows other statutes to trump BORA.*

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## Introduction

Section 13 of the Domestic Violence Act 1995 (DVA) allows a Court to grant temporary protection orders to an applicant without notice to the respondent prior to the hearing. The Latin term *Ex Parte* is, of course, commonly used for without-notice procedures. As Edward Clark[1] points out , such orders often have severe consequences for the respondent, despite having the apparently laudable objective of preventing Domestic Violence.

Just as Courts rely on expert witnesses to provide part of the basis upon which findings of fact can be made, so the Legal profession as a whole — including academics and students — depends on research carried out by researchers in non-legal fields. There is necessarily a degree of trust involved here: the Legal profession needs to be able to trust that the research has been carried out and reported objectively and honestly. However, in politically sensitive areas such as Domestic Violence, this trust has been abused, and this abuse of trust has consequences for how the New Zealand legal profession should approach the issues such as the extent to which Ex Parte Domestic Violence Protection Orders (EPDVPOs) comply with the New Zealand Bill of Rights Act 1990 (BORA), for example.

## The Bill of Rights Act and Ex Parte Protection Orders

As Clark[2] points out, the Family Court is frequently in the public eye, targeted by men's groups clamouring about a judicial bias in favour of women and politicians out to score points (though I myself would see the politicians involved as being more sincere than Clark implies). Perhaps surprisingly, he states, there is a paucity of cases involving the New Zealand Bill of Rights Act 1990 (NZBORA), and a lack of consideration of its impact either in the public sphere or judicial discourse.

Clark's article discusses to what extent the practice of granting ex parte protection orders under the Domestic Violence Act 1995 (DVA) is consistent with the right to natural justice guaranteed by s 27(1) of the New Zealand Bill of Rights Act 1990 (which I will usually refer to as "BORA"). He concludes that Ex Parte Protection Orders are generally consistent with BORA, except for the frequent long delays that occur between the imposition of such an order and the actual hearing, at which the respondent has his first chance to respond to the charges. He writes:[3]

> *The system deferring the respondent's right to be heard, as set out in the DVA, accommodates a reasonable construction of natural justice in the circumstances. The availability of protection orders without notice is an essential tool in preventing violence, but this interest must be balanced against the respondent's right to be heard. The system mandated by the DVA does this adequately by requiring a high standard of proof and by including a statutory direction that the respondent must be heard as soon as practicable and within 42 days. This regime, though, is rarely followed in practice. It usually takes weeks longer than the required 42 days for the*

> *Family Court to hear a respondent, meaning that their right to be heard is deferred for an unacceptable period of time, breaching their right to natural justice under s 27 of the NZBORA.*

In his discussion of the policy behind the Domestic Violence Act, Clark states:[4]

> *The ability for an applicant to quickly get protection orders when they are needed is an essential* (sic) *in protecting vulnerable people from domestic violence. This point is* ***not really in doubt****.* (my emphasis)

This statement (including its underlying assumptions as to the nature and scale of the problem) is based on the non-legal research on Domestic Violence that Clark takes into account, and it is the reason why Clark limits his criticism of the extent of DVPOs' BORA-compliance to the issue of delays. However, this sort of research can properly be subjected to severe criticism.

**How Policy has been Distorted by Politicised Research**

In his article *Research and advocacy: Can one wear two hats?*,[5] Richard Gelles laments the absence of objectivity on the part of Feminist critics of research demonstrating female-perpetrated domestic violence. It is tempting to read into his article a reaction to his own experience of co-authoring (with Claire Cornell) the book *Intimate Violence in Families*.[6] This book is at the end of a referential chain of Feminist surveys of the Domestic Violence research. The chain (for present purposes) starts at Clark's article.

In the course of discussing the rationale for ex parte protection orders, Clark states:[7]

> *One of the motivating forces behind the DVA was the Domestic Violence and the Justice System report commissioned by the Victims Task Force.*

Clark states that the only published version of the report is the abridged version: *Protection from Family Violence: A Study of Protection Orders under the Domestic Protection Act 1982*.[8] This report is clearly a Feminist political tract which concentrates on the theme of women as victims. There is just one passage which mentions men as victims of domestic violence:

> *Studies of domestic violence tend to focus on women, because abuse of men is rarely reported to social agencies. Research on physical assaults in the family has suggested that it is common for men to be hit by their partners. However, physical attacks on men by women are likely to be less damaging,* ***are more likely to occur in self-defence*** *(my emphasis) and are less likely to occur in an atmosphere of fear and coercion. Although men may sometimes be on the receiving end of physical asaults, they are seldom victimised by continual abuse.*

The source given for the above claims was Hilary Lapsley.[9] The above passage misquotes Lapsely (on page 35) by missing out the words "or in exchange" after the words "likely to occur in self-defence" (above), which distorts the meaning of the sentence in a way that disadvantages men. In view of published exposes of alleged Feminist intellectual dishonesty,[10] I wonder if this as just one further

example of that phenomenon (see below for another, more extreme example). The relevant sentence from the passage in Lapsley (1993) reads:

> *When women hit men they are less likely to do so with such damaging consequences, it is more likely to be in self-defence* ***or in exchange*** *(my emphasis), and they are less likely to create an atmosphere of fear and coercion.*

Lapsley, in turn, appears to be quoting Gelles and Cornell,[11] although this is not entirely clear from the text. What is clear from the text, however, is that, if she meant to cite any authority for her statement, it could only have been Gelles and Cornell.

In fact, Gelles and Cornell[12] is itself just a survey or popularisation, so what we have is a chain of three reviews/summaries, including no primary sources (so far). Gelles and Cornell is shaky authority for Lapsley's sentence (quoted above). It contains fewer than two pages on violence against men, in a so-called "Note on Husbands as Victims." So anyone who uses this book as an authority on female domestic violence against men is not making a serious attempt to come to grips with the topic.

However, Gelles and Cornell does contain actual research data. See their Table 4.1 (below).

Table 4.1 Frequency of Marital Violence: Comparison of Husband and Wife Violence Rates (in percentages)

| | *Incidence Rate* | *Frequency* | | | | |
|---|---|---|---|---|---|---|
| | | *Mean* | | | *Median* | |
| *Violent Behavior* | *Husband* | *Wife* | *H* | *W* | *H* | *W* |
| **1 Threw something at spouse** | 2.9 | 4.6 | 3.7 | 2.7 | 1.5 | 1.0 |
| **2 Pushed, grabbed, or shoved spouse** | 9.6 | 9.1 | 2.9 | 3.1 | 2.0 | 2.0 |
| **3 Slapped spouse** | 3.1 | 4.4 | 2.8 | 2.7 | 1.0 | 1.0 |
| **4 Kicked, bit, or hit with fist** | 1.5 | 2.5 | 3.9 | 2.9 | 1.5 | 1.0 |
| **5 Hit or tired (sic) to hit spouse with something** | 1.9 | 3.1 | 3.6 | 3.3 | 1.2 | 1.1 |
| **6 Beat up spouse** | .8 | .5 | 4.2 | 5.7 | 2.0 | 2.0 |
| **7 Choked spouse** | .7 | .4 | 1.9 | 2.9 | 1.0 | 1.0 |
| **8 Threatened spouse with knife or gun** | .4 | .6 | 4.3 | 2.0 | 1.8 | 1.1 |
| **9 Used a knife or gun** | .2 | .2 | 18.6 | 12.9 | 1.5 | 4.0 |
| **Overall violence (1-9)** | 21.3 | 12.4 | 5.4 | 6.1 | 1.5 | 2.5 |
| **Wife-beating/husband-beating (4-9)** | 3.4 | 4.8 | 5.2 | 5.4 | 1.5 | 1.5 |
| **SOURCE: Second National Family Violence Survey (Richard J. Gelles and Murray A. Straus, 1988).** | | | | | | |

This table says nothing about injuries, but it does show that the more serious violence (what it calls "wife-beating/husband-beating") was carried out more by wives (4.8%) than by husbands (3.4%).

When we look at the entries for "Overall Violence", however, we find that, like the Victims Task Force report, Gelles and Cornell (1990) is inaccurate in its reporting of research. The entries, which claim to be the sum of rows 1-9, show husbands (21.3%) with a much higher percentage than women (12.4%). However, if one actually does one's own addition, one finds that the true figures are 21.1% for husbands and 25.4% for wives! As mentioned above, I think that political motivation cannot be excluded as a factor in this discrepancy.

Gelles and Cornell (1990) state, as the conclusion to their note on female violence:

> *It is quite clear that men are struck by their wives. It is also clear that because men are typically larger than their wives and usually have more social resources at their command, that they do not have as much physical or social damage inflicted on them as is inflicted on women. Data from studies of households where the police intervened in domestic violence clearly indicate that men are rarely the victims of "battery".... Thus, although the data in Table 4,1 show similar rates of hitting, when injury is considered, marital violence is primarily a problem of victimised women.*

This passage, then, must be what Lapsley relied on in the passage quoted above. Gelles and Cornell do cite a study in support of their claim that greater injury is inflicted on wives than on husbands — a claim that is supported by more recent and reliable data which I cite below. However, the study they cite is based on police interventions and so is biased against male victims, since it is clear that massive publicity has encouraged women to report domestic violence to the police, whereas there is never any official encouragement for men to report violence by females — indeed, this phenomenon is officially treated as if it hardly exists.

However, it is discriminatory to conclude, as Gelles and Cornell do, that "when injury is considered, marital violence is primarily a problem of victimised women." It is unfair to expect a man simply to put up with female violence, on the grounds that, if he retaliated, he would probably inflict more damage on her than she has inflicted on him (so far)! The studies I summarise in the table below are unanimous in finding that women initiate violence more often than men do. *Prima facie*, surely, guilt and liability must lie with the initiator of physical violence, though any preceding psychological violence should also, ideally, be taken into account.

It is hard to know by what process Gelles and Cornell arrive at the conclusion that men "usually have more social resources at their command." In New Zealand, the combined forces of Ex Parte Protection Orders (which are usually granted to women), women's refuges which take in women and children and bar entry to their fathers, and a Police Force that has to a greater or lesser extent adopted a Feminist approach to Domestic Violence are all aligned with women against men. It is hard to see what "social resources" men have which could compete with that!

In 2003, the Hutt News published a supplement,[13] in which the Police printed a clearly anti-male advertisement on the topic of Domestic Violence. It is convincing evidence — together with my ex-

perience of being harassed by Police Headquarters staff while working on another floor of their building, and other anecdotal evidence— that the New Zealand Police, like their colleagues in other Western countries, cannot be confidently expected to take seriously claims of domestic violence made by men against women.

To be fair to Gelles and Cornell (1990), they do manage, in the meagre space they allocate to violence against men, to mention Suzanne Steinmetz's article *The Battered Husband Syndrome*.[14] They also bemoan the lack of research into female domestic violence — a lack that has since been remedied (see below).

In order to put into perspective the claims made in the various Feminist passages quoted above, I reproduce (below) a more up-to-date and compendious survey of domestic violence research. This is my own summary of the major findings that are evident from the annotated bibliography on Domestic Violence research that was drawn up by Martin Fiebert and incorporated in *Family Violence: A report from: Family Resources & Research*.[15]

| Finding | Number of Studies reporting that Finding |
|---|---|
| Women are more physically abusive than men. | 35 |
| Women and men are equally physically abusive. | 23 |
| Men are more physically abusive than women. | 2 |
| Women initiated violence more often than men did. | 6 |
| Men initiated violence more often than women did. | 0 |
| Women's violence has been decreasing.* | 0 |
| Men's violence has been decreasing.* | 2 |
| Women suffered more injuries than men did.** | 2 |
| Men suffered more injuries than women did.** | 1 |
| More female than male partners were | 2 |

| | |
|---|---|
| killed.** | |
| More male than female partners were killed.** | 0 |

N.B. A few individual studies are about violence in cartoons, about specific ethnic groups, or about the reasons why women are abusive, etc., and were ignored for the purposes of this overview.
* One study has been ignored (for the purposes of this table) because it compared the same group of people over time, and said that the decrease in both men's and women's violence that it found was caused by that group of people getting older.
** A possible reason for more women than men being injured and killed is (as evidenced by the data on decreases in violence) that Domestic Violence information and enforcement has been targeted mostly at male domestic violence. Since men have little encouragement or incentive to report female violence, because it will probably not be taken seriously, men probably mostly just try to put up with female violence and then explode when it gets too much to bear — resulting in injury or death.

It is relevant to mention, in this context, the classic Feminist work on Domestic Violence: *The Battered Woman*.[16] As Robert Sheaffer says in his Review:[17]

> *The Battered Woman is unsatisfactory as a serious work, and completely unacceptable as a foundation for family law. First, it is profoundly unscholarly. Without objective verification of the incidents herein described, they are nothing more than hearsay. Second, the book does not even pretend to be objective: the woman's side, and only the woman's side, is presented, when it is undeniable that in a large percentage of cases, the woman initiates violence against the man. Third, Prof. Walker's expanded definition of "battering" that includes verbal abuse does not even address the issue of female verbal abuse of men. Fourth, there is no reason whatsoever to believe that Prof. Walker's sample of "battered women" is in any way a representative sample, and even if it were, she presents no statistics to support her conclusions. In fact, most of her conclusions are utterly unsupported by any kind of data, and are simply pronounced ex cathedra.*

This book was the main inspiration for the Feminist focus on the issue of Domestic Violence which culminated in the formulation of the Duluth (Power and Control) model. This is a frankly anti-male model that sees Domestic Violence simply as the result of men's attempts to enforce their control over women. The notion that women could initiate Domestic Violence for unattractive motives of their own has no place within this model. However, as we have seen, the actual statistics are *prima facie* incompatible with this model — whatever might be the motivations of the aggressors — since most of the violence is actually initiated by women.

**Revisiting the BORA-Consistency of Ex Parte Protection Orders**

With the benefit of a more objective overview of the nature of Domestic Violence, we are now in a position to revisit the issue raised by Clark. Are EPDVPOs consistent with the New Zealand Bill of Rights Act 1990 ? It will be recalled that Clark's criticism is directed at the implementation of the

current regime, rather than at the regime itself. I quoted him (above) as follows:

> The system deferring the respondent's right to be heard, as set out in the DVA, accommodates a reasonable construction of natural justice in the circumstances. The availability of protection orders without notice is an essential tool in preventing violence, but this interest must be balanced against the respondent's right to be heard. The system mandated by the DVA does this adequately by requiring a high standard of proof and by including a statutory direction that the respondent must be heard as soon as practicable and within 42 days.

Clark limits his BORA-consistency inquiry to s. 27 (the right to justice), because of the strict word-limit he was subject to at the time.[18] I will discuss that BORA section, as well, but I will also raise other BORA sections in connection with EPDVPOs. I will also discuss the power of the Court to force respondents to attend "programmes", which appear to be courses for males, run by Male Feminists, and which aim to teach men that they are by nature violent and that they need to stop needing to control women, because this is what causes Domestic Violence. In other words, these programmes inculcate the Power and Control model.

I will discuss the following issues:
Do EPDVPOs breach BORA ss 13, 17, 18 and 25?
Do EPDVPOs breach BORA s 19(1) (on sex discrimination)?
Do EPDVPOs breach BORA s 27(the right to justice)?
Do EPDVPOs breach BORA s 22(the right not to be arbirtarily arrested or detained)?
Are EPDVPOs "essential"?

**Do EPDVPOs breach BORA ss 13, 17, 18 and 25?**

I assume that the reason Clark did not mention s. 25 (on minimum standards of criminal procedure) is that it states:

> *Everyone who is **charged with an offence** (my emphasis) has, in relation to the determination of the charge, the following minimum rights:....*

Technically, at least, EPDVPOs do not result from someone being charged with an"offence", as such, so this might seem to rule out applying s. 25 to EPDVPOs. However, constitutional enactments such as BORA are typically interpreted purposively and generously.[19] For example, in interpreting the word "interpreter" in BORA s. 24(g), the High Court in *Alwen Industries Ltd. v Collector of Customs*[20] held that "to restrict interpretative assistance to the spoken word would rob the right of its true force."

It is true that in *Drew v Attorney General,*[21] the majority did not find it necessary to decide whether to take a broad or narrow approach to the meaning of the word "offence"in BORA ss. 24 & 25, but in *Darmalingum v The State,*[22] the Privy Council held that a purposive and generous interpretation of the word "charged" in s.10(1) of the Mauritian Bill of Rights was required.

Moreover, apart from restricting the respondent's freedom of movement (BORA s. 18) and freedom of association (BORA s.17) by limiting their ability to approach or contact the applicant, EPDVPOs can often result in other restrictions on their freedom, by limiting their rights in relation to firearms (DVA s. 21), by directing them to attend a demeaning Feminist programme of anti-male indoctrination, based on the power and control model (DVA s. 32 — interfering with their BORA s. 13 right to freedom of thought, conscience, and religion), and by causing them to pay a fine or to be imprisoned if they breach the EPDVPO ( DVA s. 49). Breaching an EPDVPO is explicitly called an "offence" in s. 49, and this strengthens the case for considering the behaviour that the respondent was initially accused of by the applicant to be the equivalent of an offence.

If that behaviour crosses the threshold to be considered an "offence", it is apparent that there is a *prima facie* breach of BORA s. 25 subsections (a), (b), (c), (d), (e), and (f). They read as follows:

> ***Minimum standards of criminal procedure —***
> *Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:*
> *(a) The right to a fair and public hearing by an independent and impartial court:*
> *(b) The right to be tried without undue delay:*
> *(c) The right to be presumed innocent until proved guilty according to law:*
> *(d) The right not to be compelled to be a witness or to confess guilt:*
> *(e) The right to be present at the trial and to present a defence:*
> *(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:....*

As is well known, Family Court sessions are not public, and whether they are fair — as well as the related issue of whether the court is impartial — is a matter of heated political controversy. A delay of 42 days is arguably undue, seeing that it involves a restriction on one parent's right to associate freely with his children. This often occurs at a crucial juncture, when the other parent may be trying to alienate their affections from him, and when Family Court proceedings might result in a *de jure* confirmation of the other parent's *de facto* sole custody, on the grounds that it would unsettle the children to change their custodial arrangements.

By no stretch of the imagination does the EPDVPO process involve the respondent being proved guilty — yet a penalty can be imposed on him, which presumes that he is guilty. This is an issue I will return to in connection with the right to justice (BORA s. 27). Being compelled to attend a non-violence programme is tantamount to being compelled to confess guilt. By definition, an *Ex Parte* hearing — except in the Pickwick variation (which allows the other party to be present, but at extremely short notice) — involves the absence of the respondent. Because he is absent and is not represented at an EPDVPO hearing, the respondent cannot call or examine witnesses. Of course, the

applicant does not call or examine witnesses either, but it is arguable that the seriousness of the jeopardy requires at least the ability of the respondent to file a statement of defence and affidavits from at least one witness (e.g. himself).

The freedom of movement (BORA s. 18) that is impacted upon by an EPDVPO is typically the freedom to go to one's own home, which is one of the most severe forms of restriction on one's freedom of movement that could possibly be imposed. Similarly, the freedom of association (BORA s.17) that is impacted upon by an EPDVPO is typically the freedom to associate with members of one's own immediate family, which, again, is possibly the most severe form of restriction on one's freedom of association that could possibly be imposed. The interference with one's BORA s. 13 right to freedom of thought, conscience, and religion that is involved in being compelled to attend a Power-and Control-model-inspired non-violence course (when one might have been less violent than one's partner, or even not been violent at all) affects the core value of the Bill of Rights: the inherent dignity of the individual.. It is one thing for Feminists to invent and propagate in universities, etc. — at taxpayer expense — a model of Domestic Violence that treats men as guilty by virtue of their sex, but it is quite another thing entirely to force men to accept this as the truth by judicial fiat, when it could be contrary to their knowledge of the facts and/or to their personal religious or ethical beliefs.

The case is overwhelming, in my opinion, that EPDVPOs involve a prima facie breach of BORA ss. 13, 17, and 18. Moreover, provided that being a respondent to an EPDVPO crosses the threshhold to being considered "charged with an offence", the case is also overwhelming that EPDVPOs involve a *prima facie* breach of BORA ss. 25(a), 25(b), 25(c), 25(d), 25(e), and 25(f).

**Do EPDVPOs breach BORA s 19(1) (on sex discrimination)?**

It is clear that most respondents are male. Table 3 of the Ministry of Justice's Domestic Violence Act 1995 Process Evaluation (http://www.justice.govt.nz/pubs/reports/2000/domestic_eval/method.html#Table%203), for example, lists 42 male respondents and only two female respondents. The report states:

> *Few male applicants, and in particular gay men, are yet using the Act. In the experience of lawyers who have prepared applications for men, as well as court staff who have processed applications and judges who have decided on them, male applicants are not disadvantaged when applying under the Act, but rather they are reluctant to apply. Social taboos, stigma, shame and embarrassment can make it difficult for men to apply for an order. Some men believe that the court system is biased towards women, and that their experiences will not be taken seriously.*

The comments about social taboos, stigma, shame and embarassment may well be correct. However, it is undeniable that the Family Courts are in fact biased against men, given such statements as the following, by Family Court Judge K G MacCormick:[23]

> *That more women seek (protection orders) is* ***no doubt*** *(my emphasis) because men are generally physically stronger and more inclined to try to resolve disputes by the use of physical*

*force.*

The above statement was made without reference to any supporting evidence whatsoever.

In addition, the programmes that male respondents are told by the Court to attend inculcate the Power and Control model, which is a sexist and discriminatory model.

So EPDVPOs, as implemented in practice, involve *prima facie* breaches of s. 19(1). This cannot be rectified by amending the DVA, of course, but it is a real issue nonetheless. The amount of discrimination involved could be lessened, however, by making sure that the Power and Control model is not used as the basis for any of the programmes.

**Do EPDVPOs breach BORA s 27 (the right to justice)?**

BORA s. 5 states:

> ***Justified limitations*** *— Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rightsmay be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

As Clark points out, the right to justice is a flexible concept. Rishworth et al.[24] state:

> *The decision as to the requirements of natural justice in particular circumstances both defines and limits the right without recourse to s.5. Although in theory a failure to meet the minimum requirements of natural justice might be justified pursuant to s. 5, in practice this is unlikely to occur.... Where its principles apply there is no room and no need for the operation of s. 5.*

As stated above, Clark's finding of a breach by EPDVPOs of BORA s. 27 is limited to the following ground:

> *It usually takes weeks longer than the required 42 days for the Family Court to hear a respondent, meaning that their right to be heard is deferred for an unacceptable period of time, breaching their right to natural justice under s 27 of the NZBORA.(op.cit. p. 8)*

I commend Clark for raising this issue and for coming to this well-argued and (in my opinion) justified conclusion. However, Rishworth et al.[25] mention that there is considerable overlap between s 27 and ss. 23-25. Accordingly, I would submit that the issues I raised in connection with s. 25 (above) would also be grounds for considering EPDVPOs to be a prima facie breach of BORA s 27.

In addition, the considerations I will raise (below) in connection with BORA s. 22 could also arguably be raised in connection with s. 27.

**Do EPDVPOs breach BORA s 22 (the right not to be arbitrarily arrested or detained)?**

BORA s. 22 reads as follows:

> ***Liberty of the person*** *— Everyone has the right not to be arbitrarily arrested or detained.*

Clearly, the initial effect of an EPDVPO is not to arrest or detain the respondent. However, DVA s. 49 provides for "imprisonment for a term not exceeding 6 months or to a fine not exceeding $5,000" (or imprisonment for up to 2 years for certain categories of repeat offenders) for failing to comply with the terms of an EPDVPO or of a direction to attend a programme. So, if, in a given case, an EPDVPO can be said to have been imposed arbitrarily, and the respondent subsequently receives a prison term under DVA s. 49, I submit that he has been arbitrarily arrested and detained in terms of BORA s. 22.

The next question, then, is whether there is scope for the **arbitrary** imposition of an EPDVPO under the DVA. This is the point at which words almost fail me, because of the sheer scale of the breach that is involved, and because of the fact that it appears to have attracted no public criticism.

I refer to DVA s. 13 (2), which reads:

> ***Application without notice for protection order*** *— (1) ....*
> *(2) Without limiting the matters to which the Court may have regard when determining whether to grant a protection order on an application without notice, the Court must have regard to —*
> *(a) The perception of the applicant or a child of the applicant's family, or both, of the nature and seriousness of the respondent's behaviour; and*
> *(b) The effect of that behaviour on the applicant or a child of the applicant's family, or both.*

I do not claim an encyclopedic knowledge of the Law in all its historical and geographical forms and variations, but this subsection seems to me to be unprecedented in what we are pleased to call "civilised" communities. Courts routinely have to determine what the objective facts of a case are. In criminal cases, they also routinely have to determine what was going on in the mind of the alleged perpetrator at the time of the alleged crime, in relation to the *mens rea* elements of the crime, as described in the statute. All that is reasonable, since a person has control over his acts (with certain exceptions), and can reasonably be held to account for his own intentions, negligence, or recklessness, etc.

But to be subject to a court sanction — which may be converted into a fine or imprisonment if one does not comply with its terms — because of what goes on in the mind of **another** person is such an unreasonable assault on the inherent dignity of the individual, I submit, that even the Third Reich, that icon of crimes against humanity, did not go so far in its inhumanity to man. This modern, Feminist, New Zealand provision is certainly arbitrary, in my opinion.

**Are EPDVPOs "essential"?**

This is an issue that relates principally to BORA s.5. If EPDVPOs are held to be essential, then that may be considered to be a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

It is clear that the judgement of Parliament and of commentators such as Clark that EPDVPOs are essential has been based on research that is politically motivated, one-sided and cavalier with the truth. The input from pressure-groups at Select Committee hearings was also undoubtedly one-sided, as far as the politics of Domestic Violence are concerned. As a member of the Men's Movement myself, I am certain that there would have been virtually no Men's Movement input at the time that would have contradicted the Feminists as to the nature of Domestic Violence.

The motivation for enacting EPDVPOs, therefore, must be seen as the understandable emotional reaction by Parliament and the public to the Feminist-inspired image of a poor helpless woman being repeatedly bashed — possibly to death — by an evil, power-mad man.

Her Honour Judge Jan Doogue, in her paper *Domestic Violence: Reviewing the Needs of Children*,[26] states:

> *The Domestic Violence Act 1995 and s. 16B of the Guardianship Act 1968 were based on the classification of violence within the power and control model. In my experience and that of other Judges this model does not fit the profile of many cases coming before the Family Court in New Zealand.*

There is reasonable doubt that Parliament, when faced with the evidence outlined above, would maintain the position that the EPDVPOs are essential for the prevention of Domestic Violence.

However, there seems to me to be an overwhelming logical argument against the need for EPDVPOs: Search warrants and Ex Parte Interlocutory Injunctions (EPIIs), such as Mareva injunctions and Anton Piller Orders, are directed at the property of the respondent, and are granted *ex parte* because their effect would probably be nugatory if the respondent was given notice. However, EPDVPOs are directed at the respondent, and do not come into effect until served on the respondent, so there is almost no logical reason why a summons to appear at a defended interlocutory hearing should not be served on the respondent instead. The Domestic Violence Act 1995 does not allow for that, but such a provision, if enacted as an amendment, could protect the applicant by imposing a temporary Protection Order for the period leading up to the hearing, and by automatically imposing a 42-day Protection Order if the respondent or his counsel failed to appear at the hearing.

In that context, the real reason for EPDVPOs seems to be to prevent the respondent (who is usually male) from presenting his side of the story. This is consistent with the common Feminist approach to research and policy-making, which is systematically to exclude pro-male points of view. For example, we have seen (above) how a book that was based purely on women's accounts of Domestic Violence (The Battered Woman) has become the foundation stone of the Feminist campaign on that issue.

My conclusion would therefore be that EPDVPOs are not at all essential, since the nature and extent of the problem they are intended to solve has been distorted and exaggerated beyond all recognition. It follows, if I am correct, that the many and diverse breaches of BORA that they involve may not be considered to be a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

**Should EPDVPOs be mutual?**

Swayed by the Duluth model, Parliament has simply assumed, in the Domestic Violence Act, that Domestic Violence is one-sided, and that the relevant parties consist of one perpetrator and one victim, with no significant cross-over between the roles. Thus, there is no explicit provision for mutual Protection Orders. However, there is nothing in the Act to exclude mutual protection orders.

Paragraph 7.614 of Butterworths Family Law Service states that mutual orders (under DVA s. 18) are not actually banned, but they are cautioned against. If counsel became aware of the issues I have raised above, however, it should be easier for them to convince the Court that mutual orders were appropriate in many instances.

In fact, I would argue for mutual Protection Orders in most cases. One reason is that fairness dictates that, if both parties, on the facts, share the blame for the violence, both parties, rather than just one, should be barred from carrying out such acts on the other party. Another reason is that it is unfair to allow one party to play on the other party's emotions by phoning him, writing to him, etc., and provoking him to respond, or frustrating him through his inability to respond without putting himself in jeopardy. The third reason is that one-sided Protection Orders allow the applicant to manipulate and entrap the respondent, by inviting him to come and see her, and then (on some pretext) claiming a breach of the Protection Order, which results in the respondent acquiring a jail term and a criminal record. I know of one case where that happened, though I cannot make a judgement as to whether the breach was sincerely or maliciously alleged by the applicant.

**Conclusion**

I submit that EPDVPOs breach numerous provisions of BORA — ss. 13, 17, 18, 19(1), 27, and possibly also s. 25(a)-(f) — unless BORA s. 6 can be used to interpret the DVA in a BORA-consistent way. Their most egregious breach, however, is their breach of s. 22 — the protection against arbitrary arrest or detention. This situation needs to be rectified, and, although Parliament is the most obvious place to seek a solution, one should not necessarily write off the ability of the Courts to provide one in the meantime. The EPDVPOs' breaches of BORA — especially their breach of s. 22 — amount to *Wednesbury* unreasonableness,[27] I submit. However, BORA s. 4 prevents the Courts from trumping Parliament outright, although Justice Thomas looks forward to the time when the Common Law will empower them to do just that.[28] Recourse could be had to the Human Rights Committee, which, operating as it does under the International Covenant on Civil and Political Rights 1966, is not bound by BORA s. 4, which allows other statutes to trump BORA.

**Footnotes**

[1]Edward Clark: *Ex parte orders in the Family Court and the New Zealand Bill of Rights Act 1990*, Butterworths Family Law Journal Vol. 4, December 2003, Part 8.
[2]*Op cit,* 1.
[3]*Op cit,* 8.
[4]*Op cit,* 4.
[5]Richard Gelles, *Research and advocacy: Can one wear two hats?,*1994, *Family Process*, 33, 93-5.
[6]Richard Gelles and Claire Cornell, *Intimate Violence in Families,* 1990, second edition, London: Sage Publications.
[7]*Op cit,* 2.
[8]*Victims Task Force, Protection from Family Violence: A Study of Protection Orders under the Domestic Protection Act 1982 (Abridged), Wellington: Victims Task Force 1992.*
[9]Hilary Lapsley, *The Measurement of Family Violence: A Critical Review of the Literature*, 1993, Wellington: Social Policy Agency.
[10]Christina Hoff Sommers, *Who Stole Feminism ? How Women Have Betrayed Women,* 1994, New York: Simon and Schuster, and *Figuring Out Feminism*. 1994, National Review magazine, June 27 – also: Peter Zohrab, *Sex, Lies & Feminism*, 2002, Fourth, NZEEF Edition http://nzmera.orcon.net.nz/contents.html .
[11]*Op cit.*
[12]*Op cit.*
[13]*Life in Wainuiomata, Eastbourne, Petone, Moera, Alicetown & Western Hills* – see: http://nzmera.orconhosting.net.nz/pubenemy.html .
[14]Suzanne Steinmetz, *The Battered Husband Syndrome,* 1977-78, *Victimology: An International Journal*, 2, 499-509.
[15]Formerly at http://www.landwave.com/family/ .
[16]Lenore E. Walker, *The Battered Woman,* N.Y.: Harper Colophon Books, 1979.
[17]http://nzmera.orcon.net.nz/batwmrev.html .
[18]Personal communication.
[19]*Minister of Home Affairs v Fisher* [1980] A.C. 319, 328-329 per Lord Wilberforce, echoed in New Zealand, for example, by Cooke P in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA), 268.
[20]*Alwen Industries Ltd. v Collector of Customs* (1996) 3 HRNZ 29, 31.
[21]*Drew v Attorney General* [2002] 1 NZLR 58.
[22]*Darmalingum v The State* [2000] 1 WLR 2003.
[23]*A v R* [2003] NZFLR 1105, 1107.
[24]*The New Zealand Bill of Rights*, 2003, Melbourne, Australia: OUP, 761.
[25]*Op. cit.*, 753.
[26]Judge Jan Doogue, *Domestic Violence: Reviewing the Needs of Children*, paper delivered at the 3rd Annual Child & Youth Law Conference 2004, 1-2 April.
[27]*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[28]Justice E W Thomas, *The Relationship of Parliament and the Courts: a Tentative Thought or Two for the New Millenium*, paper delivered as the Victoria University of Wellington Law Faculty's Centennial Lecture on 30 June 1999.

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