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Towards an Improved Framework for Regulating Gender-Based Violence in South Africa



**Mini thesis submitted in partial fulfilment of the requirements for the LLM degree in the
Department of Criminal Justice and Procedure**

By

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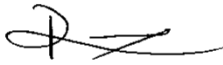
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DECLARATION

I, Pearlín Courtney Roux, declare that the work titled ‘Towards an Improved Framework for Regulating Gender-Based Violence in South Africa’ is my original work. I confirm that I have not submitted this work or any version of it to any other university or institution for any degree or qualification.

Furthermore, I have duly referenced all sources used in the completion of this mini-thesis, following appropriate academic conventions and standards.



14 June 2024

DEDICATION

This thesis is dedicated to all the women in South Africa who have been affected by the scourge of Gender-Based Violence. I hope that one day we all get to experience a South Africa where we can feel safe and protected.

"We must continue to be courageous, to speak out, and to demand justice and equality for all." — Phumzile Mlambo-Ngcuka

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ABSTRACT

This mini-thesis critically evaluates South Africa's ongoing gender-based violence (GBV) crisis and assesses the sufficiency of its legislative responses. The study opens with a contextual overview of GBV, underscoring the urgent need for targeted intervention to address this pervasive issue. Through a historical and theoretical lens, it examines how South Africa's apartheid legacy and entrenched patriarchy have contributed to a societal landscape where toxic masculinity and GBV are prevalent, thus highlighting the enduring impact of historical factors on present-day gender and violence dynamics.

Subsequently, the thesis provides a detailed analysis of the current legal framework addressing GBV in South Africa, questioning its effectiveness in protecting victims and deterring offenders. By reviewing key legislative provisions, it identifies critical gaps and weaknesses that may impede enforcement and hinder victim protection. Additionally, the study evaluates the GBV reporting process, public awareness levels, and the responsiveness of law enforcement agencies, especially the South African Police Service (SAPS), to assess whether these systems effectively support victims and promote justice. By addressing the identified gaps and proposing targeted reforms, this research aims to contribute to the development of a safer, more equitable society for all genders in South Africa.

KEY WORDS

Apartheid

Criminal (Sexual Offences and Related Matters) Amendment Act

Criminal and Related Matters Amendment Act

Domestic Violence Amendment Act

Enforcement

Gender-Based Violence

Masculinities

Patriarchy

Regulatory Framework

South Africa

South African Police Service

Violence Against Women

CHAPTER ONE

INTRODUCTION

1.1 PROBLEM STATEMENT

South Africa celebrates 30 years of democracy in 2024, a milestone that demonstrates the country's progress towards achieving freedom and equality.¹ Significant advancements have been made in the direction of a transformational, empowering and progressive constitutional framework and domestic policy.² However, women of colour, particularly black women, are disproportionately vulnerable to Gender-Based Violence (GBV) in South Africa due to the combined consequences of racial and gendered inequality brought about by colonial legacies and apartheid.³ As a result, South Africa continues to experience alarmingly high levels of GBV. This is evident when looking at the many GBV cases and the brutality thereof. In 2019, Uyinene Mrwetyana, for example, was lured to the Clarenreich Post Office in Cape Town after closing hours where she was raped, brutally murdered, set on fire and subsequently dumped in a shallow hole on an open field in Lingelethu – West, near Khayelitsha.⁴ Her perpetrator, Luyanda Botha who worked at the Post Office and had a previous rape allegation, later confessed to the rape and murder of Uyinene.⁵ Moreover, whilst Botha received three life sentences and it is held that justice was served, this is one of few cases where GBV perpetrators were efficiently tried and sentenced to jail. Additionally, Jesse Hess, and her grandfather were found dead in the same week of Uyinene's murder.⁶ Jesse is believed to be sexually assaulted

¹ Republic of South Africa 'Reflecting on the achievements of 30 years of freedom' *South African Government News Agency* 8 April 2024 available at <https://www.sanews.gov.za/south-africa/reflecting-achievements-30-years-freedom> (accessed 20 April 2024).

² Thenjiwe M, Williamson C & Maseti T 'A Twenty-Year Review of Policy Landscape for Gender-Based Violence in South Africa' (2017) 15 *Gender & Behaviour* 8607.

³ Naidoo N and Nadvi L 'Risk factor management and perpetrator rehabilitation in cases of gender-based violence in South Africa: Implications of salutogenesis' (2013) 27 *Agenda* 145.

⁴ Nombembe P 'IN HIS OWN WORDS | Luyanda Botha: 'This is how I killed Uyinene' *Sunday Times* 15 November 2019 available at <https://www.timeslive.co.za/news/south-africa/2019-11-15-in-his-own-words-luyanda-botha-this-is-how-i-killed-uyinene/> (accessed 10 May 2022).

⁵ Nombembe P 'IN HIS OWN WORDS | Luyanda Botha: 'This is how I killed Uyinene' *Sunday Times* 15 November 2019 available at <https://www.timeslive.co.za/news/south-africa/2019-11-15-in-his-own-words-luyanda-botha-this-is-how-i-killed-uyinene/> (accessed 10 May 2022).

⁶ Nombembe P 'IN HIS OWN WORDS | Luyanda Botha: 'This is how I killed Uyinene' *Sunday Times* 15 November 2019 available at <https://www.timeslive.co.za/news/south-africa/2019-11-15-in-his-own-words-luyanda-botha-this-is-how-i-killed-uyinene/> (accessed 10 May 2022).

and murdered at her grandfather's house in Parow.⁷ It later emerged that the perpetrator was Jesse's second cousin, David van Boven who also robbed the family home together with his friend, Tasliem Ambrose.⁸ Van Boven received two life sentences for murder, 40 years for two counts of robbery, three years for fraud as well as eight years for sexual assault.⁹ Ambrose received twelve years imprisonment for aggravating circumstances.¹⁰ Furthermore, in June 2022 a video from 2018 circulated on social media platforms where Jaco Swarts was seen grievously assaulting his wife, Nicoleen Swarts at their car dealership business in Sinoville, Pretoria.¹¹ After pleading guilty to the charges, he was fined R20 000 or three months in jail, after which he paid the R20 000 fine. Jaco was also handed a three-year suspended sentence for assault with the intention to cause grievous bodily harm (GBH).¹² Nicoleen Swarts opened up about her unhappiness regarding the sentence and felt that if the CCTV footage had been shown in court, Jaco would have received "more than what he got".¹³ Therefore, it is evident that the rise in GBV against women in South Africa necessitates prompt intervention from the government and other institutions.¹⁴ Moreover, a community-based multi-pronged approach and ongoing involvement with many stakeholders are required for a reduction in violence against women (VAW).

⁷ Evans J 'Jesse Hess' relative found guilty of murdering her and her grandfather' *News24* 9 May 2022 available at <https://www.news24.com/news24/southafrica/news/jesse-hess-cousin-found-guilty-of-murdering-her-and-her-grandfather-20220509> (accessed 14 May 2022).

⁸ Evans J 'Jesse Hess' relative found guilty of murdering her and her grandfather' *News24* 9 May 2022 available at <https://www.news24.com/news24/southafrica/news/jesse-hess-cousin-found-guilty-of-murdering-her-and-her-grandfather-20220509> (accessed 14 May 2022).

⁹ Simpson S 'Jesse Hess's cousin gets double life for murdering her grandpa and her' *The South African* 19 July 2022 available at <https://www.thesouthafrican.com/news/jesse-hess-david-van-boven-double-life-imprisonment-sentence-12-july-2022-breaking/> (accessed 25 July 2022).

¹⁰ Simpson S 'Jesse Hess's cousin gets double life for murdering her grandpa and her' *The South African* 19 July 2022 available at <https://www.thesouthafrican.com/news/jesse-hess-david-van-boven-double-life-imprisonment-sentence-12-july-2022-breaking/> (accessed 25 July 2022).

¹¹ Montsho M 'Jaco Swart R20k fine for brutal assault on wife not 'bad', says NPA' *Pretoria News* 9 June 2022 available at <https://www.msn.com/en-za/news/other/jaco-swarts-r20k-fine-for-brutal-assault-on-wife-not-bad-says-mpa/ar-AAyfn1v> (accessed 10 June 2022).

¹² Montsho M 'Jaco Swart R20k fine for brutal assault on wife not 'bad', says NPA' *Pretoria News* 9 June 2022 available at <https://www.msn.com/en-za/news/other/jaco-swarts-r20k-fine-for-brutal-assault-on-wife-not-bad-says-mpa/ar-AAyfn1v> (accessed 10 June 2022).

¹³ Montsho M 'Jaco Swart R20k fine for brutal assault on wife not 'bad', says NPA' *Pretoria News* 9 June 2022 available at <https://www.msn.com/en-za/news/other/jaco-swarts-r20k-fine-for-brutal-assault-on-wife-not-bad-says-mpa/ar-AAyfn1v> (accessed 10 June 2022).

¹⁴ Enaifoghe A et al 'The Prevalence of Gender-Based Violence against Women in South Africa: A Call for Action' (2021) *African Journal of Gender, Society and Development* 121.

VAW is defined as any doing of GBV that causes physical, psychological or sexual harm or distress to women.¹⁵ This includes threats, coercion or a deprivation of liberty. Such acts may also occur in public as well as private. The World Health Organisation (WHO) defines sexual violence as ‘any sexual act, attempt to obtain a sexual act, unwanted other sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work’.¹⁶ Whilst this definition of sexual violence by the WHO is broad, it essentially holds that sexual violence includes both sexual harassment as well as psychological violence.¹⁷

GBV is any form of violence aimed against a person based on their gender; hence, both men and women are equally victims of GBV.¹⁸ Therefore, GBV is an all-encompassing term that does not only include VAW, but since women are in the majority to face such violence on a daily basis, VAW will be the main theme throughout this thesis. Furthermore, the terms GBV and VAW will be used interchangeably to refer to the widely recognised GBV perpetrated by men against women. Additionally, this thesis aims to shed light on current as well as proposed laws regarding GBV in South Africa. It is found that legislation on its own is inadequate to eliminate VAW.¹⁹ Therefore, although legal protection is evident on paper, enforcement is lacking as GBV prevails.²⁰ This thesis aims to look at how the enforcement of GBV laws can be improved to alleviate the epidemic of GBV in South Africa.

1.2 BACKGROUND TO THE RESEARCH PROBLEM

There is an underlying aspect of GBV that can be traced back to apartheid in South Africa. This is due to the fact that together with the racial inequality South Africa underwent, gender

¹⁵ Declaration on the Elimination of Violence Against Women Proclaimed by General Assembly Resolution 48/104 of 20 December 1993.

¹⁶ World Health Organization *World Report on Violence and Health* (2002) 149.

¹⁷ Fairbairn J ‘Rape Threats and Revenge Porn: Defining Sexual Violence in the Digital Age’ in Bailey J and Steeves V *EGirls, ECitizens: Putting Technology, Theory and Policy into Dialogue with Girls’ and Young Women’s Voices* (2015) 229 -252.

¹⁸ Enaifoghe A et al ‘The Prevalence of Gender-Based Violence against Women in South Africa: A Call for Action’ (2021) *African Journal of Gender, Society and Development* 121.

¹⁹ The World Bank *World Development Report 2017 Background Paper: Gender-based violence and the law* (2017) 3.

²⁰ The World Bank *World Development Report 2017: Gender-based violence and the law* (2017) 3.

inequality also played an active role.²¹ During apartheid women were seen as subordinate and inferior to men. To support this statement, Mitchell and others writes that:

“Although all women are in danger of rape, Black women are the most likely to be raped. It is not based on reasons that would seem to be ‘logical’ or obvious. It has little to do with numbers and much to do with how rape and race have historically intersected in mutually reinforcing ways.”²²

Therefore, it is noteworthy to say that historic events so to speak, have a lingering effect on society as it seems as if it is still the notion in today’s day and age where men feel that they have certain rights to women and their bodies. With this being said, the increasing number of GBV cases worldwide indicates that GBV, especially against women extends beyond ethnicity, age, economic status, culture and national borders.²³

Furthermore, an increasing number of literature links the growing number of GBV cases to men’s expected prescribed masculinities and gender roles.²⁴ Society expects men to express physical strength, which may include making use of violence and aggression to control others.²⁵ This adds to the fact that the majority of violent crimes such as GBV and rape are committed by men.²⁶ Additionally, patriarchal beliefs such as ‘men should have control over women, and that men are entitled to sex from their partners at any time’ contribute to domestic violence in South Africa.²⁷ It is also found that culture and religion play a role in patriarchal beliefs where

²¹ Graaff K & Heinecken L ‘Masculinities and gender-based violence in South Africa: A study of a masculinities-focused intervention programme’ (2017) 34 *Development Southern Africa* 624.

²² Mitchell C, De Lande N & Moletsane R ‘Addressing Sexual Violence in South Africa: Gender activism in the making’ in Oinas E, Onodera H & Suurpää L (eds) *What Politics?* (2017) 317 – 336.

²³ Ulrich J ‘Confronting Gender – Based Violence with International Instruments: Is a Solution to the Pandemic within reach?’ (2000) 7 *Indiana Journal of Global Legal Studies* 632.

²⁴ Graaff K & Heinecken L ‘Masculinities and gender-based violence in South Africa: A study of a masculinities-focused intervention programme’ (2017) 34 *Development Southern Africa* 622. See also Makkan H et al ‘Attitudes Toward Gender-Based Violence Among Sexually Active Adult Men at High Risk for HIV in Rustenburg, South Africa’ (2022) 16 *American Journal of Men’s Health* 6; Pérez-Martínez V et al ‘Positive Masculinities and Gender-Based Violence Educational Interventions Among Young People: A Systematic Review’ (2023) 24 *Trauma, Violence, & Abuse* 469.

²⁵ Graaff K & Heinecken L ‘Masculinities and gender-based violence in South Africa: A study of a masculinities-focused intervention programme’ (2017) 34 *Development Southern Africa* 623.

²⁶ Graaff K & Heinecken L ‘Masculinities and gender-based violence in South Africa: A study of a masculinities-focused intervention programme’ (2017) 34 *Development Southern Africa* 623.

²⁷ Graaff K & Heinecken L ‘Masculinities and gender-based violence in South Africa: A study of a masculinities-focused intervention programme’ (2017) 34 *Development Southern Africa* 623.

it is often found that men are the heads of the house and in control.²⁸ Most importantly, from a young age men should be taught to respect women and their bodies and subsequently also unlearn toxic masculinity as violence is not an expression of manhood.²⁹ A flexible vision of manhood should be instilled in order to ensure that men are more respectful towards women as well as other men.³⁰ Moreover, the Covid-19 pandemic also had a significant impact on the increasing number of GBV cases. This may be due to several reasons including but not limited to added stress caused by job losses and being confined to your house due to lockdown regulations.³¹

1.3 RESEARCH QUESTIONS

In what ways do current and proposed laws address the epidemic of GBV in South Africa?

Sub - questions

- (a) What factors contribute to high rates of GBV in South Africa?
- (b) How do laws and enforcement measures deter GBV in South Africa?

1.4 RATIONALE FOR THE RESEARCH QUESTIONS

In June 2020, it was stated by President Cyril Ramaphosa in his national brief regarding COVID-19 that GBV is South Africa's second pandemic and it should be treated as such.³² Ramaphosa also held that women and children in South Africa are under siege and that South Africa is an unsafe place to be a woman.³³ This and the increasing number of GBV cases prove

²⁸ Ofana D 'Rethinking the problem of Gender-based violence in South Africa: a conversational perspective' (2020) 8 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 3.

²⁹ Ofana D 'Rethinking the problem of Gender-based violence in South Africa: a conversational perspective' (2020) 8 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 3.

³⁰ Ofana D 'Rethinking the problem of Gender-based violence in South Africa: a conversational perspective' (2020) 8 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 3.

³¹ Gutura P and Nunlall R 'Gender based violence and the covid-19 pandemic: a critical reflection on the global response' 2020 *Acta Criminologica: African Journal of Criminology & Victimology Special Edition – Impact of COVID-19* 33.

³² Ellis E 'Gender – based violence is South Africa's second pandemic, says Ramaphosa' *Daily Maverick* 18 June 2020 available at <https://www.dailymaverick.co.za/article/2020-06-18-gender-based-violence-is-south-africas-second-pandemic-says-ramaphosa/> (accessed 21 February 2022).

³³ Adebayo B 'A post office worker was given three life sentences for raping and murdering a student. Now South African women are saying enough' *CNN* 15 November 2019 available at <https://edition.cnn.com/2019/11/15/africa/south-africa-student-murder-sentence/index.html> (accessed 10 May 2022).

that GBV is an enormous problem in our country, therefore action needs to be taken to put an end to the constant suffering of women at the hands of GBV perpetrators. Ramaphosa therefore called upon lawmakers to support governmental policies aimed at supporting the fight against women and child abuse and to review laws on sexual offences.³⁴ Moreover, Ramaphosa further added that all facets of our country's reaction to GBV shall be improved by using every tool at the country's disposal which includes the police force, court system, social development initiatives as well as the educational system.³⁵

This thesis therefore aims to look at the new GBV legislation in order to determine the progress, if any, that was made to put an end to GBV in SA. This thesis will also look at whether such laws act as a sufficient deterrent for perpetrators of GBV. Moreover, this thesis will look at the enforcement of these laws in order to determine whether or not there is a lack of enforcement of GBV laws that contributes to the high GBV rates. Additionally, this thesis seeks to look at to what extent International and Regional Law can be implemented to further curb GBV in SA.

1.5 RESEARCH METHODOLOGY

The research methodology that will be used in the completion of this mini-thesis will consist of an extensive literature review which includes an analysis of primary as well as secondary sources of law such as case law, legislation, books, journal articles and internet references.

Legislation that will be used includes the Domestic Violence Amendment Act 14 of 2021 which essentially extends the meaning of Domestic Violence to also include people who are dating, sexual or intimate relationships as well as customary relationships, with no duration requirements.³⁶ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 13

³⁴ Adebayo B 'A post office worker was given three life sentences for raping and murdering a student. Now South African women are saying enough' *CNN* 15 November 2019 available at <https://edition.cnn.com/2019/11/15/africa/south-africa-student-murder-sentence/index.html> (accessed 10 May 2022).

³⁵ Adebayo B 'A post office worker was given three life sentences for raping and murdering a student. Now South African women are saying enough' *CNN* 15 November 2019 available at <https://edition.cnn.com/2019/11/15/africa/south-africa-student-murder-sentence/index.html> (accessed 10 May 2022).

³⁶ Ellis E 'Gender – based violence is South Africa's second pandemic, says Ramaphosa' *Daily Maverick* 18 June 2020 available at <https://www.dailymaverick.co.za/article/2020-06-18-gender-based-violence-is-south-africas-second-pandemic-says-ramaphosa/> (accessed 21 February 2022). See also Domestic Violence Amendment Act 14 of 2021.

of 2021 makes provision for a new offence of sexual intimidation.³⁷ Lastly, the Criminal and Related Matters Amendment Act provides that the names of sexual offenders on the national registry be made public.³⁸ Other sources that will be used in the completion of this mini-thesis are International Conventions, particularly the Declaration on the Elimination of Violence Against Women, Proclaimed by General Assembly Resolution 48/104 of 20 December 1993 as well as Regional Framework such as the African Charter on Human and Peoples' Rights which came into force on the 21 October 1986.

1.6 LITERATURE REVIEW

GBV creates a culture of fear and silence as it is usually handled in private.³⁹ Shane and Ellsberg found that multitudes of women suffer GBV because of the unequal status between men and women in society due to inadequate economic power and social constraints.⁴⁰ However, GBV goes beyond the scope of age, race as well as classes of women and is considered the most pervasive form of abuse.⁴¹ The author will therefore look at existing knowledge in this field as a means to try and ascertain what factors contribute to the steeping GBV rates.

Nechama Brodie's book called "Femicide in South Africa" which was published in 2020 speaks about GBV and Femicide in South Africa over the span of 40 years. The book not only looks at one form of GBV but includes a number of aspects relating to GBV such as rape, intimate partner violence as well as the misinformation regarding GBV. Brodie contends that the way in which society views GBV rates is flawed. This is because statistics are comprised of multiple components, such as the size of the country's population, the number of femicides as well as percentage changes between years.⁴² Moreover, Brodie contends that when it is said

³⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³⁸ Ellis E 'Gender – based violence is South Africa's second pandemic, says Ramaphosa' *Daily Maverick* 18 June 2020 available at <https://www.dailymaverick.co.za/article/2020-06-18-gender-based-violence-is-south-africas-second-pandemic-says-ramaphosa/> (accessed 21 February 2022). See also Criminal and Related Matters Amendment Act 12 of 2021.

³⁹ Singla P, 'Violence Against Women' in Nath K (ed) *The Indian Women's Journey: The Last Five Decades* (2020) 1-23.

⁴⁰ Thenjiwe M, Williamson C & Maseti T 'A Twenty-Year Review of Policy Landscape for Gender-Based Violence In South Africa' (2017) 15 *Gender & Behaviour* 8615. See also Shane B & Ellsberg M *Violence Against Women: Effects on Reproductive Health* (2002) 20.

⁴¹ Thenjiwe M, Williamson C & Maseti T 'A Twenty-Year Review of Policy Landscape for Gender-Based Violence in South Africa' (2017) 15 *Gender & Behaviour* 8614.

⁴² Brodie N *Femicide in South Africa* (2020) 11.

that every 3 hours a woman is murdered, it is not meant literally.⁴³ This is due to the fact that the total femicides for a year are divided by the number of days in a year, resulting in an average of how many murders take place each day, this figure is then further divided to estimate the hourly difference. For example, the South African Police Service (SAPS) reporting year, recorded 2771 femicides between 1 April 2018 and 21 March 2019. Dividing 2,771 by 365 yields approximately 7.59, which can be rounded to 8. This means that every 24 hours, 8 femicides took place, which also means 1 femicide every 3 hours. Furthermore, Brodie contends that during apartheid crime from black townships was not accurately recorded.⁴⁴ Therefore, it is reasonable to expect that there would be an increase in crimes such as murder and VAW post-apartheid. Another author, Pumla Gqola, a profound writer, research professor and gender activist writes about the rape culture in South Africa as well as violent masculinities.⁴⁵ Gqola believes that rape is a patriarchal act and connects it to power and aggression.⁴⁶ Additionally, the book “Khwezi” by Redi Tlhabi examines how GBV, sexual abuse and patriarchy work in South Africa.⁴⁷ Tlhabi holds that rape and GBV is not a new phenomenon in South Africa as it transpired throughout apartheid.⁴⁸ It is important to note that the Truth and Reconciliation Commission (TRC) addressed the sexual violence of women under ‘serious ill-treatment’.⁴⁹ Additionally, the TRC contended that it would only address sexual VAW as an act of political violence if the incident was reported to the police.⁵⁰ This was problematic according to Tlhabi, because the police were also perpetrators of horrendous sexual VAW.⁵¹

Naidoo and Nadvi also hold that there is a connection between apartheid and GBV.⁵² Naidoo contends that in as much as there was a system of racial segregation, social factors such as

⁴³ Brodie N *Femicide in South Africa* (2020) 11.

⁴⁴ Brodie N *Femicide in South Africa* (2020) 12.

⁴⁵ Gqola PD *Rape: A South African Nightmare* (2015) 7.

⁴⁶ Gqola PD *Rape: A South African Nightmare* (2015) 20.

⁴⁷ Tlhabi R *Khwezi* (2017) 35.

⁴⁸ Tlhabi R *Khwezi* (2017) 40.

⁴⁹ Tlhabi R *Khwezi* (2017) 42. See also Truth & Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report, Volume 4* (1998) 298.

⁵⁰ Tlhabi R *Khwezi* (2017) 42. See also Kusafuka A ‘Truth Commissions and Gender: A South African Case Study’ (2009) 9 *African Journal on Conflict Resolution* 58.

⁵¹ Tlhabi R *Khwezi* (2017) 42.

⁵² Naidoo N and Nadvi L ‘Risk factor management and perpetrator rehabilitation in cases of gender-based violence in South Africa: Implications of salutogenesis’ (2013) 27 *Agenda* 146. See also Thenjiwe M, Williamson C & Maseti T ‘A Twenty-Year Review of Policy Landscape For Gender-Based Violence In South Africa’ (2017) 15 *Gender & Behaviour* 8614.

gender inequality cannot be separated from apartheid.⁵³ Naidoo further argues that apartheid in South Africa is the cause of a culture of violence and specifically GBV.⁵⁴ Moreover, Thenjiwe Meyiwa holds that it is for this reason that measures should be implemented that would allow men and women to work on an equal footing.⁵⁵ Therefore, they should not view each other as competition.

As a means to alleviate violence against women, Kwakwa holds that South Africa should focus on programmes that would enable men to do some self-introspection and assess their behaviour toward women.⁵⁶ Kwakwa believes that these programmes would dismantle ideologies that men are superior to women.⁵⁷ In addition to the above, Kwakwa believes that despite the strategies that the government has in place to alleviate GBV in the country such as the 2030 GBV and Femicide National Strategic Plan, the violence that women experience on a daily basis continuously rise.⁵⁸ Hence the author contends that government strategies are only positive and encouraging on paper but the reality of it all paints a different picture.

1.7 CHAPTER OUTLINE

Chapter one consists of the introductory chapter, which will provide the reader with an overview of the GBV crisis in South Africa as well as the necessity of prompt intervention. Chapter two makes provision for a historical analysis and theoretical framework in order to understand the origin of the scourge on women. Chapter two will also discuss South Africa's history with apartheid and patriarchy and its connection to the current GBV crisis as it is believed that toxic masculinity was ingrained in men through historic events. Chapter 3 will deal with the legal framework which will analyse the law in order to determine whether it provides sufficient protection and acts as a deterrent for perpetrators of GBV. Chapter 4 is concerned with the process of reporting GBV and whether there is enough awareness. Chapter

⁵³ Naidoo N and Nadvi L 'Risk factor management and perpetrator rehabilitation in cases of gender-based violence in South Africa: Implications of salutogenesis' (2013) 27 *Agenda* 146.

⁵⁴ Naidoo N and Nadvi L 'Risk factor management and perpetrator rehabilitation in cases of gender-based violence in South Africa: Implications of salutogenesis' (2013) 27 *Agenda* 146.

⁵⁵ Thenjiwe M, Williamson C & Maseti T 'A Twenty-Year Review of Policy Landscape For Gender-Based Violence In South Africa' (2017) 15 *Gender & Behaviour* 8614.

⁵⁶ Kwakwa MM *et al* 'Factors influencing gender-based violence Against Young Women Migrants in Selected Provinces of South Africa' (2021) 19 *Gender and Behaviour* 17658.

⁵⁷ Kwakwa MM *et al* 'Factors influencing gender-based violence Against Young Women Migrants in Selected Provinces of South Africa' (2021) 19 *Gender and Behaviour* 17658.

⁵⁸ Kwakwa MM *et al* 'Factors influencing gender-based violence Against Young Women Migrants in Selected Provinces of South Africa' (2021) 19 *Gender and Behaviour* 17658.

4 will also specifically look at the SAPS and whether the law is enforced adequately. Chapter 5 will conclude this mini-thesis and provide recommendations to alleviate the crisis of GBV in South Africa.

CHAPTER TWO

THE ROOT CAUSES OF GENDER-BASED VIOLENCE: A CONCEPTUAL ANALYSIS

2.1 INTRODUCTION

To combat VAW, it is important to regulate how our past affects the present and the future.⁵⁹ This chapter will determine whether there is a connection between racial inequality during apartheid in South Africa and the sexual violence we currently face due to gender inequality. It is found that since colonial times, racial inequality and subjugation have been institutionalised, and it is believed that it has shaped South Africa's history and development.⁶⁰ Additionally, in order to increase the authority of the oppressors within indigenous tribes, patriarchal power relations were incorporated and utilised.⁶¹ Women and men from various ethnic, class, and cultural origins had significantly diverse life experiences due to the manner in which apartheid's social structure was characterised by patriarchy, the system of power and authority that was historically held by men.⁶² It is found that the restoration of patriarchal dominance often goes unnoticed throughout transitions such as military dictatorship to democracy.⁶³ Therefore, the discriminatory racial hierarchies that South Africa's apartheid state supported and upheld have a significant impact on women and their experiences with GBV today.⁶⁴ This is due to the fact that the end of apartheid did not liberate women to a non-racial South Africa free from violence and sexual oppression.⁶⁵

Therefore, to get to the root causes of the GBV epidemic we need to go back further and ask ourselves where all those young men who abducted and gang-raped women from apartheid

⁵⁹ Goldblatt B & Meintjies S 'Dealing with the aftermath: sexual violence and the Truth and Reconciliation Commission' (2011) 13 *Agenda* 17.

⁶⁰ Bridger E & Hazan E 'Surfeit and Silence: Sexual Violence in the Apartheid Archive' (2022) 81 *African Studies* 287.

⁶¹ Goldblatt B & Meintjies S 'Gender and the Truth and Reconciliation Commission' available at <https://www.justice.gov.za/trc/hrvtrans/submit/gender.htm> (accessed 20 August 2022).

⁶² Goldblatt B & Meintjies S 'Gender and the Truth and Reconciliation Commission' available at <https://www.justice.gov.za/trc/hrvtrans/submit/gender.htm> (accessed 20 August 2022).

⁶³ Moffett H 'These women, They Force Us to Rape Them': Rape as Narrative of Social Control in Post – Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 133.

⁶⁴ Moffett H 'These women, They Force Us to Rape Them': Rape as Narrative of Social Control in Post – Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 131.

⁶⁵ Mushonga M & Seloma T 'Women's voices, women's lives: Qwaqwa women's experiences of the apartheid and post-apartheid eras' (2018) 43 *Journal for Contemporary History* 196.

ended up?⁶⁶ The author submits that GBV is one of the unspoken atrocities of apartheid and men who perpetrated rape and GBV then, were excused and as a result left to continue raping and perpetrating VAW in our current democratic state. Therefore, this thesis seeks to answer whether the tendency of mass rape to go unpunished during apartheid influenced the socialisation of other black males watching.⁶⁷ This will be done by addressing the effects of apartheid, patriarchy and violent masculinity on our society. This chapter will mainly look at the negative effects patriarchy has on relationships between men and women as well as whether it reinforces toxic masculinity. The chapter will then ultimately look at the factors that contribute to the high GBV rates we currently face. The author believes that apartheid, patriarchy and toxic masculinity are intertwined and are the root causes of the high GBV rates South Africa currently experience.

2.2 HISTORICAL PERSPECTIVE OF GENDER-BASED VIOLENCE IN SOUTH AFRICA

Worldwide there is little to no connection between race and GBV, however in South Africa, racial discrimination is the cause of deeply ingrained historical, social, and psychological reasons that perpetuate GBV.⁶⁸ As a result of apartheid policies that legitimised violence by the dominant group against the marginalised, sexual violence in South Africa has evolved into a punitive project for upholding patriarchal control and instilling a subservient status of women.⁶⁹ It can also be said that the struggle against apartheid was much friendlier and accommodating to men and that women who made their mark during apartheid were somehow connected to strong and authoritative men of the struggle.⁷⁰ The author submits that Winnie Madikizela-Mandela, an anti-apartheid activist received global attention after formulating her

⁶⁶ Gqola PD 'How the 'cult of femininity' and violent masculinities support endemic gender-based violence in contemporary South Africa' (2007) 5 *African Identities* 120.

⁶⁷ Gqola PD 'How the 'cult of femininity' and violent masculinities support endemic gender-based violence in contemporary South Africa' (2007) 5 *African Identities* 120.

⁶⁸ Snodgrass L 'The sins of the father: Gender-based violence in post-apartheid South Africa' (2016) 12 *Commonwealth Youth and Development* 65.

⁶⁹ Moffett H 'These women, They Force Us to Rape Them': Rape as Narrative of Social Control in Post – Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 129.

⁷⁰ Tlhabi R *Khwezi* (2017) 40.

marriage with Nelson Mandela, although she, in her own right made a positive contribution to the liberation struggle.⁷¹

It is important to note that during Apartheid laws and policies were aimed to enforce racial segregation and the oppression of marginalised people, such as women of colour.⁷² The absence of a Bill of Rights further limited legal options, making black women particularly susceptible to discrimination and institutional violence.⁷³ Therefore, during the first ten years post-democracy and the enactment of the Constitution of the Republic of South Africa, there was an increase in sexual violence cases.⁷⁴ However, there is nothing to suggest that sexual violence was not as prevalent pre-democracy.⁷⁵ This is due to the fact that sexual violence and rape statistics during apartheid is an inaccurate indicator of prevalence because it exclude cases that were not reported to the police, cases that were reported in South Africa's Bantustans, or cases that did not meet the criteria for rape such as marital- and instrumental rape.⁷⁶ The common law definition of rape was only extended in 2007 when a 9-year-old girl was sexually penetrated in her anus by Mr Masiya.⁷⁷ At that time the common law definition of rape only included the unlawful and intentional sexual penetration of a male's penis into a female's vagina without her consent.⁷⁸ The High Court held that the definition of rape had to be extended to include males and females as well as anal penetration.⁷⁹ The matter was then taken to the Constitutional Court which had to decide on the constitutionality of the common law rape definition at that time as it was gender-specific and excluded anal penetration.⁸⁰ The Constitutional Court found that the common law definition of rape should be extended to promote the spirit, purport and objects of the Bill of Rights.⁸¹ However, the Constitutional

⁷¹ Munro B 'Nelson, Winnie, and the Politics of Gender' in Barnard R (ed) *The Cambridge Companion to Nelson Mandela* (2014) 92-114.

⁷² Pirtle W 'Racial States and Re-making Race: Exploring Coloured Racial Re- and De-formation in State Laws and Forms in Post-Apartheid South Africa' (2021) 7 *Sociology of Race and Ethnicity* 124.

⁷³ Pirtle W 'Racial States and Re-making Race: Exploring Coloured Racial Re- and De-formation in State Laws and Forms in Post-Apartheid South Africa' (2021) 7 *Sociology of Race and Ethnicity* 129.

⁷⁴ Moffett H '“These women, They Force Us to Rape Them”: Rape as Narrative of Social Control in Post – Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 132.

⁷⁵ Moffett H '“These women, They Force Us to Rape Them”: Rape as Narrative of Social Control in Post – Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 132.

⁷⁶ Bridger E & Hazan E 'Surfeit and Silence: Sexual Violence in the Apartheid Archive' (2022) 81 *African Studies* 289.

⁷⁷ *Masiya v DPP* 2007 (5) SA 30 (CC) para 6.

⁷⁸ *Masiya v DPP* 2007 (5) SA 30 (CC) para 26.

⁷⁹ *Masiya v DPP* 2007 (5) SA 30 (CC) para 15.

⁸⁰ *Masiya v DPP* 2007 (5) SA 30 (CC) para 19.

⁸¹ Constitution of the Republic of South Africa, 1996.

Court held that the common law can only be extended prospectively⁸² and as a result, Mr. Masiya was found guilty of indecent assault as opposed to rape⁸³ which is a much lesser sentence than that of rape.⁸⁴ Due to this case, the common law definition of rape was extended to be more gender neutral as well as to include unlawful and intentional anal penetration without consent.⁸⁵ Additionally, this case also contributed to replacing the common law offence of indecent assault with a new statutory offence of sexual assault.⁸⁶

Moreover, in 2020, the Constitutional Court in the *Tshabalala* case also went further and found that rape should be classified as a consequence crime as opposed to a conduct crime.⁸⁷ In this case, Tshabalala, Ntuli and other co-accused went on a rampage in Thembisa, Gauteng where they caused malicious damage to property and raped women.⁸⁸ However, not all accused members of the group physically raped women, some acted as lookouts for those raping women.⁸⁹ In the South Gauteng High Court, Tshabalala, Ntuli and the other co-accused were found guilty on eight counts of rape, seven of which were based on the doctrine of common purpose.⁹⁰ It is important to note that at the time, the doctrine of common purpose could not apply to rape as the doctrine only applied to consequence crimes and not conduct crimes such as rape.⁹¹ As a result, Tshabalala applied for leave to appeal to the Constitutional Court to set aside his conviction and sentence based on the fact that rape is a conduct crime and not a consequence crime.⁹² He therefore argued that the doctrine of common purpose could not apply to common law rape due to rape being an offence that can only be committed by the use or instrumentality of the perpetrator's own body.⁹³

The Constitutional Court agreed with the State in that the instrumentality argument is flawed when prior agreement has been established as the conduct of each accused in the execution of

⁸² *Masiya v DPP* 2007 (5) SA 30 (CC) para 51.

⁸³ *Masiya v DPP* 2007 (5) SA 30 (CC) para 74.

⁸⁴ *Masiya v DPP* 2007 (5) SA 30 (CC) para 15.

⁸⁵ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁸⁶ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁸⁷ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC).

⁸⁸ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 5.

⁸⁹ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 6.

⁹⁰ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 8.

⁹¹ Snyman CR *Criminal Law* 5 ed (2008) 269.

⁹² *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 17.

⁹³ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 33. See also *S v Kimberley* 2004 (2) SACR 38 (E).

the crime is imputed to others.⁹⁴ The Constitutional Court further held that the use of one's body cannot be a determining factor in rape cases but not in cases of assault or murder.⁹⁵ The Court also found that the instrumentality argument has no place in democratic South Africa⁹⁶ due to the fact that the applicants associated themselves with the consequences of the crime by intentionally participating in the activities of the group.⁹⁷ Additionally, the Court found that had the instrumentality argument been accepted, it would have been a grave injustice to direct as well as indirect victims of GBV.⁹⁸ This is because it would give perpetrators of GBV the freedom to indirectly perpetuate GBV knowing that the doctrine of common purpose would not find application.⁹⁹ Therefore, as a result of the Tshabalala case, rape is now considered a consequence crime which means the doctrine of common purpose is applicable.

Additionally, during apartheid, many women did not report sexual violence because at the time women of colour would be seen as informants, purely by being seen in the vicinity of a police station.¹⁰⁰ Therefore, sexual violence was generally underreported during apartheid and as a result, an increase in sexual violence cases post-apartheid should be expected.¹⁰¹ Moreover, it is probable that only one in fifty cases in the homelands were reported given the very lengthy distance to a police station and the fact that the tribal court did not deal with rape.¹⁰² The underreporting of crimes can also be attributed to a lack of trust in the police, possible embarrassment over reporting sexual assaults, financial dependence on abusers, fear that the abuser may retaliate and the challenge of securing convictions.¹⁰³ The author submits that this may still be the primary concern for victims of GBV failing to report sexual assault or domestic violence to the police.

⁹⁴ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 53.

⁹⁵ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 53.

⁹⁶ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 54.

⁹⁷ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 57.

⁹⁸ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 52.

⁹⁹ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 52.

¹⁰⁰ Armstrong S 'Rape in South Africa: an invisible part of apartheid's legacy' (1994) 2 *Focus on Gender* 36.

¹⁰¹ Vogelman L & Eagle G 'Overcoming Endemic Violence against Women in South Africa' (1991) 18 *Social Justice* 209.

¹⁰² Armstrong S 'Rape in South Africa: an invisible part of apartheid's legacy' (1994) 2 *Focus on Gender* 39.

¹⁰³ Vogelman L & Eagle G 'Overcoming Endemic Violence against Women in South Africa' (1991) 18 *Social Justice* 210.

Currently, it is held that one in three women are raped in South Africa, during apartheid it is estimated that one in four women were raped.¹⁰⁴ Thus, pre-democracy a rape took place every 83 seconds.¹⁰⁵ It is therefore evident that the GBV crisis we currently face is a continuation and intensification of violence that already existed and emanated from patriarchal ideas about women.¹⁰⁶ In instances where these crimes were reported to the police to denounce rape and to hold men accountable for their actions, only a small portion of these rape reports were published in the apartheid archive which only included those that were tried in court and found newsworthy.¹⁰⁷ Therefore, the author submits that rape is not a new phenomenon, but that the current GBV epidemic is a consequence of how the apartheid regime as well as the TRC overlooked sexual crimes during the transition to a democratic state. The author also submits that the TRC and the manner in which it dealt with apartheid crimes, especially VAW has a huge impact on how South Africa as a whole understands its traumatic past and could arguably be one of the main reasons for the high GBV rate we currently experience.

In terms of The Promotion of National Unity and Reconciliation Act 34 of 1995, the TRC had to conduct investigations into 'gross violations of human rights'.¹⁰⁸ Gross Violations of Human Rights is defined as the killing, torture, abduction or severe ill treatment from past events.¹⁰⁹ Due to the TRC's limited definition of "severe ill-treatment," women who suffered the most from oppression as a result of forced removals, pass arrests as well as other systemic apartheid brutality were not identified as victims of gross human rights violations.¹¹⁰ The TRC did not include a category for gender under the definition of gross human rights violations,¹¹¹ therefore GBV and the sexual violence that women endured throughout the struggle against apartheid were addressed under serious ill-treatment.¹¹² It was also found that women who came to testify before the TRC were interrogated about everything except sexual violence and if a woman said

¹⁰⁴ Armstrong S 'Rape in South Africa: an invisible part of apartheid's legacy' (1994) 2 *Focus on Gender* 36. See also Brodie N *Femicide in South Africa* (2020) 11.

¹⁰⁵ Armstrong S 'Rape in South Africa: an invisible part of apartheid's legacy' (1994) 2 *Focus on Gender* 36.

¹⁰⁶ Thomas K, Masinjila M & Bere E 'Political transition and sexual and gender-based violence in South Africa, Kenya, and Zimbabwe: a comparative analysis' (2013) 21 *Gender & Development* 521.

¹⁰⁷ Harris V 'The Archival Sliver: Power, Memory and Archives in South Africa' (2002) 2 *Archival Science* 65.

¹⁰⁸ Promotion of National Unity and Reconciliation Act 34 of 1995, preamble.

¹⁰⁹ Promotion of National Unity and Reconciliation Act 34 of 1995, s1(1)(ix).

¹¹⁰ Goldblatt B & Meintjies S 'Dealing with the aftermath: sexual violence and the Truth and Reconciliation Commission' (2011) 13 *Agenda* 8.

¹¹¹ Schalkwyk A 'A Gendered Truth: Women's Testimonies at the TRC and Reconciliation' (1999) 27 *Missionalia: Southern African Journal of Mission Studies* 170.

¹¹² Tlhabi R *Khwezi* (2017) 41.

that she was raped, the interviewer did not record it.¹¹³ Therefore, due to the support of women's rights in the new constitutional dispensation, many observers were surprised that women's own experiences and viewpoints were not heard when the TRC started hearings in 1996 to investigate human rights crimes committed during the apartheid era.¹¹⁴

It is therefore evident that women were less likely to have authority, money and representation.¹¹⁵ This is because women were generally underpaid, misrepresented, sexually exploited, and the victims of violence.¹¹⁶ Hence in an effort to have women's voices heard, Professor Sheila Meintjies raised concerns about the TRC's role and its inability to address rape in a submission to the TRC in 1997.¹¹⁷ She contended that we should examine our past through the prism of gender in order to be better able to grasp the history of South Africa and how it has influenced the lives of its citizens.¹¹⁸ The author therefore submits that it is impossible to move forward if one cannot deal with and overcome past trauma. This proved to be correct as the TRC's main goal was also to reconcile by allowing victims and the families of victims to heal by finding out the truth about what happened to move forward in peace. The author submits that one of the TRC's mandates was that the truth shall set you free however when looking at women's experiences with violence and especially sexual violence no initial attempt was made for them to openly speak about their trauma in order to move forward. The author further argues that GBV is one of the hidden parts of South Africa's past and as a result, GBV is located on a continuum.¹¹⁹ This is because in the past as well as present, women are seen as inferior to men thus women's experiences cannot be viewed separately from men's due to the status and role they are deemed to play within society.¹²⁰

Additionally, the Promotion of National Unity and Reconciliation Act also extends the definition of victim to dependants or relatives of victims. As a result, many women came to

¹¹³ Tlhabi R *Khwezi* (2017) 42.

¹¹⁴ Graybill L 'The Contribution of the Truth and Reconciliation Commission toward the Promotion of Women's Rights in South Africa' (2001) 24 *Women's Studies International Forum* 1.

¹¹⁵ Storkey E *Scars Across Humanity* (2018) 186.

¹¹⁶ Storkey E *Scars Across Humanity* (2018) 186.

¹¹⁷ Tlhabi R *Khwezi* (2017) 43.

¹¹⁸ Meintjies S 'CALs Submission – Dr Sheila Meintjies' *Truth and Reconciliation Commission Human Rights Violations Women's Hearing* 29 July 1997 available at <https://justice.gov.za/trc/special/women/meintjie.htm> (accessed 20 August 2022).

¹¹⁹ Goldblatt B & Meintjies S 'Dealing with the aftermath: sexual violence and the Truth and Reconciliation Commission' (2011) 13 *Agenda* 7.

¹²⁰ Goldblatt B & Meintjies S 'Gender and the Truth and Reconciliation Commission' available at <https://www.justice.gov.za/trc/hrvtrans/submit/gender.htm> (accessed 20 August 2022).

testify on behalf of their husbands, fathers or children as secondary victims, whilst they were also primary victims of apartheid atrocities. For example, the wives of the "Cradock Four", an anti-apartheid activist group who were brutally murdered by the South African Defence Force,¹²¹ came before the TRC to testify about their deceased husbands. Although they too experienced harassment and arrest, their experiences were not further explored and were considered incidental. The author therefore argues that women's substantive contributions to society are continuously diminished and as a result, women perceive their experiences as being unimportant. The author also contends that the TRC should have given these women the tools they needed to establish themselves not only as defenders of males in private but also as opponents of oppression in public.

It is further found that many women came to testify about other women's experiences with rape and often failed to mention that they were victims of rape.¹²² This may be due to several reasons including but not limited to shame and feelings of guilt.¹²³ The question that then arises is whether the TRC made provision and created a safe environment for women to come forth to speak of their own experiences about rape and sexual violence. Meintjies and Goldblatt recommended that hearings be held that are exclusively for women and that women should be asked to talk about themselves when they came to talk about others in order to create a gender analysis for the TRC's final report.¹²⁴ The TRC's reply was favourable because a few Commissioners had actively fought to ensure that gender was included in the truth-and-reconciliation process after being persuaded of its significance.¹²⁵ Additionally, three important questions are raised by Justice Khampepe in the Tshabalala case, being: "Who knows what the black woman thinks of rape? Who has asked her? Who cares?"¹²⁶ It is found that this rhetorical gesture implies that when the lived experiences of women are negated, the response to the GBV epidemic will always be inadequate and under-inclusive.¹²⁷ The author therefore submits that

¹²¹ Corliss C 'Truth Commissions and the Limits of Restorative Justice: Lessons Learned in South Africa's Cradock Four Case' (2013) 21 *Michigan State University College of Law International Law Review* 273.

¹²² Goldblatt B & Meintjies S 'Gender and the Truth and Reconciliation Commission' available at <https://www.justice.gov.za/trc/hrvtrans/submit/gender.htm> (accessed 20 August 2022).

¹²³ Goldblatt B & Meintjies S 'Gender and the Truth and Reconciliation Commission' available at <https://www.justice.gov.za/trc/hrvtrans/submit/gender.htm> (accessed 20 August 2022).

¹²⁴ Goldblatt B & Meintjies S 'Dealing with the aftermath: sexual violence and the Truth and Reconciliation Commission' (2011) 13 *Agenda* 8.

¹²⁵ Goldblatt B & Meintjies S 'Dealing with the aftermath: sexual violence and the Truth and Reconciliation Commission' (2011) 13 *Agenda* 8.

¹²⁶ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) para 68.

¹²⁷ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) footnote 38.

asking women to voice their concerns regarding societal issues that affect them is a viable solution to improving their experiences with reporting GBV and ultimately alleviating the scourge on women.

Moreover, it is submitted that the TRC only included rape as an act of political violence if a complaint was made to the police which was often not the case as it was the same police who also raped ordinary citizens as well as arrested and detained activists.¹²⁸ Therefore, Meintjies submitted that although section 20 of the Amnesty Act guaranteed perpetrators of politically motivated crimes amnesty, such amnesty should not be extended to police who were found guilty of rape.¹²⁹ This is because granting amnesty to policemen guilty of rape may imply tolerance for the societal oppression of women and an admission that rape will go unpunished under certain circumstances.¹³⁰ The author therefore submits that law and government officials be held to a higher standard as they took an oath and ought to be an example of good-standing citizens. It is also submitted that it would be very difficult to prove that rape during apartheid was used as a political act with political motives. This is due to the fact that a political rape has the same consequences for women as that of a criminal rape. Therefore, it is submitted that rape, whether it had a political motive or is a consequence crime, is an assault on both cultural integrity and individual identity that deliberately targets women for tactical and political objectives.¹³¹ Additionally, it is submitted that rape is often used as a means to prove that the male species is the dominant gender. This ideology is fuelled by patriarchal expectations of how males and females ought to conduct themselves.

2.3 PATRIARCHY

Kate Millet, in her book *Sexual Politics*, assigns the term patriarchy to the rule of men.¹³² The historical roots of patriarchy in South Africa are reinforced by colonial frameworks that

¹²⁸ Tlhabi R *Khwezi* (2017) 42.

¹²⁹ Meintjies S 'CALs Submission – Dr Sheila Meintjies' *Truth and Reconciliation Commission Human Rights Violations Women's Hearing* 29 July 1997 available at <https://justice.gov.za/trc/special/women/meintjie.htm> (accessed 20 August 2022).

¹³⁰ Meintjies S 'CALs Submission – Dr Sheila Meintjies' *Truth and Reconciliation Commission Human Rights Violations Women's Hearing* 29 July 1997 available at <https://justice.gov.za/trc/special/women/meintjie.htm> (accessed 20 August 2022).

¹³¹ Meintjies S 'CALs Submission – Dr Sheila Meintjies' *Truth and Reconciliation Commission Human Rights Violations Women's Hearing* 29 July 1997 available at <https://justice.gov.za/trc/special/women/meintjie.htm> (accessed 20 August 2022).

¹³² Millet K *Sexual Politics* (2016) 32. See also Storkey E *Scars Across Humanity* (2018) 184.

established male dominance over women.¹³³ Patriarchy points to pervasive and universal power relationships that impact all aspects of social divisions which ultimately leaves women oppressed.¹³⁴ It is through patriarchy, that a man accused of rape can become the president of a country. The author believes that the Jacob Zuma rape trial is the perfect example of how male dominance, status and power continue to oppress women. Elaine Storkey holds that patriarchy is a system of historic origin that has been rejected by some and she believes that we can reject it today as it is not eternal nor inevitable.¹³⁵ The author firmly agrees with Storkey as in the 21st century with young modern, heterosexual couples especially, many of the household chores are shared amongst the two. However, a male sharing in household chores is often frowned upon by elders due to patriarchal gender roles which dictate that a woman must do the cleaning, cooking and raising of children. It is further submitted that women too are patriarchal as many women, especially the older generation of women share in the ideology that a husband is the financial provider and must therefore come home to a home-cooked meal and a clean house. Additionally, even in women-headed households, it is ingrained in boys that they are the man of the house and should therefore protect their mother or sister. It is further submitted that patriarchy, or male domination over women, is the primary cause of violence against women rather than political unrest.¹³⁶ It is also found that religion and culture play key roles in constructing and reinforcing patriarchy as it is often held that a wife must submit to her husband since he is the head of the home. As a response, a well-known feminist, Kamla Bhasin submits that one cannot question religion or culture because when you do, the question of your belief comes in and it is difficult to argue with belief.¹³⁷

Furthermore, patriarchy pertains to the political, economic and social structure that gives men in society uneven access to leadership positions and influence over women. Pre-colonial communities were patriarchal, and colonialism combined with that produced particular kinds of gender subordination in South Africa.¹³⁸ Therefore, the author submits that patriarchy has

¹³³ Millet K *Sexual Politics* (2016) 32. See also Storkey E *Scars Across Humanity* (2018) 184.

¹³⁴ Storkey E *Scars Across Humanity* (2018) 184.

¹³⁵ Storkey E *Scars Across Humanity* (2018) 185.

¹³⁶ Thomas K, Masinjila M & Bere E 'Political transition and sexual and gender-based violence in South Africa, Kenya, and Zimbabwe: a comparative analysis' (2013) 21 *Gender & Development* 520.

¹³⁷ Pisharoty SB 'She Lives It!' available at <https://www.im4change.org/latest-news-updates/she-lives-it-sangeeta-barooah-pisharoty-20747.html> (accessed 9 December 2022).

¹³⁸ Igbelina – Igbokwe N 'Africa: Contextualizing Gender Based Violence Within Patriarchy in Nigeria' available at <https://africarealities.blogspot.com/2013/05/contextualizing-gender-based-violence.html> (accessed 23 January 2023).

woven its binds around South African women inextricably with the evolution of race and class in our nation. This is because years of socialisation may cause women to support the patriarchal system.¹³⁹ It is found that women may even oppose change because they believe that gender equality violates cultural norms that define how men and women should behave.¹⁴⁰ This may be a result of Western civilisation being suffused within the paradigm of relationships which deforms both sexes and destroys their bond.¹⁴¹ Black people were classified under apartheid as second-class civil and political subjects, while women received an even worse social and legal standing as a result of common law, customary law, as well as other social systems.¹⁴² This social imbalance has given men the power to devalue women, and it is this power imbalance that is responsible for the pervasive abuse and oppression of women in South Africa.¹⁴³ The author therefore submits that similar to other methods of social and political control, violence has frequently been used to impose male supremacy.

Furthermore, it is found that maintaining hierarchical family structures where men are considered "heads of families" encourages the subordination of women.¹⁴⁴ Additionally, as a means to maintain gender roles and to reinforce hierarchies, violence is often used.¹⁴⁵ Thus it is the author's view that even in instances where women redefine gender roles by financially contributing to the household, they are still required to perform specific duties such as raising the children and submitting to their husbands, just by virtue of the male superior gender as culture dictates. Therefore, the author argues that if women are not treated equally at home, they will not be treated equally, with dignity and respect outside of the home. It is further submitted that, if women do not feel safe and secure at home, they will not feel safe anywhere else.¹⁴⁶

¹³⁹ Igbelina – Igbokwe N 'Africa: Contextualizing Gender Based Violence Within Patriarchy in Nigeria' available at <https://aficarealities.blogspot.com/2013/05/contextualizing-gender-based-violence.html> (accessed 23 January 2023).

¹⁴⁰ Igbelina – Igbokwe N 'Africa: Contextualizing Gender Based Violence Within Patriarchy in Nigeria' available at <https://aficarealities.blogspot.com/2013/05/contextualizing-gender-based-violence.html> (accessed 23 January 2023).

¹⁴¹ Terrence R *How can I get through to you? Reconnecting Men and Women* (2002) 18.

¹⁴² Goldblatt B & Meintjies S 'Gender and the Truth and Reconciliation Commission' available at <https://www.justice.gov.za/trc/hrvtrans/submit/gender.htm> (accessed 20 August 2022).

¹⁴³ Goldblatt B & Meintjies S 'Gender and the Truth and Reconciliation Commission' available at <https://www.justice.gov.za/trc/hrvtrans/submit/gender.htm> (accessed 20 August 2022).

¹⁴⁴ Moffett H 'These women, They Force Us to Rape Them': Rape as Narrative of Social Control in Post – Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 136.

¹⁴⁵ Storkey E *Scars Across Humanity* (2018) 175.

¹⁴⁶ Storkey E *Scars Across Humanity* (2018) 98.

It is found that due to the prevalent fear of violence, women are more likely to seek safety from men, the very ones who abuse them.¹⁴⁷ The perception is that husbands and boyfriends shield women from potential harm by unidentified men in public.¹⁴⁸ It is therefore submitted that patriarchal ideologies that women need men to protect them are still present in society today. Additionally, to solve the issue of GBV, South African males are primarily given patriarchal advice to be defenders rather than perpetrators of GBV.¹⁴⁹ Patriarchal ideology therefore brainwashes men into believing that their dominance over women is beneficial when it is quite the opposite.¹⁵⁰ This is due to the fact that women are told to be in a constant state of vigilance and vulnerability.¹⁵¹ The author finds that women are told to not stop at a red light when it is dark, to not be out alone at night and to be as small and invisible as possible. With this being said, the author is prompt to raise questions about women who have no other choice but to take public transport when it is dark outside, how can they be more vigilant? The sad reality is that township living conditions, public transport as well as the lack thereof together with load-shedding and poor lighting exacerbate the occurrence of GBV.¹⁵² Therefore, we need to rethink how our cities and public transport are planned to acknowledge those vulnerable to violence.¹⁵³

Furthermore, the empowerment of women indeed challenges the way patriarchy operates and encourages legislative progression, but it does not guarantee the safety of women.¹⁵⁴ This is due to the fact that women who are empowered in their respective professions are still believed to be submissive wives in private. Furthermore, it is found that women with higher autonomy, who occupy key positions in their professions, politics and business may be at a greater risk of violence.¹⁵⁵ This may be due to men's fragile masculinity who often feel threatened by powerful women. However, it is also found that women who are educated, who receive an income and who are self-sufficient are more protected against domestic violence because it

¹⁴⁷ Vogelman L & Eagle G 'Overcoming Endemic Violence against Women in South Africa' (1991) 18 *Social Justice* 213.

¹⁴⁸ Vogelman L & Eagle G 'Overcoming Endemic Violence against Women in South Africa' (1991) 18 *Social Justice* 213.

¹⁴⁹ Moffett H 'These women, They Force Us to Rape Them': Rape as Narrative of Social Control in Post – Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 144.

¹⁵⁰ Hooks B *The Will to Change: Men, Masculinity and Love* (2004) 27.

¹⁵¹ Storkey E *Scars Across Humanity* (2018) 15.

¹⁵² Vogelman L & Eagle G 'Overcoming Endemic Violence against Women in South Africa' (1991) 18 *Social Justice* 211.

¹⁵³ Storkey E *Scars Across Humanity* (2018) 15.

¹⁵⁴ Storkey E *Scars Across Humanity* (2018) 89.

¹⁵⁵ Storkey E *Scars Across Humanity* (2018) 89.

would be easier to get out of the abusive relationship.¹⁵⁶ On the other hand, it is found that women who end an abusive relationship can find themselves at an increased risk of violence and control from their former abusive partner.¹⁵⁷ The author submits that the above may be true in a minority of cases, such as instances where the victim still relies on the perpetrator for financial support but not in instances where the victim is self-sufficient and able to completely cut ties with the abusive partner. Therefore, women's empowerment does aid in the fight against GBV, but change is slow because patriarchal culture and gender roles resist legislation and the majority of women do not know their rights.¹⁵⁸

2.4 VIOLENT MASCULINITIES

Richard Rayner argues that during military training, a young soldier is conditioned into an extreme form of masculinity and is expected to demonstrate his military prowess by demonstrating that he is neither gay nor a "girl."¹⁵⁹ He further submits that there is a connection between masculinity, sexualised violence and militarism as hypermasculine behaviour, sexual promiscuity, adversarial sexual beliefs, acceptance of VAW and hostile attitude toward women are associated with rape and a tendency toward it.¹⁶⁰ Black men's struggle with racial oppression included preserving their manhood because they were subjected to emasculation and humiliation under apartheid.¹⁶¹ Moreover, it is found that men who display violent tendencies and a desire to overpower women are those who experienced humiliation in their formative years.¹⁶² This is because apartheid fostered a culture of violence and a notion of "macho" manhood.¹⁶³ Therefore, when males lose the ability to support their families, they often attempt to re-establish their manhood in opposition to a system that disempowered them.¹⁶⁴ This deep heritage of humiliation, which is ingrained in South African culture, was

¹⁵⁶ Ahmed SM 'Intimate Partner Violence against Women: Experiences from a Woman-focused Development Programme in Matlab, Bangladesh' (2005) 23 *Journal of Health, Population and Nutrition* 97.

¹⁵⁷ Barter C et al *Partner Exploitation and Violence in Teenage Intimate Relationships* (2009) 139.

¹⁵⁸ Storkey E *Scars Across Humanity* (2018) 13.

¹⁵⁹ Borer T 'Gendered War and Gendered Peace: Truth Commissions and Post-conflict Gender Violence: Lessons from South Africa' (2009) 15 *Violence Against Women* 1170.

¹⁶⁰ Borer T 'Gendered War and Gendered Peace: Truth Commissions and Post-conflict Gender Violence: Lessons from South Africa' (2009) 15 *Violence Against Women* 1170.

¹⁶¹ Snodgrass L 'The sins of the father: Gender-based violence in post-apartheid South Africa' (2016) 12 *Commonwealth Youth and Development* 67.

¹⁶² Snodgrass L 'The sins of the father: Gender-based violence in post-apartheid South Africa' (2016) 12 *Commonwealth Youth and Development* 65.

¹⁶³ Green D *Gender Violence in Africa: African Women's Responses* (1999) 70-71.

¹⁶⁴ Green D *Gender Violence in Africa: African Women's Responses* (1999) 71.

historically fuelled by the coexisting ideologies of racism and sexism associated with apartheid, and it sheds light on the shockingly high rates of GBV and particularly sexual VAW.¹⁶⁵

Even today men are taught that they should be rugged, bold and strong, men are brought up to think of themselves as superior to women and therefore deserving of their respect.¹⁶⁶ Heavy drinking, carrying dangerous objects and being willing to defend one's honour in a physical altercation are regarded as signs of manhood.¹⁶⁷ Given that the majority of males believe that women must submit to male control, physical and sexual VAW is employed to demonstrate male power and teach women "their place", which is often enforced through punishment.¹⁶⁸ It can therefore be said that the high GBV rates are a result of men wanting to reassert their manhood, status, and dominance by exercising control and hostility toward women.¹⁶⁹ Therefore, there is a clear link between sexual violence and men's toxic masculinity.¹⁷⁰ As a result, domestic violence is the most dominant form of violence and affects women of all cultures.¹⁷¹

Moreover, during conflict, men use VAW to regain and hold onto power over family resources and women's reproductive and creative rights because violence was seen as an acceptable means of waging and ending conflict.¹⁷² It is also found that violence by toxic masculinities can continue across the lifetime of women from birth to old age.¹⁷³ It is further argued that violence is not only linked to men's toxic masculinity but also to the unequal status of women within society including illiteracy, poverty, systematic discrimination as well as patriarchy.¹⁷⁴ It is said that due to black men being emasculated, they are going through a "crisis of manhood," and while these statements are problematically ingrained in unchallenged patriarchal

¹⁶⁵ Snodgrass L 'The sins of the father: Gender-based violence in post-apartheid South Africa' (2016) 12 *Commonwealth Youth and Development* 67.

¹⁶⁶ Seedat M et al 'Violence and injuries in South Africa: prioritising an agenda for prevention' (2009) 374 *The Lancet* 1015.

¹⁶⁷ Seedat M et al 'Violence and injuries in South Africa: prioritising an agenda for prevention' (2009) 374 *The Lancet* 1015.

¹⁶⁸ Seedat M et al 'Violence and injuries in South Africa: prioritising an agenda for prevention' (2009) 374 *The Lancet* 1015.

¹⁶⁹ Dunaiski M 'Gender-Based Violence in South Africa: A Crisis of Masculinity?' 2013 *E-international Relations* 4.

¹⁷⁰ Morell R 'Men, masculinities and gender politics in South Africa: a reply to Macleod' (2007) 35 *Psychology in Society* 18.

¹⁷¹ Storkey E *Scars Across Humanity* (2018) 80.

¹⁷² Borer T 'Gendered War and Gendered Peace: Truth Commissions and Post-conflict Gender Violence: Lessons from South Africa' (2009) 15 *Violence Against Women* 1172.

¹⁷³ Storkey E *Scars Across Humanity* (2018) 16.

¹⁷⁴ Storkey E *Scars Across Humanity* (2018) 86.

ideologies, they do have some validity, but it fails to take into account that white men are also found guilty of rape and perpetrating VAW.¹⁷⁵ Therefore, all men are capable of rape but the motives for doing so vary depending on the victim as well as the victim and perpetrator's structural position in society.¹⁷⁶

2.5 CONCLUSION

It is found that men and women today, especially black women¹⁷⁷, face many of the same problems that date back to the nation's terrible past of structural violence that was infused by racism.¹⁷⁸ Additionally, GBV and rape is a complex topic that touches on a number of themes, including the destructive impacts of apartheid however it is submitted that sexual violence in South Africa is not fuelled by racial narratives but rather by acrimonious patriarchal expectations.¹⁷⁹ Storkey believes that men too are victims of patriarchy, which has hardened men to the point where, barring reform, mankind will perish.¹⁸⁰ Therefore, our men need to change, not only to support women but to also protect themselves from the brutality of generations of exposure to patriarchy.¹⁸¹ Additionally, Vogelmann holds that VAW will only be completely eradicated when gender relations are fundamentally altered at every level.¹⁸² The next chapter will focus on the international, regional and South African legal framework to assess how laws and enforcement measures deter GBV in South Africa.

¹⁷⁵ Moffett H ‘‘These women, They Force Us to Rape Them’’: Rape as Narrative of Social Control in Post – Apartheid South Africa’ (2006) 32 *Journal of Southern African Studies* 136.

¹⁷⁶ Moffett H ‘‘These women, They Force Us to Rape Them’’: Rape as Narrative of Social Control in Post – Apartheid South Africa’ (2006) 32 *Journal of Southern African Studies* 136.

¹⁷⁷ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) footnote 38.

¹⁷⁸ Snodgrass L ‘The sins of the father: Gender-based violence in post-apartheid South Africa’ (2016) 12 *Commonwealth Youth and Development* 67.

¹⁷⁹ Moffett H ‘‘These women, They Force Us to Rape Them’’: Rape as Narrative of Social Control in Post – Apartheid South Africa’ (2006) 32 *Journal of Southern African Studies* 143.

¹⁸⁰ Storkey E *Scars Across Humanity* (2018) 187.

¹⁸¹ Pisharoty SB ‘She Lives It!’ available at <https://www.im4change.org/latest-news-updates/she-lives-it-sangeeta-barooah-pisharoty-20747.html> (accessed 9 December 2022).

¹⁸² Vogelmann L & Eagle G ‘Overcoming Endemic Violence against Women in South Africa’ (1991) 18 *Social Justice* 214.

CHAPTER THREE

LEGAL FRAMEWORK

3.1 INTRODUCTION

Among the other factors that contribute to the high GBV rates, it is evident that South Africa's history with apartheid and its patriarchal notions can be attributed to the scourge on women in South Africa. It is found that VAW is institutional and systemic, with a clear aim to maintain male supremacy over women rather than being an aberration.¹⁸³ With this being said, it is important to acknowledge that post-apartheid and the TRC process, South Africa made significant progress concerning gender equality and human rights.¹⁸⁴ This was done by promulgating various pieces of legislation as well as ratifying international conventions that protect and promote women's rights.¹⁸⁵ It is believed that these pieces of legislation should have alleviated the GBV catastrophe but if anything, GBV rates are the highest it is ever been. South Africa is deemed the rape capital of the world.¹⁸⁶ Therefore, it is evident that South Africa's human rights focused legislation is failing to protect women from GBV.¹⁸⁷

This chapter will focus on international, regional and domestic laws such as the Domestic Violence Amendment Act 14 of 2021, the Criminal and Related Matters Amendment Act 12 of 2021 as well as the Criminal (Sexual Offences and Related Matters) Amendment Act 13 of 2021. These Acts are known as "GBV Acts" and they represent legislative efforts to combat the epidemic of GBV in South Africa as well as strengthen the protection of vulnerable populations, such as women within the criminal justice system.¹⁸⁸ The definition of VAW as well as the process of how governmental departments should address GBV are

¹⁸³ Thomas K, Masinjila M & Bere E 'Political transition and sexual and gender-based violence in South Africa, Kenya, and Zimbabwe: a comparative analysis' (2013) 21 *Gender & Development* 520.

¹⁸⁴ Mogale R, Burns K & Richter S 'Violence Against Women in South Africa: Policy Position and Recommendations' (2012) 18 *Violence Against Women* 581.

¹⁸⁵ Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 167.

¹⁸⁶ Mamabolo S, Lekgau K & Maluleke W 'Perspectives on Contributing Factors to Rape in Selected Areas of Mankweng South Africa' (2022) 5 *International Journal of Social Science Research and Review* 124.

¹⁸⁷ Mogale R, Burns K & Richter S 'Violence Against Women in South Africa: Policy Position and Recommendations' (2012) 18 *Violence Against Women* 581.

¹⁸⁸ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 8.

comprehensively covered in the above legislation.¹⁸⁹ The author then ultimately seeks to determine whether laws and enforcement measures provide sufficient protection and accurately act as a deterrent for GBV perpetrators. It is submitted that South African law, although progressive, is unable to solve the scourge of GBV that currently depicts our nation. Moreover, despite the existence of progressive VAW legislation, there has been little success in how this law is responded to and applied.¹⁹⁰

3.2 INTERNATIONAL LAW

International law and Conventions are essential building blocks for altering global discourses and national policies.¹⁹¹ By way of Section 39 of the Constitution, courts and other legal authorities are required to take international law into account when construing the Bill of Rights.¹⁹² Additionally, Sections 231, 232, and 233 of the Constitution lay out the tools and procedures for South Africa to adopt and internalise international law. It is therefore evident that the South African Constitution values international law as clear procedures are laid down to follow it.

The 1948 Universal Declaration of Human Rights (UDHR) is among the most important declarations that helped establish gender equality. According to the UDHR, all humans are born equal and free thus every woman has a right to dignity and equality.¹⁹³ In 1967 the United Nations adopted the Declaration on the Elimination of Discrimination Against Women. This declaration holds that discrimination against women is an infringement on human dignity.¹⁹⁴ It

¹⁸⁹ Mogale R, Burns K & Richter S 'Violence Against Women in South Africa: Policy Position and Recommendations' (2012) 18 *Violence Against Women* 581.

¹⁹⁰ Beninger C 'The Effectiveness of Legislative Reform in Combatting Domestic Violence: A Comparative Analysis of Laws in Ghana, Namibia and South Africa' (2014) 32 *Netherlands Quarterly of Human Rights* 107.

¹⁹¹ Giesen M 'Framing gender-based violence in multi-level contexts: a networked approach to studying adoption of the Istanbul Convention' (2023) 6 *European Journal of Politics and Gender* 77.

¹⁹² *Masiya v DPP* 2007 (5) SA 30 (CC) para 45. See also *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 54.

¹⁹³ Universal Declaration of Human Rights, 1948 United Nations General Assembly Resolution 217A (1948) Art 1.

¹⁹⁴ Matadi M & Calvino L 'Evaluating the Legislative Framework in Curtailing the GBV Epidemic: A Comparative Analysis of South Africa and The DRC' 4 available at https://www.researchgate.net/profile/Lizelle-Ramaccio-Calvino/publication/354414042_EVALUATING_THE_LEGISLATIVE_FRAMEWORK_IN_CURTAILING_THE_GBV_EPEDEMIC_A_COMPARATIVE_ANALYSIS_OF_SOUTH_AFRICA_AND_THE_DRC/links/613761462_b40ec7d8bed9fad/EVALUATING-THE-LEGISLATIVE-FRAMEWORK-IN-CURTAILING-THE-GBV-EPEDEMIC-A-COMPARATIVE-ANALYSIS-OF-SOUTH-AFRICA-AND-THE-DRC.pdf (accessed 25 May 2023).

is important to note that this declaration did not have a binding effect and as a result, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was enacted in 1979 which was binding on all member states. The primary goal of CEDAW is to eradicate all types of discrimination against women,¹⁹⁵ making it one of the most ratified conventions worldwide.¹⁹⁶ Due to the fact that CEDAW is designed to combat discrimination against women because of their gender at birth, it sets it apart from other legislation.¹⁹⁷ Additionally, according to its provisions, States are required to implement all necessary reforms to their laws to guarantee women's full and equal protection and participation in all spheres of society, including politics, social life, the economy, and culturally.¹⁹⁸ Therefore, CEDAW provides women the opportunity to full enjoyment of their rights. South Africa ratified CEDAW in 1995¹⁹⁹ and in 2005 South Africa ratified the Optional Protocol to CEDAW.²⁰⁰ Therefore, South Africa is required to implement the necessary steps to end all forms of discrimination against women.²⁰¹ To address the inequity and prejudice that women endure, especially as a result of violence, domestic legislation has been developed in light of these requirements.²⁰² Additionally, it is found that CEDAW should have legal force at the municipal level because it is an international treaty that the Constitution recognises under Article 231 of the Constitution.²⁰³ South Africa thus has a responsibility to enact it into national legislation under Article 231(4) of the Constitution to achieve CEDAW's objectives.²⁰⁴ With

¹⁹⁵ Convention on the Elimination of All Forms of Discrimination against Women, 1979 United Nations General Assembly Resolution 34/180 (1979) Art 2.

¹⁹⁶ Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 167.

¹⁹⁷ Cusack S & Cook R 'Combating Discrimination Based on Sex and Gender' in Krause C & Scheinin M et al (eds) *International Protection of Human Rights: A Textbook* (2009) 209.

¹⁹⁸ Convention on the Elimination of All Forms of Discrimination against Women, 1979, art 3.

¹⁹⁹ United Nations 'Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination against Women' *UN Human Rights Office* 27 March 2020 available at https://www.tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW (accessed 15 June 2023).

²⁰⁰ United Nations 'Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination against Women' *UN Human Rights Office* 27 March 2020 available at https://www.tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW (accessed 15 June 2023).

²⁰¹ Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 165.

²⁰² Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 165.

²⁰³ Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 175.

²⁰⁴ Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 175.

this being said, it is evident that South Africa has made a commitment to upholding international law by applying CEDAW-compliant legal interpretations to advance the rights of women in the country. However, international law norms are rarely used and enforced in domestic courts, particularly when it comes to international human rights legislation as it is often regarded as redundant.²⁰⁵ This avoidance may in part be due to the courts, judges, and legal councils' apparent lack of knowledge of international law.²⁰⁶ Moreover, domestic rules frequently conflict with international law since international law does not specify how governments should carry out their duties.²⁰⁷

It is also important to note that CEDAW does not specifically refer GBV, it merely provides for recommendations regarding VAW in its General Recommendations. Therefore, in 1993 at the World Conference on Human Rights, VAW was recognised as a human rights violation. Additionally, a Rapporteur on VAW was appointed in the Vienna Declaration and Programme of Action.²⁰⁸ The Rapporteur's main mission was to investigate the causes and consequences of VAW.²⁰⁹ Furthermore, The Declaration on the Elimination of Violence Against Women (DEVAW) was also proclaimed by the UN General Assembly in 1993 to strengthen and complement CEDAW. Although DEVAW is non-binding and has lesser status than CEDAW, it is the first international instrument that explicitly addresses VAW.²¹⁰ It holds that VAW is a manifestation of historically unequal power relations between men and women.²¹¹

²⁰⁵ Viljoen F 'International Protection of Human Rights' in Strydom H (ed) *International Law* (2016) 364.

²⁰⁶ Dugard J 'South Africa' in Sloss D (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 448-76.

²⁰⁷ Meyersfeld B 'Domesticating international standards: The direction of international human rights law in South Africa' (2013) 5 *Constitutional Court Review* 399.

²⁰⁸ Commission on Human Rights (Fiftieth session) *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45* (1994).

²⁰⁹ Commission on Human Rights (Fiftieth session) *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45* (1994).

²¹⁰ Matadi M & Calvino L 'Evaluating the Legislative Framework in Curtailing the GBV Epidemic: A Comparative Analysis of South Africa and The DRC' 4 available at https://www.researchgate.net/profile/Lizelle-Ramaccio-Calvino/publication/354414042_EVALUATING_THE_LEGISLATIVE_FRAMEWORK_IN_CURTAILING_THE_GBV_EPEDEMIC_A_COMPARATIVE_ANALYSIS_OF_SOUTH_AFRICA_AND_THE_DRC/links/613761462b40ec7d8bed9fad/EVALUATING-THE-LEGISLATIVE-FRAMEWORK-IN-CURTAILING-THE-GBV-EPEDEMIC-A-COMPARATIVE-ANALYSIS-OF-SOUTH-AFRICA-AND-THE-DRC.pdf (accessed 25 May 2023).

²¹¹ Matadi M & Calvino L 'Evaluating the Legislative Framework in Curtailing the GBV Epidemic: A Comparative Analysis of South Africa and The DRC' 1 available at

https://www.researchgate.net/profile/Lizelle-Ramaccio-Calvino/publication/354414042_EVALUATING_THE_LEGISLATIVE_FRAMEWORK_IN_CURTAILING_THE

Additionally, DEVAW emphasises the fact that women and children are vulnerable and in need of protection from violence.²¹² DEVAW mandates that women's rights be applied universally with regard to the dignity, liberty, security and equality of all people.²¹³ Moreover, due to the fact that GBV is seen as a serious and widespread violation of human rights worldwide, the United Nations has included the elimination of all forms of VAW as one of its Substantial Development Goals for 2030.²¹⁴ Goals five, ten and sixteen focus on reducing inequality within communities, promoting peaceful and inclusive societies for long-term growth as well as promoting gender equality.²¹⁵

3.3 REGIONAL FRAMEWORK

The African Union (AU) formally known as the Organisation of African Unity (OAU) was established in 2002 with the aim to focus on human rights.²¹⁶ This has led to the adoption of various human rights instruments such as the African Charter on Human and Peoples' Rights as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol.²¹⁷ The Maputo Protocol was enacted to protect women's rights regionally as well as to complement the African Charter's provisions.²¹⁸ Additionally, the African Union aspires to eliminate all forms of GBV and discrimination

[_GBV EPIDEMIC A COMPARATIVE ANALYSIS OF SOUTH AFRICA AND THE DRC/links/613761462_b40ec7d8bed9fad/EVALUATING-THE-LEGISLATIVE-FRAMEWORK-IN-CURTAILING-THE-GBV-EPIDEMIC-A-COMPARATIVE-ANALYSIS-OF-SOUTH-AFRICA-AND-THE-DRC.pdf](https://www.researchgate.net/profile/Lizelle-Ramaccio-Calvino/publication/354414042_EVALUATING_THE_LEGISLATIVE_FRAMEWORK_IN_CURTAILING_THE_GBV_EPIDEMIC_A_COMPARATIVE_ANALYSIS_OF_SOUTH_AFRICA_AND_THE_DRC/links/613761462_b40ec7d8bed9fad/EVALUATING-THE-LEGISLATIVE-FRAMEWORK-IN-CURTAILING-THE-GBV-EPIDEMIC-A-COMPARATIVE-ANALYSIS-OF-SOUTH-AFRICA-AND-THE-DRC.pdf) (accessed 25 May 2023).

²¹² Declaration on the Elimination of Violence Against Women Proclaimed by General Assembly Resolution 48/104 of 20 December 1993 art 4.

²¹³ Declaration on the Elimination of Violence Against Women Proclaimed by General Assembly Resolution 48/104 of 20 December 1993.

²¹⁴ Matadi M & Calvino L 'Evaluating the Legislative Framework in Curtailing the GBV Epidemic: A Comparative Analysis of South Africa and The DRC' 4 available at

https://www.researchgate.net/profile/Lizelle-Ramaccio-Calvino/publication/354414042_EVALUATING_THE_LEGISLATIVE_FRAMEWORK_IN_CURTAILING_THE_GBV_EPIDEMIC_A_COMPARATIVE_ANALYSIS_OF_SOUTH_AFRICA_AND_THE_DRC/links/613761462_b40ec7d8bed9fad/EVALUATING-THE-LEGISLATIVE-FRAMEWORK-IN-CURTAILING-THE-GBV-EPIDEMIC-A-COMPARATIVE-ANALYSIS-OF-SOUTH-AFRICA-AND-THE-DRC.pdf (accessed 25 May 2023). See also United Nations Sustainable Development Goals available at <https://sdgs.un.org/goals> (accessed 12 February 2024).

²¹⁵ United Nations Sustainable Development Goals available at <https://sdgs.un.org/goals> (accessed 12 February 2024).

²¹⁶ Organization of African Unity, 1963 *Charter of the Organization of African Unity* (1963).

²¹⁷ African Charter on Human and Peoples' Rights, 1981 (1982) 21 ILM 58.

²¹⁸ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) Adopted by the Assembly of the African Union in Maputo, art 2(a).

against women by the year 2063.²¹⁹ Moreover, in 2020 when Cyril Ramaphosa was elected to serve as the chair of the African Union (AU) for 2020, he committed to give the AU Convention on VAW top priority in his efforts to have it adopted.²²⁰ Currently there are two binding regional frameworks regarding the right of women to be free from violence. These include the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women also known as the Belém do Pará Convention and the European Convention on Preventing and Combating Violence Against Women and Domestic Violence, known as the Istanbul Convention.²²¹

3.2.1 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Africa has long struggled for dignity, freedom, equality, and justice, and the African Charter on Human and Peoples' Rights is a manifestation of that fight, allowing Africans to define the meaning and core of the rights that fully express their ideals.²²² Article 2 of the African Charter on Human and Peoples' Rights prohibits discrimination especially discrimination based on sex.²²³ Moreover, article 18(3) requires states to end all discrimination against women and to ensure the preservation of their rights as outlined in international declarations and agreements discussed above.²²⁴ In order to advance and defend human rights, the African Commission is required under Article 60 of the Charter to look to international law for guidance on how to promote and protect human rights.²²⁵ Therefore, the Charter obliges states to conform to international human rights standards on the rights of women. However, because the Charter has minimal provisions on women's rights specifically, it has been criticised for ignoring women's rights.²²⁶ As a means to address women's rights, the first Special Rapporteur on the

²¹⁹ African Union *Agenda 2063: The Africa We Want* (2015) 9.

²²⁰ Ababa A 'Acceptance Statement by South African President H.E Cyril Ramaphosa on Assuming the Chair of the African Union for 2020' 9 February 2020 available at https://au.int/sites/default/files/speeches/38086-sp-au_acceptance_statement-english.pdf (accessed 15 June 2023).

²²¹ Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 198.

²²² African Union 'The Realities of 40 years of implementation of the African Charter on Human and Peoples' Rights' 05 July 2021 available at <https://au.int/en/pressreleases/20210705/realities-40-years-implementation-african-charter-human-and-peoples-rights> (accessed 13 February 2024).

²²³ African Charter on Human and Peoples' Rights, 1981 (1982) 21 ILM 58, art 2.

²²⁴ African Charter on Human and Peoples' Rights, 1981 (1982) 21 ILM 58, art 18(3).

²²⁵ African Charter on Human and Peoples' Rights, 1981 (1982) 21 ILM 58, art 60.

²²⁶ Bondzie-Simpson E 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 657.

Rights of Women in Africa was appointed in 1999.²²⁷ The issue of women's rights in Africa was the primary focus of the Special Rapporteur on her promotional visits to several countries.²²⁸ She assisted non-governmental organisations that have been working on women's rights since 1995 to create a Protocol to the African Charter on Human and Peoples' Rights on the rights of women.²²⁹ A group of government specialists worked to refine the draft Protocol before it was approved by the AU Assembly in Maputo in July 2003.²³⁰ In November 2005, the Maputo Protocol came into effect after it was ratified by the required member states of the AU.²³¹

3.2.2 THE MAPUTO PROTOCOL

In interpreting the Maputo Protocol, all promoting and safeguarding provisions found in the African Charter on Human and Peoples' Rights and other human rights agreements are equally relevant.²³² Importantly, the Maputo Protocol has VAW provisions which are mostly based on the UN Declaration on the Elimination of Violence Against Women.²³³ However, the Protocol includes amendments that are both context-specific and progressive.²³⁴

The Maputo Protocol makes it clear that the ideals of equality, freedom, dignity, justice, solidarity, and democracy form the foundation of positive African values.²³⁵ Consequently, VAW transgresses the fundamental values and principles outlined in the Maputo Protocol.²³⁶ Discrimination against women is broadly defined in Article 1 of the Protocol

²²⁷ Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 201.

²²⁸ Harrington J 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 265.

²²⁹ Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 201.

²³⁰ Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 201.

²³¹ Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 201.

²³² Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 202.

²³³ Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 202.

²³⁴ Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 202.

²³⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) Adopted by the Assembly of the African Union in Maputo, Preamble.

²³⁶ Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 202.

‘As any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.’²³⁷

Article 2 of the Maputo Protocol urges nations to adopt proactive measures to overcome gender disparities in their efforts to guarantee that women have access to their rights.²³⁸ The Maputo Protocol also discusses the legal and non-legal measures that member states must take to combat VAW in detail.²³⁹ In order to further emphasise the need to eliminate discrimination and GBV, The Maputo Protocol requires State Parties to incorporate “the principle of equality between men and women” into their national constitutions.²⁴⁰ Notwithstanding the positive strides the Maputo Protocol has made in advocating for women’s rights, it has been criticised for relying on Western ideas of women’s rights without considering customary law in its implementation.²⁴¹ Moreover, the Protocol’s incoherence and failure to adhere to international norms in some areas is another critique.²⁴² The African human rights system faces many difficulties, such as limited resources, delays in decision-making, a lack of political will, trust, and knowledge, a failure to comply with reporting requirements, and a lack of support within the regional human rights mechanisms.²⁴³

²³⁷ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2003) Adopted by the Assembly of the African Union in Maputo, art 1(f).

²³⁸ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2003) Adopted by the Assembly of the African Union in Maputo, art 2.

²³⁹ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2003) Adopted by the Assembly of the African Union in Maputo, art 4.

²⁴⁰ Matadi M & Calvino L ‘Evaluating the Legislative Framework in Curtailing the GBV Epidemic: A Comparative Analysis of South Africa and The DRC’ 1 available at https://www.researchgate.net/profile/Lizelle-Ramaccio-Calvino/publication/354414042_EVALUATING_THE_LEGISLATIVE_FRAMEWORK_IN_CURTAILING_THE_GBV_EPEDEMIC_A_COMPARATIVE_ANALYSIS_OF_SOUTH_AFRICA_AND_THE_DRC/links/613761462_b40ec7d8bed9fad/EVALUATING-THE-LEGISLATIVE-FRAMEWORK-IN-CURTAILING-THE-GBV-EPEDEMIC-A-COMPARATIVE-ANALYSIS-OF-SOUTH-AFRICA-AND-THE-DRC.pdf (accessed 25 May 2023).

²⁴¹ Davis K ‘The emperor is still naked: Why the Protocol on the Rights of Women in Africa leaves women more exposed to discrimination’ (2009) 42 *Vanderbilt Journal of Transnational Law* 949.

²⁴² Rebouché R ‘Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions’ (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 94.

²⁴³ Mystris D ‘Why a regional criminal court for Africa is a good idea’ *The Conversation* 29 September 2019 available at https://theconversation.com/why-a-regional-criminal-court-for-africa-is-a-good-idea-123650#comment_2037807 (accessed 18 June 2023).

3.2.3 THE BELÉM DO PARÁ CONVENTION

The Belém do Pará Convention was adopted in 1994.²⁴⁴ This Convention defines VAW as ‘any act or conduct, based on gender, which causes death or physical, sexual, or psychological harm or suffering to women, whether in the public or private sphere.’²⁴⁵ This means that the Convention explicitly acknowledges the link between discrimination and GBV, pointing out that the former is a result of historically unequal power relations between men and women, and that women's right to a life free from violence includes the right to be free from discrimination as well as the right to be valued and educated without being subjected to stereotypes about certain behaviours.²⁴⁶ It is proven that violence has a variety of negative effects on women, making it difficult for them to exercise their fundamental rights, including civil, political, economic, social and cultural rights.²⁴⁷ It specifies that state parties must take all reasonable steps to prevent, look into, and punish VAW, whether it occurs in the public or private realms or is committed by citizens or state agents.²⁴⁸ The Belém do Pará Convention acknowledges the crucial connection between the elimination of violence and the discrimination that fuels it as well as women's access to proper judicial protection when reporting violent actions.²⁴⁹

3.2.4 THE ISTANBUL CONVENTION

The Istanbul Convention which applies to Europe, is the second regional treaty to specifically address VAW was adopted in 2011 and came into effect in 2014.²⁵⁰ The Istanbul Convention strengthens the responsibility placed on nations by addressing VAW as a human rights violation and a form of discrimination based on gender.²⁵¹ The Convention has 81 articles that

²⁴⁴ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem Do Para”, 1994.

²⁴⁵ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem Do Para”, 1994, art 1.

²⁴⁶ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem Do Para”, 1994, art 6.

²⁴⁷ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem Do Para”, 1994, art 5.

²⁴⁸ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem Do Para”, 1994, art 7.

²⁴⁹ Manjoo R & Nekura R ‘Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems’ 2020 *Acta Juridica* 215.

²⁵⁰ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014) CETS 210.

²⁵¹ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014) CETS 210, art 3.

outline a variety of integrated legal and other steps that states must take to fulfil their commitments to stop, defend against, and prosecute VAW.²⁵² According to the Convention, states must adopt comprehensive and well-integrated policies that prioritise victim rights in all actions and involve all applicable parties, including national, regional, and local governments and civil society organisations.²⁵³

In terms of prevention, states must implement laws that will alter mindsets and dismantle gender roles and prejudices that justify VAW.²⁵⁴ Moreover, States are required to collaborate with NGOs, the media, and the commercial sector; to educate professionals working with victims about the many forms of violence and its traumatising effects. States must also collaborate with the community at large.²⁵⁵ In order to subscribe to the duty of States to protect and support, the needs and safety of all victims are to be placed at the forefront of all State actions. States must offer support services to victims and their children such as medical care as well as psychological and legal. Specialised support must also be provided to sexual violence victims. Additionally, States must establish sufficient shelters, free telephone helplines as well as a reporting structure for professionals.²⁵⁶ Concerning the requirement to investigate and prosecute in accordance with substantive as well as procedural law, States must offer sufficient civil remedies as well as make sure that all types of VAW and domestic violence are criminalised and punished appropriately.²⁵⁷ Furthermore, States must ensure that victims are afforded special protection during investigations and legal proceedings as well as ensure that risk assessment protocols are in place to improve victim protection. States must ensure that law enforcement responds quickly to assistance requests and that they handle dangerous situations appropriately. Moreover, States must introduce preventive and protective legislation.²⁵⁸ It is acknowledged that systematic and adequate data collection is a critical prerequisite for

²⁵² Manjoo R & Nekura R 'Does Africa Need a Regional Treaty on Violence Against Women? A Comparative Analysis of Normative Standards in Three Regional Human Rights Systems' 2020 *Acta Juridica* 208.

²⁵³ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014) CETS 210, arts 7 & 12(3).

²⁵⁴ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014) CETS 210, arts 12-17.

²⁵⁵ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014) CETS 210, arts 12-17.

²⁵⁶ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014) CETS 210, arts 18-28.

²⁵⁷ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014) CETS 210, arts 29-43 & 45.

²⁵⁸ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014) CETS 210, arts 49-58.

monitoring the execution of policies as well as an essential element of effective policymaking.²⁵⁹

3.3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

South Africa has the most progressive constitution in relation to human rights as well as legislative protection for gender equality.²⁶⁰ Therefore, the government by way of the Constitution pledged to eliminate gender and racial inequality, both of which had historically been a defining characteristic of the country.²⁶¹ This is evident when looking at constitutional provisions such as the right to equality contained in section 9 which prohibits discrimination and provides that everyone deserves equal protection and benefit of the law.²⁶² In section 10, the Constitution upholds that everyone has the right to have their human dignity respected and protected.²⁶³ Moreover, by way of section 12, the Constitution holds that everyone is entitled to freedom and security which also includes bodily and psychological autonomy and integrity.²⁶⁴ In terms of section 7(2) of the Constitution, these rights must be respected, promoted and protected by the State.²⁶⁵ We can then go ahead and ask ourselves why South Africa, 30 years after democracy, is one of the most unsafe countries worldwide to be poor, black and female.²⁶⁶

Furthermore, the South African government has identified GBV as a major concern and prioritised women's safety as a goal in terms of South Africa's National Development Plan (NDP).²⁶⁷ In terms of this plan government held that by 2030, women should feel free,

²⁵⁹ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014) CETS 210, arts 11 & 68.

²⁶⁰ Dunaiski M 'Gender-Based Violence in South Africa: A Crisis of Masculinity?' 2013 *E-international Relations* 1.

²⁶¹ Graybill L 'The Contribution of the Truth and Reconciliation Commission toward the Promotion of Women's Rights in South Africa' (2001) 24 *Women's Studies International Forum* 1.

²⁶² Constitution of the Republic of South Africa, 1996. See also *Sali v National Commissioner of the South African Police Service and Others* [2014] ZACC 19.

²⁶³ Constitution of the Republic of South Africa, 1996. See also *S v Makwanyane and Another* [1995] ZACC 3.

²⁶⁴ Constitution of the Republic of South Africa, 1996. See also *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22.

²⁶⁵ Constitution of the Republic of South Africa, 1996.

²⁶⁶ Snodgrass L 'The sins of the father: Gender-based violence in post-apartheid South Africa' (2016) 12 *Commonwealth Youth and Development* 59.

²⁶⁷ The Presidency 'National Development Plan 2030' available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 12 February 2024) 36.

protected and have no fear of crime.²⁶⁸ Consequently, the efficacy of the criminal justice system ought to be evaluated based on its capacity to safeguard the most susceptible members of the community.²⁶⁹ The government also aims at raising everyone's sense of responsibility for their safety and lowering anxiety by informing communities and stakeholders about safety plans.²⁷⁰ Moreover, increased assistance will be given to non-governmental organisations that work to protect citizens.²⁷¹ The NDP also recommends that the Department of Social Development arrange talks with non-governmental and commercial sectors to establish successful partnerships aimed at prioritising the elimination of sexual offences and domestic violence.²⁷² Additionally, the government proposed The National Strategic Plan which is a program designed to eradicate femicide and GBV on a societal level.²⁷³ This plan is structured around six pillars: preventing GBV, bolstering the reaction of the criminal justice system to GBV, and offering assistance, healing, and support to victims of GBV.²⁷⁴

3.4 DOMESTIC VIOLENCE AMENDMENT ACT 14 OF 2021

The Domestic Violence Act²⁷⁵ (DVA) was found to be one of the most progressive and inclusive pieces of legislation due to the fact that it recognises an exhaustive list of domestic abuse.²⁷⁶ The DVA also recognised South Africa's international commitments in the DVA's preamble.²⁷⁷ It is therefore clear that South Africa's worldwide commitment to fighting VAW

²⁶⁸ The Presidency 'National Development Plan 2030' 73 available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 12 February 2024).

²⁶⁹ The Presidency 'National Development Plan 2030' 396 available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 12 February 2024).

²⁷⁰ The Presidency 'National Development Plan 2030' 397 available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 12 February 2024).

²⁷¹ The Presidency 'National Development Plan 2030' 398 available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 12 February 2024).

²⁷² The Presidency 'National Development Plan 2030' 398 available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 12 February 2024).

²⁷³ The Presidency 'National Strategic Plan on Gender-Based Violence and Femicide' available at <https://www.presidency.gov.za/node/4890> (accessed 13 February 2024).

²⁷⁴ The Presidency 'National Strategic Plan on Gender-Based Violence and Femicide' 19-20 available at <https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf> (accessed 13 February 2024).

²⁷⁵ Domestic Violence Act 116 of 1998.

²⁷⁶ Mogale R, Burns K & Richter S 'Violence Against Women in South Africa: Policy Position and Recommendations' (2012) 18 *Violence Against Women* 581.

²⁷⁷ Domestic Violence Act 116 of 1998, preamble.

has been recognised by the particular inclusion of CEDAW in the DVA.²⁷⁸ Moreover, because the goal of the DVA was to protect and oppose VAW, women regarded this as a way to have this issue addressed and even averted.²⁷⁹ This however was not the case as VAW in South Africa remained rampant. Therefore in 2021, the legislature introduced the Domestic Violence Amendment Act (DVAA).²⁸⁰ Since the enactment of the DVAA, the definition of domestic violence was extended to include ‘sexual harassment, related person abuse, spiritual abuse, elder abuse, coercive behaviour, controlling behaviour’ and exposing a child to domestic violence.²⁸¹

Spiritual abuse in terms of the DVAA involves manipulating the spiritual or religious beliefs of the complainant to justify abusing the complainant.²⁸² This definition takes into account a variety of factors, including individual backgrounds, cultural dynamics, and the specific circumstances surrounding the behaviour in question.²⁸³ In addition, the DVAA provides a thorough definition of sexual abuse as any behaviour that violates, humiliates, debases, or otherwise takes advantage of the complainant's or a connected person's sexual integrity.²⁸⁴ This definition provides a wider ambit of conduct that may not necessarily qualify as a sexual offence in terms of The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.²⁸⁵ Therefore, the author submits that the DVAA is built on an already progressive piece of legislation and makes a significant contribution to the safety of women in South Africa.

Another important contribution of the DVA is protection orders which are granted to victims of domestic violence.²⁸⁶ Protection orders, both interim and permanent, can be used to safeguard victims of domestic abuse as outlined by the DVA.²⁸⁷ The DVA also enabled an interested party to apply for a domestic violence interdict on a victim's behalf.²⁸⁸ Protecting

²⁷⁸ Barkley S ‘A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?’ 2020 *Acta Juridica* 187.

²⁷⁹ Mogale R, Burns K & Richter S ‘Violence Against Women in South Africa: Policy Position and Recommendations’ (2012) 18 *Violence Against Women* 581.

²⁸⁰ Domestic Violence Amendment Act 14 of 2021.

²⁸¹ Domestic Violence Amendment Act 14 of 2021, s 1.

²⁸² Domestic Violence Amendment Act 14 of 2021, s 1.

²⁸³ Calvino LR & Matadi MT ‘Enforcement of Gender-Based Violence Legislation in South Africa: The Need for a Paradigm Shift’ in Stamatakis N (ed) *Global Trends in Law Enforcement – Theory and Practice* (2023) 1-14.

²⁸⁴ Domestic Violence Amendment Act 14 of 2021, s 1.

²⁸⁵ Domestic Violence Amendment Act 14 of 2021, s 1.

²⁸⁶ Domestic Violence Act 116 of 1998, s 5(2)(a).

²⁸⁷ Domestic Violence Act 116 of 1998, s 7.

²⁸⁸ Domestic Violence Act 116 of 1998, s 4(3).

against domestic violence was one of the DVA's goals, and it also calls for the State to take action to fulfil its commitments.²⁸⁹ However, despite the aforementioned, research has indicated victims are discouraged from obtaining the necessary protection outlined in the DVA due to several factors including the inaccessibility of police stations and courts, particularly in rural areas,²⁹⁰ lack of familiarity with the legal system; delays in processing domestic violence applications resulting from staff shortages and/or a lack of interdepartmental cohesion; and the inability of the SAPS to support victims.²⁹¹ The DVAA took these obstacles in applying for protection orders into account and as a result allows for the electronic application of protection orders.²⁹² The author believes that this is a significant advancement to the processing of our law which in turn will improve the application thereof, especially when urgent relief is sought by GBV victims. Moreover, the addition of police responsibilities and procedures in situations when a domestic violence protection order was broken²⁹³ marked a substantial improvement from the Protection Against Family Violence Act 133 of 1993. It is therefore evident that the legislature makes a constant effort to ensure that legislation is updated to advance the safety and legislative protection of women in the country.

In 2016, the Special Rapporteur on VAW found that the DVA lacked gender sensitivity and ignored the gender roles that are frequently reinforced by police officers who are unwilling to support victims of domestic disputes since GBV is frequently treated as a private affair.²⁹⁴ Due to government officials functioning under the assumption that domestic violence was a private matter, a public/private divide was established in the criminal justice system giving rise to both the excuse for non-interference and the possibility of violence.²⁹⁵ As a result, the Domestic Violence Amendment Act now obliges functionaries as well as ordinary citizens who learn of an act of domestic violence against a vulnerable person such as a child, the elderly or someone with a disability to report this information to the police or a social worker.²⁹⁶ Failing to comply

²⁸⁹ Domestic Violence Act 116 of 1998, preamble.

²⁹⁰ Vetten L 'Violence against Women in South Africa' in Buhlungu S et al (eds) *State of the Nation: South Africa* (2007) 432.

²⁹¹ Vetten L 'Show Me the Money': A Review of Budgets Allocated towards the Implementation of South Africa's Domestic Violence Act' (2005) 32 *Politikon: South African Journal of Political Studies* 283.

²⁹² Domestic Violence Amendment Act 14 of 2021, s 4A(2)(b).

²⁹³ Domestic Violence Act 116 of 1998, s 8.

²⁹⁴ UN Human Rights Council Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa (2016) 16.

²⁹⁵ Maphosa R 'Tackling the "shadow pandemic": The Development of a Positive Duty on Adults To Report Domestic Violence' (2022) 51 *De Jure Law Journal* 104.

²⁹⁶ Domestic Violence Amendment Act 14 of 2021, s 2A&B.

with this obligation, constitutes a criminal offence.²⁹⁷ It can be said that the mandatory reporting requirement is an infringement of the autonomy of domestic violence victims or their right to privacy.²⁹⁸ However, it is clear from the increased incidence of domestic violence during the Covid-19 pandemic, that the State needs to take an integrated approach to fight the current culture of violence, focusing on social and cultural norms, as well as attitudes and beliefs that fuel the high domestic violence rates.²⁹⁹ It is believed that mandatory reporting will break down societal barriers that currently exist and cause victims to be stigmatised in public spaces and legal proceedings.³⁰⁰ The author concurs that the DVAA makes a significant contribution to de-stigmatising the idea that domestic abuse is only a family issue that should be resolved within the family and as a result, we are one step closer to alleviating the GBV epidemic.

The DVAA also obliges police officers to arrest perpetrators of domestic violence on reasonable grounds that the victim will suffer imminent harm to their safety, health or wellbeing.³⁰¹ However, police officers are only allowed to warrant an arrest if a protection order is breached.³⁰² Therefore although victims of domestic violence can receive aid, it may be challenging to do so.³⁰³ This is because domestic violence has not yet been recognised as a crime in and of itself.³⁰⁴ Instead, it is listed as an assault, a murder, or another similar offence when it is reported.³⁰⁵ The execution of numerous acts that violate a protection order is what is criminalised therefore only when a protection order forbids the behaviour in question does it become a crime.³⁰⁶ As a result, it can be argued that a respondent has not broken any laws if the conduct is highlighted in the Domestic Violence Amendment Act but not forbidden by a

²⁹⁷ Domestic Violence Amendment Act 14 of 2021, s 2B(4).

²⁹⁸ Maphosa R 'Tackling the "shadow pandemic": The Development of a Positive Duty on Adults to Report Domestic Violence' (2022) 51 *De Jure Law Journal* 103-104.

²⁹⁹ Maphosa R 'Tackling the "shadow pandemic": The Development of a Positive Duty on Adults to Report Domestic Violence' (2022) 51 *De Jure Law Journal* 105.

³⁰⁰ Maphosa R 'Tackling the "shadow pandemic": The Development of a Positive Duty on Adults to Report Domestic Violence' (2022) 51 *De Jure Law Journal* 105.

³⁰¹ Domestic Violence Amendment Act 14 of 2021, s 14 (5)(b).

³⁰² Domestic Violence Amendment Act 14 of 2021, s 14 (5)(b).

³⁰³ Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 187.

³⁰⁴ Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 187.

³⁰⁵ Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 187.

³⁰⁶ Sibisi S 'The Domestic Violence Act 116 of 1998: Offences, Defences, Economic Abuse, Imminent Harm and The Crime of Domestic Abuse—What Is New?' (2023) 44 *Obiter* 345.

protection order, provided such behaviour is not illegal under common law.³⁰⁷ As a result, it is impossible to determine the extent of domestic violence in South Africa as there are no accurate statistical data.³⁰⁸

3.5 CRIMINAL AND RELATED MATTERS AMENDMENT ACT 12 OF 2021

The consequences of the Criminal and Related Matters Amendment Act 12 of 2021 (CRMAA) are more general and broader than those of the other GBV Acts which concentrate specifically on issues connected to domestic violence and sexual offences.³⁰⁹ Act 12 of 2021 amends other legislation such as The Criminal Law Amendment Act 105 of 1997, which stipulates that minimum sentences must be imposed upon conviction of certain serious offences as well as the Criminal Procedure Act 51 of 1977 (CPA) to better support victims of GBV.³¹⁰

The CRMAA permits the employment of intermediaries so that witnesses who are vulnerable, such as minors, the elderly, or those who have a medical, physiological, or psychological condition, can testify in court through the appointed intermediary.³¹¹ The result of the amendment is that these witnesses will be able to provide testimony without having to physically appear in court but with the assistance of a third party from another informal setting.³¹² This will allow the witness to feel more at ease by not being in the presence of someone who would make them uncomfortable.³¹³ Furthermore, the CRMAA imposes extra strict conditions for considering bail applications in cases involving an offence of domestic violence or the violation of a court- or protection order.³¹⁴ Additionally, the Act no longer permits a police official to consider granting bail in connection with any crime when the victim and accused are involved in a domestic relationship or when the offence involves a violation of a protection order or any other order that was made to protect a person from the accused.³¹⁵ Therefore, an accused person must stay in police custody up until their first court appearance,

³⁰⁷ Sibisi S 'The Domestic Violence Act 116 of 1998: Offences, Defences, Economic Abuse, Imminent Harm and The Crime of Domestic Abuse—What Is New?' (2023) 44 *Obiter* 345.

³⁰⁸ Barkley S 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women?' 2020 *Acta Juridica* 187.

³⁰⁹ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 9.

³¹⁰ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 9.

³¹¹ Criminal and Related Matters Amendment Act 12 of 2021, s 1.

³¹² Criminal and Related Matters Amendment Act 12 of 2021, s 37A.

³¹³ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 9.

³¹⁴ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 10.

³¹⁵ Criminal and Related Matters Amendment Act 12 of 2021, s 3(b).

during which time they may apply to be freed from custody.³¹⁶ Moreover, before a decision to grant bail to an accused person, the safety of any victim against whom the alleged offence was committed must be considered by the court.³¹⁷ Additionally, before the court decides whether the accused's release is in the best interests of justice, the court must also take into account the accused's propensity for domestic violence crimes, as well as if the accused has ever threatened to harm the victim or anyone else.³¹⁸ If a court approves the release of an accused person on bail, it must conduct an investigation to determine whether to issue a protection order against the defendant in the same manner as if the complainant had applied for one.³¹⁹ If a bail application is not challenged in certain domestic violence situations, the prosecutor must justify not opposing bail.³²⁰ This means that a bail request from the accused should generally be denied unless the prosecutor can justify not opposing bail.³²¹

Criminal offences including domestic abuse and disobeying court orders are now included in Schedules 5 and 6 of the Criminal Procedure Act 51 of 1977, which also serves to shield a victim from the accused.³²² Moreover, in the past when a bail application was made, the defendant was required to only inform the court of specific details, such as their history of convictions and ongoing legal proceedings.³²³ The CRMAA now broadens the responsibility by mandating that the accused must additionally inform the court of any protection order or other similar order that a court issued against him or her to protect the individual against whom the alleged offence was committed and whether such order is still in effect.³²⁴ Additionally, there are now more reasons for the cancellation of bail which include violating a protection order or posing a threat to the safety of the alleged crime victim.³²⁵ Furthermore, the victim is also given a chance to take part in discussions on whether the offender should be released on parole and under close supervision from prison.³²⁶ The Act therefore places a high value on the victim's involvement at numerous points during the criminal justice process.³²⁷ The author

³¹⁶ Criminal and Related Matters Amendment Act 12 of 2021, s 3(b).

³¹⁷ Criminal and Related Matters Amendment Act 12 of 2021, s 4(b).

³¹⁸ Criminal and Related Matters Amendment Act 12 of 2021, s 4(e).

³¹⁹ Criminal and Related Matters Amendment Act 12 of 2021, s 4(i).

³²⁰ Criminal and Related Matters Amendment Act 12 of 2021, s 4(a).

³²¹ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 10.

³²² Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 10.

³²³ Criminal and Related Matters Amendment Act 12 of 2021, s 4(h).

³²⁴ Criminal and Related Matters Amendment Act 12 of 2021, s 4(h).

³²⁵ Criminal and Related Matters Amendment Act 12 of 2021, s 5.

³²⁶ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 10.

³²⁷ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 10.

contends that giving victims of GBV the power to influence decisions that have an impact on their safety and well-being is an effective solution to prevent and protect victims from experiencing future harm.³²⁸

Additionally, the Act stipulates that if an accused person is found guilty of murder or attempted murder while the victim is or was involved in a domestic relationship, they will receive severe minimum penalties.³²⁹ The same holds true in rape cases where the victim was a domestic partner of the accused, an elderly person, a person with a disability, or a minor.³³⁰ Therefore, by imposing minimum penalties, the CRMAA seek to protect vulnerable groups from violent crimes.³³¹

3.6 CRIMINAL (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 13 OF 2021

The promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) brought about the repeal of the common law offence of rape and resulted in a wider range of sexual offences being included in terms of the Act.³³² One of the main goals of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021 (SORMA Amendment Act) is to further strengthen the criminal law by adding a new sexual offence of sexual intimidation to the Act.³³³ The offence of sexual intimidation is committed when a perpetrator makes a threat to a complainant that gives rise to a reasonable fear and belief of imminent harm in the complainant that a sexual offence will be committed against the complainant, the complainant's family or anyone close to the complainant.³³⁴ Therefore, the Amendment Act provides for a broader scope of threats of imminent harm as it does not limit it to sexual violation but includes any sexual offence, committed against anyone close to the complainant and not only against the complainant.³³⁵

³²⁸ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) footnote 38. See also Chapter 2.1 of this mini-thesis.

³²⁹ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 10.

³³⁰ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 10.

³³¹ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 10.

³³² Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³³³ Criminal (Sexual Offences and Related Matters) Amendment Act 13 of 2021, s 14A.

³³⁴ Criminal (Sexual Offences and Related Matters) Amendment Act 13 of 2021, s 14A.

³³⁵ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 8.

Additionally, a legal duty was placed on everyone to report knowledge or a reasonable suspicion that a sexual offence against a child or a person with mental disabilities has been committed.³³⁶ Failure to report such knowledge or suspicion resulted in the person being found guilty of an offence and upon conviction held liable to a fine, a prison sentence of up to five years or both.³³⁷ The SORMA Amendment Act has increased the legal obligation for persons to inform a police authority if they have knowledge, a reasonable suspicion, or a belief that a sexual offence has been committed against a vulnerable person.³³⁸ The offender will be found guilty of an offence and subject to the same punishment as before if they do not comply.³³⁹ Additionally, The SORMA Amendment Act states that anyone who discloses a reasonable suspicion or belief in good faith cannot be subjected to civil or criminal proceedings if the suspicion is refuted.³⁴⁰ The SORMA Amendment Act has also addressed the scope of the National Register of Sex Offenders as the National Register previously only contained information about people who had been found guilty of sexual offences against children or disabled people.³⁴¹ After the commencement of The SORMA Amendment Act, the details of anyone found guilty of a sexual offence after will now be listed in the National Register.³⁴²

3.7 CONCLUSION

From this chapter, it is evident that South Africa has ample progressive legislation regarding GBV and women's rights. However, the author submits that patriarchal culture must reflect the legislative changes as women's rights-focused legislation can only be effective if we also change the way we think by doing away with patriarchal norms and standards. Therefore, in the next chapter, the author seeks to look at the enforcement of the law and how such enforcement measures deter GBV in South Africa. Moreover, the author will also look at whether victims of GBV receive adequate aid from the SAPS when GBV is reported. Additionally, the author will also determine whether the GBV epidemic that plagues our nation is due to an inability of SAPS to skilfully investigate crime. The author submits that there might

³³⁶ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s 54.

³³⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s 54.

³³⁸ Criminal (Sexual Offences and Related Matters) Amendment Act 13 Of 2021, s 54(1)(a).

³³⁹ Criminal (Sexual Offences and Related Matters) Amendment Act 13 Of 2021, s 54 (1)(b).

³⁴⁰ Criminal (Sexual Offences and Related Matters) Amendment Act 13 of 2021, s 54 (2)(c).

³⁴¹ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 9.

³⁴² Criminal (Sexual Offences and Related Matters) Amendment Act 13 of 2021, s 42.

be an issue at ground level due to the SAPS being the first responder to calls for safety and security in our communities.

CHAPTER 4

REPORTING GENDER-BASED VIOLENCE

4.1 INTRODUCTION

South Africa has been praised for enacting a plethora of progressive legislation to address GBV and for making notable progress in empowering women in the country.³⁴³ From the previous chapter, it is evident that South Africa indeed has progressive GBV legislation and actively seeks to incorporate international law as required by the Constitution.³⁴⁴ However, from the continued staggering GBV cases in our country, one cannot help but question the effectiveness and practicality of these laws. Therefore, in this chapter, the author will first examine whether the victims of GBV are cognisant of their rights and the procedures that ought to be followed when VAW is reported. This chapter will also look at the role the media plays in informing the public about the epidemic of GBV. Additionally, the author then seeks to determine what role the State plays in creating awareness, not only about the GBV epidemic but also how it should be reported for GBV to be alleviated in our country. Furthermore, the author seeks to determine what role the State plays in informing the public about hotlines and other relief that are available to victims of GBV. Lastly, this chapter will examine whether the SAPS fulfils its mandate to protect GBV victims and effectively investigate crime to ensure that GBV perpetrators are successfully prosecuted which will ensure that GBV in South Africa is alleviated.

4.2 AWARENESS

Brodie contends that the media plays a pivotal part in creating awareness about important topics that plague our nation.³⁴⁵ A large portion of the public's interest in criminal justice and their limited understanding of the criminal justice system can be attributed to media coverage of crime stories.³⁴⁶ Crime receives a lot of attention from the media, whether it takes the shape of

³⁴³ United Nations “South Africa’s Still Long Walk to Free Women from the Shackles of Violence” – UN Expert Calls for Change available at <https://www.ohchr.org/en/press-releases/2015/12/south-africas-still-long-walk-free-women-shackles-violence-un-expert-calls> (accessed 20 June 2023).

³⁴⁴ Constitution of the Republic of South Africa, 1996, s233.

³⁴⁵ Brodie N *Femicide in South Africa* (2020) 28.

³⁴⁶ Roberts J & Stalans L *Public Opinion, Crime and Criminal Justice* (1998) 3.

news broadcasts or dramatised stories.³⁴⁷ Newspapers and news websites inform us about crimes that have occurred as well as those that are important which is a mutually beneficial relationship because newspapers also choose to highlight stories or crimes that they believe will be important to their readers.³⁴⁸ The author therefore bears to ask, what awareness about crime in our country means if the media chooses which crimes are important enough to publish based on their benefit? With this being said, Brodie did a study where she cross-referenced South African news coverage of femicides and the total number of reported femicides between April 2012 and 31 March 2013 which was the police reporting year.³⁴⁹ She found that less than twenty percent of female homicides were reported in the press during that period.³⁵⁰ She further found that intimate partner abuse and victims of colour were often left out of news stories while white victims and the elderly were frequently overemphasised.³⁵¹ It is therefore important to highlight that the current context of VAW is still influenced by place, space, and geography.³⁵² It is also important to take into account the role Apartheid played in these factors as well as how we are still dealing with the consequences thereof. This is due to the fact that these factors have an impact on how GBV is seen in the real world as well as the accessibility of vital resources and service providers, such as police officers who are required to address such problems.³⁵³ The author further contends that whatever the cause for the underreporting of GBV and femicide concerning victims of colour is, GBV is endemic and affects everyone, everywhere, although it might be more commonplace in black communities.³⁵⁴ Additionally, it is held that rape has a particularly harmful impact on black women in South Africa.³⁵⁵

Furthermore, it is believed that society unknowingly contributes to the GBV stigma and epidemic in the way we talk and the language that we use. It is held that we should not refer to people who experienced GBV as victims as it places them in a position of vulnerability and

³⁴⁷ Roberts J & Stalans L *Public Opinion, Crime and Criminal Justice* (1998) 3.

³⁴⁸ Brodie N *Femicide in South Africa* (2020) 28.

³⁴⁹ Brodie N *Femicide in South Africa* (2020) 28.

³⁵⁰ Brodie N *Femicide in South Africa* (2020) 28.

³⁵¹ Pain R 'Geotrauma: Violence, place and repossession' (2021) 45 *Progress in Human Geography* 973. See also Tyner J *Space, Place, and Violence: Violence and the Embodied Geographies of Race, Sex and Gender* 14.

³⁵² Britton H *Ending Gender-Based Violence: Justice and Community in South Africa* (2020) 46.

³⁵³ Britton H *Ending Gender-Based Violence: Justice and Community in South Africa* (2020) 46.

³⁵⁴ West T *Solidarity and Defiant Spirituality: Africana lessons on Religion, Racism and Ending Gender Violence* 47. See also *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) footnote 38.

³⁵⁵ *Tshabalala v The State; Ntuli v The State* 2020 2 SACR 38 (CC) footnote 38.

creates a power imbalance.³⁵⁶ Activists believe that we should use the term GBV survivors rather than GBV victims as the term survivor is associated with strength.³⁵⁷ Additionally, for women who have experienced sexual violence, victim-blaming and self-blame are frequent experiences as more emphasis is placed on the victim.³⁵⁸ Furthermore, it is found that the government places the responsibility on women to end GBV by asking them to stand up and speak out about their abuse, while no mention is made to men, the perpetrators of GBV.³⁵⁹ Gqola holds that we place too much pressure on women and as a result treat rape as a perpetrator-less crime.³⁶⁰ The author agrees that more responsibility should be placed on men to speak out and seek help, to go for counselling and to stop perpetuating VAW. The author submits that although victims of GBV need to receive the necessary support after they have been violated, more measures should be implemented to avoid the perpetration of GBV in the first place.

Moreover, the idea that rape is brought on by a woman's clothing is another pervasive rape myth of society that contributes to the secondary victimisation of GBV victims.³⁶¹ The author submits that by looking at the choice of clothing women wear, we objectify women by placing focus on the victim and not the perpetrator. As a result, women fear being re-victimised which prevents them from seeking justice for the GBV committed against them.³⁶² Additionally, due to the fact that these myths are constantly repeated to the point where it is believed to be true, women change their behaviour to avoid GBV such as changing the clothing they wear, how they move around in public places and who they interact with.³⁶³ Therefore, it can be said that

³⁵⁶ Schwark S & Bohner G 'Sexual Violence – "Victim" or "Survivor": News Images Affect Explicit and Implicit Judgements of Blame' (2019) 25 *Violence Against Women* 1491-1509.

³⁵⁷ Schwark S & Bohner G 'Sexual Violence – "Victim" or "Survivor": News Images Affect Explicit and Implicit Judgements of Blame' (2019) 25 *Violence Against Women* 1492.

³⁵⁸ Gravelin C, Biernat M & Bucher C 'Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors' (2019) 9 *Frontiers in Psychology* 2.

³⁵⁹ Oparinde K & Matsha R 'Powerful Discourse: Gender-Based Violence and Counter-Discourses in South Africa' (2021) 8 *Cogent Arts & Humanities* 6. See also Mendes K 'Representing the Movement: SlutWalk Challenges Rape Culture' in Mendes K *SlutWalk: Feminism, Activism and Media* (2015) 127.

³⁶⁰ Gqola PD *Rape: A South African Nightmare* (2015) 7.

³⁶¹ Oparinde K & Matsha R 'Powerful Discourse: Gender-Based Violence and Counter-Discourses in South Africa' (2021) 8 *Cogent Arts & Humanities* 6. See also Mendes K 'Representing the Movement: SlutWalk Challenges Rape Culture' in Mendes K *SlutWalk: Feminism, Activism and Media* (2015) 127.

³⁶² Maiorano N, Travers A & Vallières F 'The Relationship Between Rape Myths, Revictimization by Law Enforcement, and Well-Being for Victims of Sexual Assault' (2023) 29 *Violence Against Women* 2877.

³⁶³ Mendes K 'Representing the Movement: SlutWalk Challenges Rape Culture' in Mendes K *SlutWalk: Feminism, Activism and Media* (2015) 140. See also Valenti J *Full Frontal Feminism: A Young Woman's Guide to Why Feminism Matters* (2007) 63.

women either consciously or unconsciously follow a "rape schedule" in their daily lives.³⁶⁴ Additionally, it is problematic and deceptive to suggest that women should take precautions to prevent GBV.³⁶⁵ Once again, it suggests that males were not involved in the crime and should not be accountable for their actions.³⁶⁶ It also suggests that women should be responsible for putting an end to such violence in addition to having to deal with its physical and psychological effects.³⁶⁷

4.3 SOUTH AFRICAN POLICE SERVICE

The Constitution places a positive duty on SAPS to 'prevent, combat and investigate crime to maintain public order, to protect and secure the citizens of the Republic and their property and to uphold and enforce the law'.³⁶⁸ This chapter will look at whether the SAPS complies with this duty as held in section 205(3) of the Constitution. Additionally, in terms of the South African Police Service Act, members of the SAPS must maintain law and order, investigate alleged offences and prevent crime.³⁶⁹ The previous chapter spoke to the progressive GBV laws that South Africa has. The author therefore submits that South Africa has ample legislation that speaks to the rights of women and the need for equality, safety and security. However, the SAPS third quarter crime statistics for 2023/2024 reported 1 830 attempted murder cases, 1 135 murder cases and 18 474 assault GBH cases against female victims took place during October, November and December.³⁷⁰ Therefore, when looking at the above crime rate, in respect of VAW in the country, the author contends that there might be a lack of enforcement of the law by SAPS. This section will therefore evaluate whether SAPS fulfils its Constitutional duty to investigate and prevent GBV as well as the obstacles it faces in combatting GBV.

³⁶⁴ Valenti J *Full Frontal Feminism: A Young Woman's Guide to Why Feminism Matters* (2007) 63. See also Gqola PD *Female Fear Factory* (2021) 113.

³⁶⁵ Valenti J *Full Frontal Feminism: A Young Woman's Guide to Why Feminism Matters* (2007) 63.

³⁶⁶ Oparinde K & Matsha R 'Powerful Discourse: Gender-Based Violence and Counter-Discourses in South Africa' (2021) 8 *Cogent Arts & Humanities* 11.

³⁶⁷ Oparinde K & Matsha R 'Powerful Discourse: Gender-Based Violence and Counter-Discourses in South Africa' (2021) 8 *Cogent Arts & Humanities* 11.

³⁶⁸ Constitution of the Republic of South Africa, 1996, sec205(3). See also *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30.

³⁶⁹ South African Police Service Act 68 of 1995, sec 205(3). See also *South African Policing Union and Others v Minister of Police and Others* (66522/2020) [2021] ZAGPPHC 10 (8 January 2021).

³⁷⁰ *Crime Registrar Head Office* Police Recorded Crime Statistics Republic of South Africa Third Quarter of 2023-2024 Financial Year (October 2023 to December 2023) available at https://www.saps.gov.za/services/downloads/2023-2024_-_3rd_Quarter_WEB.pdf (accessed 25 April 2024) 18.

4.3.1 THE DUTY OF SAPS TO PREVENT CRIME

The Constitutional Court case, *AK v Minister of Police*³⁷¹ is the perfect example of SAPS failing in their Constitutional duty to investigate crime, especially VAW in South Africa in order to combat it. In this case, Ms K. was kidnapped, robbed of her belongings, and sexually abused by an unidentified male on December 9, 2010, at around 14:30 at King's Beach in Port Elizabeth.³⁷² Her captor repeatedly raped her throughout the entire time of her confinement, until she was able to flee from him at 06:00 on December 10, 2010.³⁷³ In search of assistance, Ms K ran to the shore and eventually received help from some males who were jogging along the beach and took her to Humewood police station, where she filed a report of robbery, assault, rape, and kidnapping related to the incident.³⁷⁴

On December 9 at around 19:00, Ms. K. was reported missing to the neighbourhood police station.³⁷⁵ At around 23:30 that evening, SAPS personnel found Ms K's car broken into in the beach's parking lot.³⁷⁶ There was no sign of Ms K. A suspect was detained after being discovered in possession of some of her things, but he was never connected to the crimes of kidnapping, assault, and rape that were committed against Ms K.³⁷⁷ On November 14, 2013, the applicant filed a lawsuit in the Eastern Cape Local Division of the High Court of South Africa in Gqeberha, with the goal of holding the Minister delictually accountable for the alleged careless failures on the part of SAPS to carry out a thorough search and investigation.³⁷⁸ Ms K sought compensation for the severe psychological injuries she allegedly had as a result of the police allegedly failing to properly search for her and adequately investigate the offences

³⁷¹ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018).

³⁷² *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 5.

³⁷³ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 9.

³⁷⁴ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 9.

³⁷⁵ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 10.

³⁷⁶ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 11.

³⁷⁷ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 15.

³⁷⁸ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 16.

committed against her.³⁷⁹ She argued that (a) if the police had searched for her or conducted a reasonably effective search, they would have discovered her and stopped the rape shortly after 23:00 when they arrived at King's Beach; and (b) if the police had conducted a skilled and diligent investigation on the morning of December 10 and afterwards, she would not have suffered the full extent of the injury she claimed to have experienced.³⁸⁰ The applicant was granted a favourable ruling by the High Court, which determined that the Minister bore legal responsibility for the careless actions of the SAPS.³⁸¹ The SAPS failed to carry out a reasonable search to save the applicant or a reasonable investigation into the crimes that were committed against her.³⁸²

On appeal to the SCA, the court ruled that Ms K's claim should have been rejected since the evidence presented could not support the high court's findings that the elements of negligence, wrongfulness and causation were proved.³⁸³ As a result, the SCA held that SAPS were not negligent in their alleged omission to properly investigate.³⁸⁴ Ms K then appealed to the Constitutional Court on February 9, 2021, to which the Constitutional Court held that the SCA erred in its finding that SAPS were not negligent.³⁸⁵ The court applied the reasonable person test and found that reasonable police officers in the same position would have conducted a wider search, questioned those who lived in the area and viewed the CCTV footage.³⁸⁶ All of which the respective police officers failed to do in this case and therefore based on the assessment and balancing of available evidence, the element of causation is established.³⁸⁷ In applying the legal convictions of society to determine wrongfulness, the Constitutional Court found that excluding SAPS from liability would make it harder for GBV victims to uphold their rights.³⁸⁸ The Constitutional Court therefore found the negligent omission of SAPS to

³⁷⁹ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 18.

³⁸⁰ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 18.

³⁸¹ *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 239.

³⁸² *A K v Minister of Safety and Security and Others* (3429/2013) [2018] ZAECPEHC 82 (22 November 2018) para 239.

³⁸³ *AK v Minister of Police* [2022] ZACC 14 para 44.

³⁸⁴ *AK v Minister of Police* [2022] ZACC 14 para 44.

³⁸⁵ *AK v Minister of Police* [2022] ZACC 14 para 81.

³⁸⁶ *AK v Minister of Police* [2022] ZACC 14 paras 82 & 83.

³⁸⁷ *AK v Minister of Police* [2022] ZACC 14 para 110.

³⁸⁸ *AK v Minister of Police* [2022] ZACC 14 para 121.

conduct a proper investigation wrongful and as a result upheld the High Court's decision to hold the Minister of Police liable.³⁸⁹

Another example of the SAPS failing to protect women from abuse even after multiple cries for help, is the historic *Carmichele* case.³⁹⁰ In this case, a man who was facing charges for attempting to rape another lady attacked the applicant sexually while out on bail.³⁹¹ The police and prosecution had released the defendant pending trial despite the nature of the alleged crime and the fact that he had previously been convicted of rape.³⁹² The applicant filed a lawsuit against the Minister for damages, claiming that the police and prosecutors had negligently disregarded a legal obligation they had to her to take action to stop the defendant from hurting her.³⁹³ The applicant's claim was rejected by the High Court³⁹⁴ and the SCA upheld this decision, concluding that the police and prosecution owed the applicant no duty of care.³⁹⁵ Following an appeal, the Constitutional Court overturned the lower courts' rulings and referred the case to the High Court to continue with the trial.³⁹⁶ The Constitutional Court ruled that the advice by the police to let the attacker go free could have constituted improper conduct giving rise to responsibility because the State is required by the Constitution and international law to defend women's dignity and safety.³⁹⁷ Moreover, the Constitutional Court reiterated that international law requires South Africa to forbid any gender-based discrimination that aims to or actually does impede women from enjoying their fundamental rights and freedoms and to take reasonable steps to prevent those rights from being violated.³⁹⁸ The Constitutional Court further held that one of the main government agencies in charge of defending women from violent criminal violations of their fundamental rights is the police.³⁹⁹ The author agrees that it is important for the police as well as the prosecution to show a duty of care towards women's rights to freedom and security in South Africa. Lastly, the Constitutional Court ruled that prosecutors might be held accountable for carelessly neglecting to perform their obligation to

³⁸⁹ *AK v Minister of Police* [2022] ZACC 14 para 126.

³⁹⁰ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22.

³⁹¹ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 1.

³⁹² *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 2.

³⁹³ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 2.

³⁹⁴ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 3.

³⁹⁵ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 3.

³⁹⁶ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 83.

³⁹⁷ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 62.

³⁹⁸ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 62.

³⁹⁹ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 62.

bring any information pertinent to the denial or approval of bail before the court.⁴⁰⁰ In order to determine whether SAPS is failing in its duty to prevent crime, it is important to evaluate how crime ought to be prevented by SAPS. The author contends that it might be difficult to prevent crime as criminal justice and common law hold that the law should be applied prospectively. As was held in the *Carmichele* case as well, the police and prosecution held that they could only do something to protect her once the defendant caused her harm, even though she knew that she was in imminent danger and lived in fear, which she also communicated to the police and prosecution.⁴⁰¹ Therefore, in this case, the police were negligent to the extent that they withheld information from the court that may have helped determine whether the offender should be granted bail. The author submits that in order to ensure that the concerns of victims for their safety are treated as serious and to avoid just waiting for harm, SAPS has a positive duty to intentionally and skilfully investigate crime. Therefore, the SAPS need to take a proactive approach to dealing with GBV which will help spread knowledge, facilitate early detection, and stop recurrences.⁴⁰²

4.3.2 THE DUTY OF SAPS TO INVESTIGATE CRIME

There is a greater percentage of unidentified perpetrators in sexual homicide cases compared to non-sexual homicide cases. It is thus evident that South African forensic crime technology, such as DNA evidence, is not being utilised successfully in the identification of offenders.⁴⁰³ Additionally, there is a poor conviction rate for sexual homicide cases.⁴⁰⁴ This points to the fact that sexual homicide cases are not properly investigated by SAPS because the foundational work of a proper police investigation significantly impacts the outcome of the justice process for victims of GBV.⁴⁰⁵ One can also say that there is a lack of cooperation between the health department and SAPS which has a negative impact on the investigative outcome of rape cases.⁴⁰⁶ SAPS 2022/2023 crime statistics for quarter two show a DNA backlog of 111 174

⁴⁰⁰ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 71.

⁴⁰¹ *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22 para 15.

⁴⁰² Nortje W 'Professionalising the Fight Against Police Corruption in South Africa: Towards a Proactive Anti-Corruption Regime' (2023) 48 *Journal for Juridical Science* 85.

⁴⁰³ Abrahams N et al 'Sexual homicides in South Africa: A national cross-sectional epidemiological study of adult women and children' (2017) 12 *PLoS ONE* 10.

⁴⁰⁴ Brodie N *Femicide in South Africa* (2020) 81.

⁴⁰⁵ Abrahams N et al 'Sexual homicides in South Africa: A national cross-sectional epidemiological study of adult women and children' (2017) 12 *PLoS ONE* 10.

⁴⁰⁶ Abrahams N et al 'Sexual homicides in South Africa: A national cross-sectional epidemiological study of adult women and children' (2017) 12 *PLoS ONE* 10.

DNA specimens at forensic service laboratories.⁴⁰⁷ As a result, the Commission for Gender Equality declared SAPS incapable of handling the GBV epidemic as it lacks the necessary resources.⁴⁰⁸ However, SAPS has significantly worked on the DNA backlog as the SAPS quarter 3 crime statistics show a 99,3% reduction in DNA backlog by SAPS.⁴⁰⁹ Additionally, the forensic laboratory in Gqeberha, Eastern Cape, has been fully constructed and equipped, which will significantly lessen the demand for the Western Cape forensic laboratory.⁴¹⁰ It is therefore evident that SAPS is conscious of its part in the GBV epidemic and is actively trying to improve its mechanism and response to GBV in order to alleviate it in our country. Furthermore, the quality of investigations by SAPS also determines whether or not a case will be prosecuted in court or just simply remain a police docket. This delay in DNA evidence has caused the National Prosecuting Authority (NPA) to strike cases from the court roll⁴¹¹ or cases being withdrawn by victims due to a lack of trust in the justice system.⁴¹² With this being said, the 2023 third quarter police report held that 77 reported GBV cases were struck off the roll due to SAPS inefficiencies.⁴¹³ The author therefore contends that although SAPS made significant strides to alleviate GBV in dealing with the DNA backlog, they still have a long way to go to ensure that perpetrators are successfully brought to trial to ultimately combat GBV. Additionally, Minister of Police Bheki Cele, during the third quarter police statistics brief made a call for society to stand together and report GBV perpetrators in their community.

⁴⁰⁷ South African Police Service ‘Speaking Notes Delivered by Police Minister General Bheki Cele (MP) at the Release of the Quarter Two Crime Statistics 2022/2023 Hosted in Pretoria, Gauteng, on Wednesday 23 November 2022’ available at <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=43497> (accessed 9 September 2023).

⁴⁰⁸ Chetty R ‘SAPS is unfit to deal with GBV says Commission for Gender Equality’ The South African 13 July 2022 available at <https://www.thesouthafrican.com/news/saps-unfit-deal-with-gender-based-violence-gbv-says-commission-for-gender-equality-in-new-report/> (accessed 12 September 2023).

⁴⁰⁹ South African Police Service ‘Speaking notes for Police Minister General Bheki Cele (MP) on the occasion of the release of Quarter 3 Crime Statistics in Cape Town on 17 February 2023’ available at <https://www.gov.za/speeches/minister-bheki-cele-quarter-crime-statistics-17-feb-2023-0000> (accessed 9 September 2023).

⁴¹⁰ South African Police Service ‘Speaking notes for Police Minister General Bheki Cele (MP) on the occasion of the release of Quarter 3 Crime Statistics in Cape Town on 17 February 2023’ available at <https://www.gov.za/speeches/minister-bheki-cele-quarter-crime-statistics-17-feb-2023-0000> (accessed 9 September 2023).

⁴¹¹ Commission for Gender Equality Biannual SAPS Report 2021 – Call to Action: United to End GBVF (2021) 59.

⁴¹² Commission for Gender Equality Biannual SAPS Report 2021 – Call to Action: United to End GBVF (2021) 42.

⁴¹³ Mthetwa C ‘Cop out: More than 70 GBV cases struck off Western Cape Court roll because of police incompetence’ News24 10 September 2023 available at <https://www.news24.com/news24/southafrica/news/cop-out-more-than-70-gbv-cases-struck-off-western-cape-court-roll-because-of-police-incompetence-20230910> (accessed 12 September 2023).

Although the author agrees that community members must report known perpetrators of GBV, the author also believes that the statement by Cele shifts attention away from the actual stakeholders to investigate and prevent crimes such as GBV. Additionally, Britton holds that the State's carceral approach after apartheid shifts attention away from the State and its obligations to its citizens.⁴¹⁴ She also notes that it is difficult to imagine the national state being more involved in reducing violence in the current climate because the governing ANC has strayed from its commitments to achieve gender equality.⁴¹⁵

Moreover, the Criminal Law (Sexual Offences and Related Matters) Amendment Act promotes harsher penalties and punishment for perpetrators of GBV and especially domestic violence.⁴¹⁶ The rationale for this is that harsher sentences ought to act as a deterrent for GBV perpetrators. However, in order for perpetrators to be convicted and sentenced successfully which usually is the last step of a typically drawn-out and equivocal justice procedure, a rock-steady foundation of strong police and forensic work needs to be done in order to construct a case that can be prosecuted in the courts. Therefore, excellent investigation work needs to be carried out and documented by a functional, well-resourced and organised police force.⁴¹⁷ It is thus evident that having laws that allow for longer sentences serves little practical purpose if we cannot get past the initial policing and prosecution barriers.⁴¹⁸

4.3.3 THE DUTY OF THE CRIMINAL JUSTICE SYSTEM TO MAINTAIN LAW AND ORDER

In 2022 there was a public outcry for the death penalty which was abolished in 1995 as a result of the *S v Makwanyane*⁴¹⁹ case, to be reinstated and applied to perpetrators of VAW as a means to restore law and order in South Africa. This is due to the fact that society at large lost faith in SAPS to maintain law and order and believed that the reinstatement of the death penalty would alleviate the GBV epidemic in its entirety. Therefore, it is important to evaluate the *S v Makwanyane* case to determine whether the death penalty can act as a deterrent for perpetrators of GBV and ultimately protect victims. In this case, two accused persons were convicted on

⁴¹⁴ Britton H *Ending Gender-Based Violence: Justice and Community in South Africa* (2020) 150.

⁴¹⁵ Britton H *Ending Gender-Based Violence: Justice and Community in South Africa* (2020) 151.

⁴¹⁶ Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021.

⁴¹⁷ Brodie N *Femicide in South Africa* (2020) 82.

⁴¹⁸ Brodie N *Femicide in South Africa* (2020) 82.

⁴¹⁹ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3.

four counts of murder and sentenced to death on each count of murder because, at the time, the death penalty was considered an acceptable sentence for murder.⁴²⁰ The accused then appealed to the Appellate Division of the Supreme Court against the death penalty but the Appellate Division dismissed the appeal on the basis that the circumstances of the murder were to such an extent that the accused should receive the heaviest sentence permissible under South African law.⁴²¹ However, in 1993 when the interim Constitution came into force, the Appellate Division invited counsel for the accused to determine whether the death penalty was a competent sentence for murder, considering the right to equality and life founded in the Constitution.⁴²² Therefore, the Constitutional Court had to decide on the constitutionality of section 277(1)(a) of the Criminal Procedure Act as well as the implications of section 241(8) of the Constitution.⁴²³ The Constitutional Court held that several factors had to be considered in the application of section 277 in practice that could influence the outcome of the case such as the police's investigation of the crime, the prosecution's case presentation, the defence's effectiveness as well as the judge's disposition and personality.⁴²⁴ The court further held that South Africans had a duty to prioritise the rights to life and dignity over all other rights since they are the foundation of all other personality rights in Chapter 2 of the Constitution. The State must also demonstrate this in everything it does, including the manner in which it punishes offenders.⁴²⁵ The Court held that this was not accomplished by objectifying murderers and executing them in order to serve as an example to others in the hopes that they may be deterred.⁴²⁶ As a result, the Court concluded that the execution of the death penalty violated human dignity, which was safeguarded by section 10 of the Constitution, destroyed life, which was unquestionably protected by section 9, had aspects of arbitrariness in its execution, and was irreversible.⁴²⁷ Therefore, the Court found that the death penalty was, in fact, a harsh, inhumane, and degrading punishment within the context of the Constitution.⁴²⁸

Therefore, it is the author's submission that there is no evidence that suggests that implementing an irreversible and fatal solution would accomplish anything. This is because

⁴²⁰ Criminal Procedure Act 51 of 1977, s277(1)(a).

⁴²¹ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 1.

⁴²² *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 2.

⁴²³ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 3.

⁴²⁴ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 48.

⁴²⁵ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 144.

⁴²⁶ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 144.

⁴²⁷ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 146.

⁴²⁸ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 166.

the court in *S v Makwanyane* also was not satisfied that the death penalty would be a more effective deterrent or preventative measure against murder than a life sentence.⁴²⁹ The author therefore submits that we must consider the fact that the police and justice systems are not currently in an ideal state. It is therefore irrational thinking that the court can successfully sentence rape perpetrators to death when the vast majority of rape cases are not even prosecuted.⁴³⁰ As a result, the Court ultimately held that successful arrest and conviction must serve as a deterrent for criminals.⁴³¹ To this end, the State should, to the extent that its resources permit, endeavour to prevent serious crime by paying the police force a fair wage, providing incentives for them to enhance their knowledge and expertise, increasing the number of officers in strategic locations, and enhancing their legitimacy in the eyes of the communities they serve.⁴³²

4.4 REPORTING GENDER-BASED VIOLENCE TO THE SAPS

In relation to VAW, the duties of SAPS also include informing victims of their rights as well as the right to get a protection order from the courts.⁴³³ Additionally, should the victim require urgent medical care, the attending police officer should help the victim by making arrangements for quick medical attention as well as finding suitable shelter should the victim require it.⁴³⁴ In addition to assisting with medical care and finding shelter for the victim, SAPS should provide the victim with transportation to the shelter as well as help the victim in finding relevant counselling services. However, due to a lack of resources, police officers are unable to easily transport victims to social workers, especially for court assessments and as a result victims frequently miss out on counselling treatment.⁴³⁵ Furthermore, SAPS do not maintain reliable crime data for GBV as SAPS does not make use of unique crime codes.⁴³⁶ Domestic violence offences are therefore not accurately tracked or given the same weight in the national

⁴²⁹ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 202.

⁴³⁰ Brodie N *Femicide in South Africa* (2020) 82.

⁴³¹ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 290.

⁴³² *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3, para 290.

⁴³³ Govender D 'Is Domestic Violence being Policed in South Africa?' (2015) 28 *South African Journal of Criminology* 33.

⁴³⁴ Govender D 'Is Domestic Violence being Policed in South Africa?' (2015) 28 *South African Journal of Criminology* 33.

⁴³⁵ Govender D 'Is Domestic Violence being Policed in South Africa?' (2015) 28 *South African Journal of Criminology* 35. See also Commission for Gender Equality Biannual SAPS Report 2021 – Call to Action: United to End GBVF (2021) 56.

⁴³⁶ Govender D 'Is Domestic Violence being Policed in South Africa?' (2015) 28 *South African Journal of Criminology* 33.

crime statistics as violent crimes.⁴³⁷ GBV is often listed as a murder, sexual assault or another recognised crime under South African law.⁴³⁸ With this being said, it has been established that a female homicide is not the same as a male homicide and that there is a distinct reason why GBV perpetrators murder and rape females. Therefore, the author submits that putting VAW in the shadow of a recognised crime is a gross underestimation of the true horror that it is. It is submitted that sexual violence is not directly comparable to murder, but it is a lethal weapon of gender domination.⁴³⁹ One of the most frequent methods of death in cases of sexual homicide was strangulation which is an important fact as it can direct forensic and police inquiry.⁴⁴⁰ Due to strangulation being used as a means to cause unconsciousness, it can be said that this mode of death raises the suspicion that rape was the primary motivation.⁴⁴¹ Therefore, rape and femicide must be comprehended as components of a continuum of VAW, where death is the last act and rape is just one of many weapons.⁴⁴²

Furthermore, GBV statistics, although high are not an accurate reflection of the GBV crisis in South Africa. This is due to the fact that not all VAW are reported to the SAPS. Due to the high rate of underreporting of these incidents, police statistics grossly underestimate the number of VAW.⁴⁴³ During the COVID-19 pandemic, domestic abuse cases increased dramatically in other countries, thus there was concern that South Africa would follow the trend given the high rates of GBV cases prior to the pandemic.⁴⁴⁴ During the COVID-19 nationwide lockdown, many people lost their jobs and were forced to stay at home with their abusers, which exacerbated VAW.⁴⁴⁵ Therefore, as anticipated, in South Africa there was also an

⁴³⁷ Govender D 'Is Domestic Violence being Policed in South Africa?' (2015) 28 *South African Journal of Criminology* 33.

⁴³⁸ Cowling N Violent Crime in South Africa – Statistics & Facts Statista 20 September 2023 available at <https://www.statista.com/topics/11404/violent-crime-in-south-africa/#topicOverview> (accessed 29 September 2023).

⁴³⁹ Moffett H 'These Women, They Force Us to Rape Them': Rape as Narrative of Social Control in Post-Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 134.

⁴⁴⁰ Abrahams N et al 'Sexual homicides in South Africa: A national cross-sectional epidemiological study of adult women and children' (2017) 12 *PLoS ONE* 10.

⁴⁴¹ Abrahams N et al 'Sexual homicides in South Africa: A national cross-sectional epidemiological study of adult women and children' (2017) 12 *PLoS ONE* 10.

⁴⁴² Brodie N *Femicide in South Africa* (2020) 84.

⁴⁴³ Nduna M & Tshona S 'Domesticated Poly-Violence Against Women During the 2020 Covid-19 Lockdown in South Africa' (2021) 66 *Psychological Studies* 348.

⁴⁴⁴ Gould C 'Gender-based violence during lockdown: looking for answers' (2020) 113 *Servamus Community-based Safety & Security Magazine* 56.

⁴⁴⁵ Nobanda L, Nkosi SL & Sibanyoni EK 'A Possible Explanation of Violence Against Women During the Covid-19 Lockdown in South Africa: A Systematic Review' (2021) 34 *Acta Criminologica (Criminological Society of Southern Africa)* 20.

increase in domestic VAW, placing victims at a greater risk of danger and preventing them from fleeing their abusers during the quarantine.⁴⁴⁶ Statistics also show an increase in domestic violence-related calls to the GBV Command Call Centre.⁴⁴⁷ As a result, the Department of Social Development partnered with shelters established by non-governmental organisations (NGOs) to guarantee that assistance for victims of domestic violence continues to be accessible and available.⁴⁴⁸ This includes state hospitals such as Thuthuzela Care Centers, which offer one-stop assistance for victims of sexual assault and also remained operational during the lockdown.⁴⁴⁹ Additionally, NGOs like Rape Crisis were forced to quickly react by launching online and supplementary telephonic reporting and counselling services. Furthermore, the national hotline for GBV also received a lot of publicity. The author submits that many GBV-related complaints were not reported to the SAPS as a result of being confined in their home due to the national lockdown. This is because lockdown restrictions imply that women were unable to report their abuse because they were unable to reach a police station or because they were unable to call a hotline without their partners being aware of it.⁴⁵⁰ The author further submits that if victims did not report their abuse because they were too afraid that nothing would come from reporting the incident,⁴⁵¹ that reporting would make being confined in one's house with your abuser worse, then the justice system is failing victims of GBV.

Furthermore, it is found that a lack of skilled, thoughtful, and attentive police officers may cause severe pain to victims of sexual offences in the manner the investigation is conducted by SAPS and the questions they ask.⁴⁵² Additionally, a lot of individuals do not know how courts work and as a result, the idea of appearing in court causes feelings of worry and anxiety.⁴⁵³

⁴⁴⁶ Nobanda L, Nkosi SL & Sibanyoni EK 'A Possible Explanation of Violence Against Women During the Covid-19 Lockdown in South Africa: A Systematic Review' (2021) 34 *Acta Criminologica (Criminological Society of Southern Africa)* 19.

⁴⁴⁷ Nduna M & Tshona S 'Domesticated Poly-Violence Against Women During the 2020 Covid-19 Lockdown in South Africa' (2021) 66 *Psychological Studies* 349.

⁴⁴⁸ Gould C 'Gender-based violence during lockdown: looking for answers' (2020) 113 *Servamus Community-based Safety & Security Magazine* 56.

⁴⁴⁹ *South African Government* Thuthuzela Care Centres available at <https://www.gov.za/TCC> (accessed 20 March 2024).

⁴⁵⁰ Gould C 'Gender-based violence during lockdown: looking for answers' (2020) 113 *Servamus Community-based Safety & Security Magazine* 57.

⁴⁵¹ Brodie N *Femicide in South Africa* (2020) 82.

⁴⁵² Bruce L Con Court to hear argument on police failures in gang rape case Centre for Applied Legal Studies (CALs) 5 February 2021 available at <https://www.wits.ac.za/news/sources/cals-news/2021/con-court-to-hear-argument-on-police-failures-in-gang-rape-case.html> (accessed 7 September 2023).

⁴⁵³ The Centre for the Study of Violence and Reconciliation 'Gender-Based Violence (GBV) in South Africa: A Brief Review' available at

This could make it difficult for some victims to get assistance, and it can even make them decide to drop their cases.⁴⁵⁴ Due to lengthy wait times and a staffing shortfall, some women decide not to pursue their applications for protection orders because they do not find the court system to be user-friendly.⁴⁵⁵ Public Protector Kholeka Gcaleka found that magistrate courts lack the necessary resources to assist GBV victims.⁴⁵⁶ In her report that focussed on the challenges faced by GBV victims when filing cases at magistrate's courts across the nation, she found that many courts lack a fully functional integrated case management system, forcing cases to be manually captured.⁴⁵⁷ Moreover, it was found that inadequate office equipment such as defective photocopiers, shared computers, malfunctioning telephone lines and network issues have made the integrated case management system largely unreliable and slow.⁴⁵⁸ Furthermore, many GBV victims are compelled to disclose their experiences of abuse in crowded police stations due to a lack of victim-friendly rooms at the SAPS.⁴⁵⁹ The author believes that these failures may have devastating effects on GBV victim's decision to report crimes. The author therefore argues that the underreporting of sexual offences can be attributed to the way victims are treated in the justice system which severely impacts access to justice.

It is further found that unemployed women fail to report domestic violence due to the potential that their attacker would leave and as a result, leave their family without a breadwinner.⁴⁶⁰ This

<https://csvr.org.za/pdf/Gender%20Based%20Violence%20in%20South%20Africa%20-%20A%20Brief%20Review.pdf> April 2016 (accessed 20 May 2024) 14.

⁴⁵⁴ The Centre for the Study of Violence and Reconciliation 'Gender-Based Violence (GBV) in South Africa: A Brief Review' available at

<https://csvr.org.za/pdf/Gender%20Based%20Violence%20in%20South%20Africa%20-%20A%20Brief%20Review.pdf> April 2016 (accessed 20 May 2024) 14.

⁴⁵⁵ The Centre for the Study of Violence and Reconciliation 'Gender-Based Violence (GBV) in South Africa: A Brief Review' available at

<https://csvr.org.za/pdf/Gender%20Based%20Violence%20in%20South%20Africa%20-%20A%20Brief%20Review.pdf> April 2016 (accessed 20 May 2024) 14.

⁴⁵⁶ Charles M 'Public Protector finds magistrates courts are not adequately equipped to support victims of GBV' *News24* 4 June 2024 available at <https://www.news24.com/news24/southafrica/news/public-protector-finds-magistrates-courts-are-not-adequately-equipped-to-support-victims-of-gbv-20240604> (accessed 5 June 2024).

⁴⁵⁷ Nemaakonde V 'Public protector probe confirms inadequate GBV measures by justice department' *The Citizen* 5 June 2024 available at <https://www.citizen.co.za/news/public-protector-report-gbv-victims-courts/> (accessed 5 June 2024).

⁴⁵⁸ Nemaakonde V 'Public protector probe confirms inadequate GBV measures by justice department' *The Citizen* 5 June 2024 available at <https://www.citizen.co.za/news/public-protector-report-gbv-victims-courts/> (accessed 5 June 2024).

⁴⁵⁹ Mbengo Z 'Judiciary fails victims of GBV' – Public Protector' *The Citizen* 5 June 2024 available at <https://www.citizen.co.za/news/south-africa/courts/judiciary-fails-victims-of-gbv-public-protector/> (accessed 5 June 2024).

⁴⁶⁰ Govender D 'Is Domestic Violence being Policed in South Africa?' (2015) 28 *South African Journal of Criminology* 33.

financial dependence encourages women to engage in more amicable behaviour in order to prevent being left in a precarious situation.⁴⁶¹ The author believes that this is an indication that little is done to inform women of their rights and the assistance that is available to them by the SAPS. The author further submits that many women may not find such assistance by SAPS adequate which compels them to stay in an abusive relationship. Therefore, it is crucial that the police evaluate the risk factors of the women who are granted protection orders and direct them to safe havens if it would be unsafe for them to return home.⁴⁶² It is further submitted that the inability of victims of GBV to access justice appears to be a barrier to their seeking assistance and raises the possibility of additional abuse and possibly femicide.⁴⁶³

4.5 CONCLUSION

In conclusion, Gqola describes rape as a fate worse than death, a South African nightmare.⁴⁶⁴ The author agrees that rape and GBV as a form of control is a gruesome attack on one's person which has severe psychological consequences that impact you for the rest of your life.⁴⁶⁵ Therefore, if women's right to citizenship is to become a reality in South Africa, it must be founded on the understanding that it is impossible to contribute to society while experiencing violence and terror.⁴⁶⁶ The author submits that the best way for SAPS to fulfil its duty to protect vulnerable groups such as women against GBV is to restore faith in them as well as the justice system. This can be achieved by increasing police visibility in places prone to violence as well as improving the turnover for responding to domestic violence and GBV-related incidents.

⁴⁶¹ Govender D 'Is Domestic Violence being Policed in South Africa?' (2015) 28 *South African Journal of Criminology* 33.

⁴⁶² The Centre for the Study of Violence and Reconciliation 'Gender-Based Violence (GBV) in South Africa: A Brief Review' available at <https://csvr.org.za/pdf/Gender%20Based%20Violence%20in%20South%20Africa%20-%20A%20Brief%20Review.pdf> April 2016 (accessed 20 May 2024) 14.

⁴⁶³ The Centre for the Study of Violence and Reconciliation 'Gender-Based Violence (GBV) in South Africa: A Brief Review' available at <https://csvr.org.za/pdf/Gender%20Based%20Violence%20in%20South%20Africa%20-%20A%20Brief%20Review.pdf> April 2016 (accessed 20 May 2024) 14.

⁴⁶⁴ Gqola PD *Rape: A South African Nightmare* (2015) 22. See also Rayburn C 'Better Dead Than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes' (2004) 78 *St. John's Law Review* 1146-1147.

⁴⁶⁵ Lomax J & Meyrick J 'Systematic Review: Effectiveness of psychosocial interventions on wellbeing outcomes for adolescent or adult victim/survivors of recent rape or sexual assault' (2022) 27 *Journal of Health Psychology* 306. See also *Bridgman NO v Witzenberg Municipality and Others* [2017] 1 All SA 466 (WCC) para 187.

⁴⁶⁶ Goldblatt B & Meintjies S 'Dealing with the aftermath: sexual violence and the Truth and Reconciliation Commission' (2011) 13 *Agenda* 17.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

South Africa's GBV rate is currently rated as one of the worst in the world, posing a direct threat to women's safety and well-being.⁴⁶⁷ VAW is a grave concern for women in South Africa and therefore there is an urgent need for change and for women's rights to not only be recognised in terms of legislation but that it should also be enforced by SAPS. Apartheid, patriarchy and toxic masculinity are the three main stakeholders of the GBV epidemic in South Africa. This is due to South Africa's history and development being influenced by the institutionalisation of racial inequality and subordination from colonial times. Therefore, many of the issues that women, in particular, experience today are similar to those that men faced decades ago, during the country's dreadful period of structural violence blended with racism.⁴⁶⁸ The author contends that racial as well as gender inequality has indoctrinated how males think and ultimately act as patriarchal power went unnoticed when South Africa went from an Apartheid to a Democratic state. Hence, women's experiences with GBV today are greatly impacted by the racist hierarchies that South Africa's apartheid regime maintained and promoted.⁴⁶⁹ As a result, it is argued that there is a clear link between the sexual violence we experience today because of gender inequality and the racial inequality that existed in South Africa during the apartheid era.

Furthermore, although sexual violence and rape are complicated topics that touch on a variety of subjects, such as the devastating effects of apartheid, it is argued that bitter patriarchal demands rather than racial narratives are what drives sexual violence in South Africa. It is found that domestic violence occurs when the complainant is either physically or emotionally abused often by a drunk partner, during a disagreement about money, when the spouse refuses to cook, when the complainant is absent from the home, and occasionally when sex is

⁴⁶⁷ Snodgrass L 'The sins of the father: Gender-based violence in post-apartheid South Africa' (2016) 12 *Commonwealth Youth and Development* 67.

⁴⁶⁸ Snodgrass L 'The sins of the father: Gender-based violence in post-apartheid South Africa' (2016) 12 *Commonwealth Youth and Development* 67.

⁴⁶⁹ Moffett H 'These women, They Force Us to Rape Them': Rape as Narrative of Social Control in Post – Apartheid South Africa' (2006) 32 *Journal of Southern African Studies* 131.

refused.⁴⁷⁰ It is therefore evident that GBV or domestic violence is often perpetrated where males have a sense of entitlement often accompanied by gender roles and patriarchal standards.⁴⁷¹ Due to these perceived gender roles and patriarchal standards, women are constantly objectified and deemed to fit in a box, deemed to be ticking off specific criteria such as cooking, cleaning or being submissive. Male dominance is typically regarded as an honour in cultures, and if a woman has more benefits than a man does, whether in terms of work or education, the man may use various violent acts to maintain his dominance or to restrict the woman's advancement.⁴⁷² It can therefore be said that if all else fails, men use physical violence to show dominance and superiority and ultimately, that he is the man.⁴⁷³

Therefore, notwithstanding the fact that initiatives have been adopted to combat GBV, due to patriarchy males have significantly higher social, political, and economic power than women do, thus they can make a substantial contribution to alleviate GBV in our nation.⁴⁷⁴ The author therefore contends that males should be at the forefront of alleviating the GBV epidemic in South Africa, as the reason why GBV rates are so high is because of the way in which women are viewed by men. Therefore, one cannot have complete equality if patriarchal ideologies still exist. The author believes that male-focused workshops, funded by the state should be held in all parts of South Africa, to unpack these toxic ideologies that have been ingrained in men and how it impacts the lives of women. It is also important to reiterate that the gender roles mentioned in Chapter Two are enforced by women. Therefore, it is evident that there is a lack of knowledge of how the roles of men and women have changed in modern society and there is a need to teach the younger generation equality between men and women, that they should not let gender roles define how they ought to act. The author therefore contends that we can only truly dismantle patriarchy and toxic masculinity with the younger generation as in most cases patriarchal roots run too deep, especially in elder men.

⁴⁷⁰ Govender D 'Is Domestic Violence being Policed in South Africa?' (2015) 28 *South African Journal of Criminology* 32.

⁴⁷¹ Hattery AJ & Smith E *Gender, Power and Violence: Responding to sexual and intimate partner violence in society today* 69.

⁴⁷² Nobanda L, Nkosi SL & Sibanyoni EK 'A Possible Explanation of Violence Against Women During the Covid-19 Lockdown in South Africa: A Systematic Review' (2021) 34 *Acta Criminologica (Criminological Society of Southern Africa)* 20.

⁴⁷³ Van Niekerk TJ & Boonzaier FA 'The Only Solution There is to Fight: Discourses of Masculinity Among South African Domestically Violent Men' (2016) 22 *Violence Against Women* 277.

⁴⁷⁴ Mathekg T & Raveloharimisy J "Am I next?" The Masculine Perspective in Decoding the Predicament of Gender-Based Violence and Femicide in South Africa (2021) 47 *Michigan Academician* 106.

It is noted that South Africa has ample GBV legislation such as the Criminal and Related Matters Amendment Act, the Domestic Violence Amendment Act and the Criminal (Sexual Offences and Related Matters Amendment Act. These acts, collectively referred to as "GBV Acts," are a result of legislative initiatives to increase the protection of vulnerable groups such as women within the criminal justice system and to address the GBV epidemic in South Africa.⁴⁷⁵ Additionally, the South African Constitution is found to be one of the best constitutions worldwide, especially in relation to the recognition of women's rights. It is contended that:

“The rights to dignity, privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go to and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”⁴⁷⁶

Therefore, it is held that due to the Constitutional protection of women's rights,⁴⁷⁷ South Africa should not be seen as a country where women are routinely raped and degraded. It is further argued that gender-sensitive legislation has been unsuccessful in preventing GBV. This may be due to the complexity of "structural violence" during South Africa's history with apartheid.⁴⁷⁸ It is therefore evident that more should be done to ensure the protection of women's rights, other than just legislative protection as it is currently proven to be ineffective. It is also argued that South Africa made tremendous progress toward achieving gender equality and human rights following the end of apartheid. However, it has also been found that South Africa's legislation that prioritises human rights does not adequately shield women against GBV. Therefore, despite the fact that South Africa has a progressive legal framework, the prevalence of GBV in our country cannot be eradicated by just implementing legislation. To effectively address GBV South Africa must not only enforce domestic laws but also deepen its

⁴⁷⁵ Van Rooyen M 'Legislative Developments' (2022) 7 *Just Africa* 8.

⁴⁷⁶ *Tshabalala v The State; Ntuli v The State* [2019] ZACC 48. See also *S v Chapman* 1997 (3) SA 341 (SCA), paras 3 & 4.

⁴⁷⁷ Constitution of the Republic of South Africa, sec9(2).

⁴⁷⁸ Britton H *Ending Gender-Based Violence: Justice and Community in South Africa* (2020) 20.

commitment to international and regional frameworks, such as CEDAW and the Maputo Protocol, leveraging these instruments to build a comprehensive and inclusive approach that targets both the gendered and systemic roots of violence. The author also contends that the police play a pivotal role in combatting GBV, however, the efforts of SAPS must be strengthened by the entire criminal justice system, including the NPA as well as the Courts.

5.2 RECOMMENDATIONS

It is argued that the current laws and enforcement measures do not act as a deterrent to GBV and that SAPS is ineffective in dealing with the GBV epidemic. This is due to the fact that SAPS ought to not only investigate GBV, but they should also implement measures to ensure that GBV is prevented, an area in which SAPS is currently lacking. Police and forensic pathologists are to focus their investigations on looking for signs of a sexual crime in all femicide cases.⁴⁷⁹ Additionally, a proforma document should be prescribed and included in all routine screening and investigations of rape and femicides to ensure that all the requirements for determining whether an offence took place are satisfied.⁴⁸⁰ The author contends that different crime codes should be created for all GBV-related crimes and that such proforma documents be used to determine what crime took place. Furthermore, the various forms of sexual offences that are reported must be immediately documented by SAPS on a computer system as it is necessary to put an end to the current confusion surrounding the classification of various crimes including VAW.⁴⁸¹ Additionally, the criminal justice system must keep track of GBV cases by assigning a unique tracking number to each case across all service providers such as the police, health, and court systems.⁴⁸² The author also contends that SAPS should utilise this tracking system to help keep victims up to date with their cases and ultimately restore faith in the justice system.

⁴⁷⁹ Brodie N *Femicide in South Africa* (2020) 81.

⁴⁸⁰ Brodie N *Femicide in South Africa* (2020) 81.

⁴⁸¹ Basdeo V 'Policing Sexual Violence in South Africa: Problems and Challenges' (2018) 13 *International Journal of Criminal Justice Sciences* 120.

⁴⁸² Basdeo V 'Policing Sexual Violence in South Africa: Problems and Challenges' (2018) 13 *International Journal of Criminal Justice Sciences* 120.

It is found that domestic violence is not criminalised in South Africa but rather the different offences in contravention of a protection order are considered crimes.⁴⁸³ However, if one can acknowledge that domestic violence comprises a group of acts that fall under the same general category of domestic violence, one can argue that domestic violence is criminalised.⁴⁸⁴ Therefore, it would be feasible to combine the different crimes that constitute domestic violence into one category and refer to it as "domestic abuse." In that instance, someone may be found guilty of domestic abuse if they are found guilty of conduct that are forbidden by a protective order.⁴⁸⁵ In order to prevent ambiguity in the accused's record, it should also accurately indicate the conduct for which the accused was found guilty, such as "domestic abuse - rape," "domestic abuse - assault," or "domestic abuse - stalking." This allows individuals handling a criminal record of an accused person to ascertain the behaviour that led to a conviction and to make well-informed decisions regarding matters like the accused person's access to children.⁴⁸⁶

The author believes that SAPS should handle GBV cases with empathy and compassion, especially in terms of how victims are being questioned by the police. SAPS should not just rely on the statement of a victim to determine whether domestic violence took place but put more effort into investigating such crimes as well as looking at the living conditions of females who report domestic violence. SAPS should also look at whether such victims are financially dependent on the perpetrator of GBV especially when they want to withdraw a case at SAPS. Moreover, when police officers use their discretion "to change the culture of policing within their stations, transform the relationship between the police and local communities," and commit themselves to combating GBV professionally and compassionately, they can alleviate VAW.⁴⁸⁷ Therefore, the author recommends that police officers in the Family Violence, Child Protection and Sexual Offences Unit (FCS) should receive additional training on how to handle GBV cases, especially in terms of questioning as well as offering additional support after a

⁴⁸³ Sibisi S 'The Domestic Violence Act 116 Of 1998: Offences, Defences, Economic Abuse, Imminent Harm and The Crime of Domestic Abuse – What is New?' (2023) 44 *Obiter* 345. See also Chapter 3.4 of this mini-thesis.

⁴⁸⁴ Sibisi S 'The Domestic Violence Act 116 Of 1998: Offences, Defences, Economic Abuse, Imminent Harm and The Crime of Domestic Abuse – What is New?' (2023) 44 *Obiter* 346.

⁴⁸⁵ Sibisi S 'The Domestic Violence Act 116 Of 1998: Offences, Defences, Economic Abuse, Imminent Harm and The Crime of Domestic Abuse – What is New?' (2023) 44 *Obiter* 346.

⁴⁸⁶ Sibisi S 'The Domestic Violence Act 116 Of 1998: Offences, Defences, Economic Abuse, Imminent Harm and The Crime of Domestic Abuse – What is New?' (2023) 44 *Obiter* 346.

⁴⁸⁷ Britton H *Ending Gender-Based Violence: Justice and Community in South Africa* (2020) 99.

case has been opened. It is argued that female police officers should be at the forefront of the FCS to make the process of reporting VAW easier for victims.

Furthermore, GBV can also be alleviated by re-evaluating and dispelling rape myths. By dealing with them, we can get one step closer to a society where rape is treated seriously, where victims of rape can receive help and healing, and where rape is discouraged rather than rationalised.⁴⁸⁸ Moreover, the misguided and incorrect notion that sexuality is a personal and private concern should also be dispelled. Sexual assault should not even be mentioned as a private affair, as this misrepresents what GBV is, what causes it and how it should be fought and reduced.⁴⁸⁹ Additionally, sustainable development is essential for establishing gender equality and women's empowerment for their own well-being and growth, but it is also a requirement for the global community's inclusive and sustainable development.⁴⁹⁰ All other objectives, such as eradicating poverty and ensuring universal access to education, are hampered by pervasive and ongoing VAW.⁴⁹¹

It is imperative to address the substandard quality of statements obtained, ensure that victims receive competent and empathetic treatment, and ensure that police officers, especially those in the FCS are well prepared for court.⁴⁹² Therefore, to combat GBV and to ensure justice for the victims thereof, laws must be properly framed and enforced by strict police officers, thorough lawyers, thoughtful courts and unbiased presiding officers.⁴⁹³ The rights of victims must be better known to the general public, and the basic expectations for service delivery must be upheld.⁴⁹⁴ Moreover, the author believes that the complete elimination of VAW necessitates the abolition of patriarchy and other significant changes to gender relations.

⁴⁸⁸ Gqola PD *Rape: A South African Nightmare* (2015) 143.

⁴⁸⁹ Oparinde K & Matsha R 'Powerful Discourse: Gender-Based Violence and Counter-Discourses in South Africa' (2021) 8 *Cogent Arts & Humanities* 9.

⁴⁹⁰ Singla P & Tulsyan A 'Violence Against Women' in Nath K (ed) *The Indian Women's Journey: Last 5 Decades* (2020) 1-23.

⁴⁹¹ Singla P & Tulsyan A 'Violence Against Women' in Nath K (ed) *The Indian Women's Journey: Last 5 Decades* (2020) 1-23.

⁴⁹² Basdeo V 'Policing Sexual Violence in South Africa: Problems and Challenges' (2018) 13 *International Journal of Criminal Justice Sciences* 119.

⁴⁹³ Storkey E *Scars Across Humanity* (2018) 94.

⁴⁹⁴ Basdeo V 'Policing Sexual Violence in South Africa: Problems and Challenges' (2018) 13 *International Journal of Criminal Justice Sciences* 120.

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