

The use of impact statements, minimum sentences and victims' privacy interests: a therapeutic exploration*

Annette van der Merwe

BPROC (UP), LLB (UNISA), LLM (UP), PhD (RHODES)

Professor, School of Law, University of Limpopo

Lize-Mari Mitchell

LLB (NWU), LLM (NWU), HONS (PSYC) (UNISA)

Lecturer, School of Law, University of Limpopo

SUMMARY

By submitting or presenting an impact statement, reflecting on the different kinds of harm caused by the commission of a crime against them, victims are also allowed the opportunity to participate in criminal justice procedures. In South Africa, its use has been endorsed through appellate judgments, legislation, and a Victims' Charter. Though the precise role, value, weight and inconsistent use of victim impact statements have often been debated, no possible human right violation had, until recently, been highlighted. However, in the axe-murder case of *S v van Breda* (SS17/16) [2018] ZAWCHC 87 (7 June 2018) the prosecution indicated that, in protecting the right to privacy of the surviving victim, no impact statement would be presented during sentencing. This paper explores the argument raised by the state and, in the event of an impact statement infringing on an adult victim's privacy, what the likely psychological consequences are. It is contended that, while it is widely used, and often considered essential, as one factor to determine the absence or existence of substantial and compelling circumstances, it also reveals extremely intimate detail about victims and may be perceived to infringe on their privacy. Victims should at all times be informed of the route this information might take into not only the public domain, but also more pertinently the divulgence to the accused *per se*. They should be empowered to take an informed decision in this regard. Based on an individualistic approach, the particular victim's well-being should be respected and advanced.

* This article is based on a paper presented at the Annual Conference of the European Association of Psychology and Law, Santiago de Compostela, Spain, 17 – 20 July 2019 titled "The use of impact statements and victims' privacy interests".

1 Introduction

The prosecution has always had the option, as part of relevant information and evidence during sentencing procedures, to submit a victim impact statement (hereafter VIS).¹ This practice has, in particular, become relevant in inter-personal violent crimes, such as in rape, murder and attempted murder. In recent years precedent has encouraged,² and indeed often required,³ the use of victim impact statements during sentencing, and in 2010, it was statutorily introduced in matters involving child offenders.⁴ The crime victim's right to provide information to the sentencing court is also highlighted in the Service Charter for Victims of Crime in South Africa 2007.⁵

Though the precise role, value, weight and inconsistent use of victim impact statements have often been debated,⁶ no possible human right violation had, until recently, been highlighted. However, in the axe-murder case of *S v van Breda*,⁷ the prosecution indicated that, in protecting the right to privacy of the surviving victim, no impact statement would be presented during sentencing. Marli van Breda

-
- 1 S 274 of the Criminal Procedure Act 51 of 1977 (hereafter CPA). Terblanche *Guide to Sentencing in South Africa* (2016) 123. Kruger *Hiemstra's Criminal Procedure* (2019) 28-2.
 - 2 *S v Vilakazi* 2009 1 SACR 552 (SCA) par 21; *S v Matyityi* 2011 1 SACR 40 (SCA) par 16; *S v v PB* 2013 (2) SACR 533 (SCA); *S v Ganga* 2016 1 SACR 600 (WCC) para 52.
 - 3 *Rammoko v Director of Public Prosecutions* 2003 1 SACR 200 (SCA) 205e – since the matter involved an appeal against the imposition of life imprisonment, the case was referred back to the trial court to obtain a victim impact statement. The court held that such omission led to a risk for the accused where s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) applied in that: "... substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present."; *S v Mhlongo* 2016 2 SACR 611 (SCA) par 23 – Mocumie JA held that the absence of a victim impact statement about the harm suffered by a 27-year-old rape victim (after having been abducted and subjected to a night of terror (para 21)), was a cause of concern (para 22).
 - 4 S 70 (2) of Child Justice Act 75 of 2008 (hereafter CJA) provides as follows: "The prosecutor may, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim, and, where practicable, furnish the child justice court with a victim impact statement provided for in subsection (1)".
 - 5 Clause 2 (see <http://www.justice.gov.za/VC/VCdocs.htm> (accessed 2019-10-28)).
 - 6 Van der Merwe "A critical evaluation of the use of victim impact statements in child sexual abuse cases" 2006 *De Jure* 422 – 435. Also *S v Ganga supra*.
 - 7 SS17/16 2018 ZAWCHC 87 (7 June 2018)). Van Breda was convicted on three counts of murder and one count of attempted murder. Life imprisonment was imposed for all three murder accounts (his parents and brother) and 15 years for the attempted murder of his sister. She had several wounds directed at the part of the human body with a high mortality rate (para 279) but survived against all expectations (para 298).

(almost 20 years old at the time of sentencing), who survived the excessively violent attack by her brother on the family, was still suffering from amnesia and had not seen the accused since the attack. The decision to withhold an impact statement was probably also influenced by the huge media exposure she had been subjected to since the brutal incident.⁸

This article explores the state's argument concerning victims older than 18 years at the time of making the impact statement. It focusses on the use of impact evidence in considering minimum sentences, the merit of the state's argument in *van Breda*, and if an impact statement indeed infringes on a victim's privacy, what the most likely psychological consequences would be.

2 Impact evidence and minimum sentences

By submitting or presenting an impact statement, victims are allowed the last opportunity to participate in criminal justice procedures.⁹ Thereby they are also given a voice to tell their story with reference to the after-effects that the crime had or still has, on their lives.¹⁰ This happens in addition to their testimony regarding the elements needed for a conviction, which is heard during evidence in chief. Normally it does not include any opinion on what the actual sentence should be,¹¹ since the sentencing discretion belongs to the court.¹² Impact statements may contain a description of the different kinds of harm caused by the commission of the crime against the victim, such as physical or mental injury, emotional suffering, economic loss, or substantial impairment of fundamental rights.¹³

When minimum sentences are prescribed,¹⁴ courts consider evidence about emotional and psychological harm that victims of sexual offences have suffered or still suffer, of particular importance.¹⁵ Though presiding officers generally do not question the existence of emotional harm suffered by the complainants in rape matters, neither that the harm may vary in gravity, or that it "generally deserves more emphasis than

8 See for example <https://www.google.com/search?client=firefox-b-d&q=marli+van+breda+now>. On 3 November 2019 a google search revealed 33 000 results.

9 *S v Mhlongo supra* para 22.

10 Muller & van der Merwe "Recognising the victim in the sentencing phase: The use of victim impact statements in court" 2006 *SAJHR* 663.

11 Müller & van der Merwe 647-656.

12 *S v Siebert* 1998 1 SACR 554 (SCA) 558i-559a.

13 According to the definition of harm in the Victims' Charter above.

14 S 51 of the Criminal Law Amendment Act 105 of 1998, read with Schedule 2.

15 *Rammoko v Director of Public Prosecutions supra*; *S v Abrahams* 2002 (1) SACR 116 (SCA) 124C; *S v Matyityi supra*; *S v Ganga supra*.

physical injuries”,¹⁶ they do need reliable evidence for the determination of a proportionate or just sentence.¹⁷ For aggravated forms of rape and murder, the sentence of life imprisonment is prescribed as the minimum discretionary sentence.¹⁸ Its imposition is, however, not mandatory and courts may deviate when they find substantial and compelling circumstances to be present in the matter.¹⁹ The after-effects of the crime is one of the factors that are cumulatively taken into account in order to determine whether such a finding would be justified.²⁰ On the other hand, when rape and murder fall outside the most severe category created by section 51 of the Criminal Law Amendment Act 105 of 1997, aggravating factors, such as the harm caused by the crime, may influence courts to increase the prescribed sentence of 10 and 15 years, respectively.²¹ Despite the introduction of the minimum sentencing regime, South African courts still enjoy a fairly wide sentencing discretion,²² and that, in turn, leads to unpredictable sentencing outcomes.²³ Thus, within the same offence category, imposed sentences will differ to varying degrees. Davis J highlights that not all rapes deserve equal punishment – that is in no way to diminish the horror of rape; it is however to say that there is “a difference even in the heart of darkness.”²⁴

Impact statements may be prepared and submitted in different ways. Firstly, victims (or someone on their behalf) may prepare a statement

-
- 16 *S v Ganga supra*, para 51. Cf; *S v Ncheche* 2005 2 SACR 386 (W) para 29 and *S v Snoti* 2007 1 SACR 660 (E) 663c where the court held that, despite the absence of psychological impact evidence, the brutality and severe injuries caused by crime of rape may totally justify the sentence of life imprisonment.
- 17 In *S v Ganga supra* par 52 the court held that, despite the submission of an impact report by a forensic social worker, expert evidence about the emotional and psychological harm that the respective victims had suffered, would have been more valuable.
- 18 S 51(1) read with Schedule 2, Part I, of the Criminal Law Amendment Act 105 of 1997.
- 19 S 51(3) of the Criminal Law Amendment Act 105 of 1997. The exercise to determine the presence or absence of substantial circumstances is, however, compulsory. In *S v Malgas* 2001 1 SACR 469 (SCA) para 9 it was held that all recognised aggravating and mitigating factors should be considered. It should be noted that victims’ interest is a factor separate from the crime, offender and interests of the society to be considered (*S v Matyityi supra*).
- 20 *S v Matyityi supra*. When a deviation from life imprisonment is permitted, the practical outcome of the sentence will be influenced significantly. For life imprisonment the offender must serve 25 years before consideration of parole (section 73(6)(b)(iv) Correctional Services Act 111 of 1998), while in all other instances of determinate sentences, the offender must only serve 50% of the imposed term (s 73(6)(a) Correctional Services Act 111 of 1998).
- 21 S 51(2) read with Schedule 2, Parts II and III, of the Criminal Law Amendment Act 105 of 1997. See also *S v Mthembu* 2012 1 SACR 517 (SCA) para 11, where, in a murder matter involving road rage, the prescribed sentence of 15 years was increased to 18 years imprisonment.
- 22 Terblanche 375-376.
- 23 *S v Kwanape* 2014 1 SACR 405 (SCA) para 16.
- 24 *S v Swartz* 1999 2 SACR 380 (C) paras 386b–c.

and simply hand it to the prosecutor or may present it personally in court. For example, the complainants in *S v Hewitt*,²⁵ presented their impact statements during the sentencing hearing. The court had the opportunity to gain an understanding of the total degree of harm inflicted by the acts of rape perpetrated against them when they were still young girls. It provided a rare window into the true extent of the long-term harm suffered by victims of sexual offences. In this case the offences had been committed decades earlier and the lasting and devastating consequences for the victims, as well as their families, were found to be a serious aggravating factor. The court summarised the life-long impact as follows:

“The first and second complainants, who are both divorcees, have struggled to maintain intimate relationships with men throughout their adult lives, as a direct result of the rapes. According to the second complainant, her parents and sister never recovered from the incident and it has affected her children too as a result of the manner in which she is raising them. The first complainant has suffered severe depression and anxiety and has led what she termed “a self-destructive” life. All three complainants, who were described as promising tennis players in the trial, abandoned their potential tennis careers, and told how they cannot bring themselves to even watch tennis to this day because of its link to the offences”.²⁶

In *S v Tuswa*,²⁷ the elderly rape complainant prepared a written victim impact statement, complemented by the testimony of her niece. According to her statement, she still suffered from a great deal of pain and had become incontinent and soiled herself occasionally. The incident had turned her into “a small child”,²⁸ sharing a bed with her daughter-in-law, and she had constantly to be reminded that she was not alone. The complainant had to abandon her home, the only inheritance from her deceased husband, as she was unable to continue living in the same place where she had been traumatised. She further received regular medical attention for the massive tear inflicted by the accused during the prolonged act of rape,²⁹ and had to start taking medicine for the first time in her life.³⁰ The complainant’s niece informed the court that before the incident she had been a proud and healthy woman who regularly comforted and pastored members of the community. In contrast, she no longer had any confidence to be of assistance to anyone and had become a liability to her family.³¹ The court concluded that the accused’s conduct had reduced the complainant from an independent farming woman and a leader in her community to someone, as her niece had described, who is “mentally disturbed, forgetful and frightened with no self-confidence”.³² The court attached substantial weight to this

25 2017 1 SACR 309 (SCA).

26 *S v Hewitt supra*, para 12.

27 2013 2 SACR 269 (KZP).

28 *S v Tuswa supra*, para 59.

29 See *S v Tuswa supra*, paras 12-20 for a description of the injuries inflicted and the force used during the act of rape.

30 *S v Tuswa supra*, para 59.

31 *S v Tuswa supra*, para 59.

32 *S v Tuswa supra*, para 60.

factor, particularly in the light that the complainant was theoretically old enough to be the accused's great-great grandmother. It further took a wide approach to the after-effects of the crime in this matter and included the ripple effect on the complainant's family and on the community where she had lived all her life. These cumulative after-effects, on their own, were found to be compelling reasons to punish the accused severely.³³

In the case of *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi*,³⁴ the court accepted that the widow of the deceased suffered enormous trauma caused by finding her husband lying on the ground, tied up with "wires" and with "a stocking" in his mouth, murdered during the course of a robbery:

"She broke down sobbing in the witness box as she testified that she could never go back to that house again. The incident had effectively ruined her life. Not only did she lose her husband of 39 years and her home, but she also lost her job because she could not concentrate. She was suffering from depression and nightmares and could not sleep. She could not live on her own and had been living in various different houses since the incident."

When the victim does not have the ability or desire to relive the trauma of a personal court appearance, letters or poems written by the victim after the crime can be used. In *S v van Wyk*,³⁵ the court found the following poem, written by the rape victim, which shows the personal horror experienced by her, to be very enlightening about the effect of the act:

"Happy Days Today it is exactly a week,
For seven days long, everything was broken.
May I ask, why me, Was I in the wrong place?
Why, wherefore, what now,
His eyes were not blue but brown, like his skin, his ears hideously small.
How must I forget, I smell his sweat, Am scared that soon reality will grab me."³⁶

Secondly, impact evidence may be prepared and/or presented by a social worker, psychologist, or other behavioural science expert. For example, in *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi*,³⁷ (already referred to above in context of the 84-year old widow discovering her murdered husband), a social worker compiled a separate

33 *S v Tuswa supra*, paras 61-62. Life imprisonment was imposed (para 72).

34 2012 1 SACR 423 (SCA) para 13.

35 2000 1 SACR 45 (CPD) 51.

36 The text contains a translation by the authors. The following appeared in the judgment: *Happy Days Dis vandag presies 'n week, vir sewe dae alles het gebrek Mag ek vra hoekom ek, Was ek op die verkeerde plek? Hoekom, waarom, wat doen nou. Sy oë was nie eens blou maar bruin, soos sy vel, sy ore aaklig klein. Hoe moet ek vergeet, ek ruik sy sweet, Is bang een of ander tyd, gaan die werklikheid my vang.*

37 *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi supra*, para 13.

victim impact report about the psychological trauma caused by the act of rape following the murder, and described it as being profound and ongoing on the widow:

“... she was reported to have been experiencing constant headaches which she did not have before the incident. She was terrified and hysterical two years after the rape. She seemed very embarrassed and ashamed of what had happened. When she had to face or recall the events, which led to her trauma, she blocked them out psychologically. She was physically and emotionally traumatised. She was suffering from nightmares and was always scared. She was experiencing panic attacks, nervous tension and lack of emotional control. She still needed counselling two years after the rape.”

It was found, on appeal, that the trial court, in imposing sentence on both the murder and the rape charges, over-emphasised the personal interests of the accused over the seriousness and prevalence of the offences, the interests of society and the harm suffered by the rape victim and by the family of the deceased.³⁸ In contrast to the trial court, no substantial and compelling circumstances were found to be present, and life imprisonment was imposed on both counts.

Irrespective of the way an impact statement is prepared and presented, the defence and accused will be aware of it, since either it is read out in court, presented as evidence or the court refers to it in the sentencing judgment. By being incorporated into the judgment, it becomes part of the public court record. In addition, the media may report about the contents on different platforms, while, in all likelihood, social media comment will continue and is uncontrolled. Though the identity of complainants in sexual offences is statutorily protected,³⁹ victims differ in terms of resilience, as well as attitudes towards privacy. Nonetheless, as the cases discussed above reveal, intimate and very personal details about victims enter the public domain *via* information provided in impact statements.

3 Right to privacy

The need for privacy is a trait shared and valued by most of humanity.⁴⁰ Globally it is protected by most democratic Constitutions and within the transformative constitutional state of South Africa,⁴¹ it is protected by

38 *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi supra*, para 25.

39 S 153(2)(b) and S 154(2) of the Criminal Procedure Act 51 of 1977.

40 Macleod “Privacy: Concept, Value, Right?” in Cudd and Navin *Core Concepts and Contemporary Issues in Privacy* (2018) 32; Cudd and Navin “Conceptualizing Privacy Harms and Values” in Cudd and Navin *Core Concepts and Contemporary Issues in Privacy* (2018) 1; Moore “Privacy: Its Meaning and Value” 2003 *American Philosophical Quarterly* 215.

41 It should be noted that most legislation is centred around data protection and surveillance, with a limited focus on individual privacy. However, the use of the word “includes” in the Constitution is indicative of the wide range that the right to privacy might cover. Despite the numerous

mutually supporting legislation and policies.⁴² Despite this, privacy has been notoriously difficult to define,⁴³ with great discrepancies in the understanding historically, conceptually, and philosophically.⁴⁴

In order to attempt a definition within a legal sense, reference is firstly made to the fundamental 1960 text of William Prosser, “Privacy”,⁴⁵ which defined and systematized the concept of privacy within the court system. Prosser identified four types of invasions of persons’ interests:

- a intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs;
- b public disclosure of embarrassing private facts about the plaintiff;
- c publicity which places the plaintiff in a false light in the public eye; and
- d appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

For purpose of this article, the first two types of invasion are of importance. More specifically, the potential intrusion that the content of a VIS can have on a victim’s seclusion/solitude and the disclosures of information that the victim would deem private or embarrassing.

legislation and case law surrounding privacy, an exact definition has not been provided by the judiciary. It is also of importance to note that there are debates surrounding the justifiable legal grounds of privacy. Although this paper acknowledges this, it will not elaborate on it. It is a constitutionally recognized right in SA and will be analysed as such.

- 42 For example, domestically it is enshrined in s 14 of the Constitution which provides for an express, justiciable right to privacy. It states: “Everyone has the right to privacy, which includes the right not to have – (a) their person or home searched; (b) their property searched; (c) their possessions seized; (d) the privacy of their communications infringed.” This is supported by the Protection of Personal Information Act 4 of 2013 (hereafter POPI) which is the primary instrument regulating data protection in South Africa. It is also found in regional and international documents, which South Africa is signatory to, for example, the Universal Declaration on Human Rights (article 12); the International Covenant on Civil and Political Rights (article 17); and the African Charter on the Rights and Welfare of the Child (article 10).
- 43 Macleod 32; Cudd and Navin 3-4; Lee “The Nature and Value of Privacy” in Cudd and Navin *Core Concepts and Contemporary Issues in Privacy* (2018) 47.
- 44 Allen *Uneasy access: Privacy for women in a free society* (1988) 16; Thomas *The Right to Privacy* (1975) 295–313; DeCew “Privacy” (2015) in Zalta (ed) *The Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/archives/spr2015/entries/privacy/>; Lee 47-51. A large body of philosophical debates about privacy has focused on whether privacy is a coherent concept. It has been criticised as being overly vague, with no clearly defined parameters. Philosophers, like Judith Jarvis Thomson, famously argued against the coherence of privacy. Others like, De Cew and Lee have defended the coherence of privacy. Addressing this in a definite manner is outside the scope of the article, but the debate surrounding the coherence is acknowledged.
- 45 Prosser “Privacy” 1960 *California Law Review* 383–423.

Taking Prosser's categories of privacy as a starting point, privacy is further defined with a focus on one specific context, relative to victims of violent crime and the potential content of a VIS.

The definition as provided by Stan Lee,⁴⁶ encapsulates this best:

"Privacy is a condition (and/or the legal and social institutions that support that condition) under which individuals have a protected degree of control over how they are presented publically, in terms of information about themselves available to others."

He elaborated in stating:⁴⁷

"It is the ability of individuals, founded in protections provided by social and legal institutions, to have some control over how they are presented to the public, whether directly in the observation of their activities or indirectly in terms of what is publically represented about them by others."

Lee's definition clearly addresses both types of privacy as defined by Prosser.⁴⁸ With reference to the victims of crime, the emphasis should therefore be on privacy in the context of access, distribution and control over their personal information. More specifically the information held in a VIS. It should be understood as the unitary right of a victim that protects their ability to have control over the dissemination of information about their personal lives. The right to privacy, as referred to in the *Breda* case, should therefore be understood as the right that the victim, Marli van Breda, has to control both information about herself and the impact the heinous crime has had on her life. It refers to the choice she has to limit or simply keep this information from others. Although one can argue that a victim can, to an extent, control the information contained in a VIS, the actual loss of control comes from having it become public record and the fact that the perpetrator and public are privy to these intimate details.

Within this definition, one must also keep in mind the influence of the digital age. The digital age has given rise to renewed concerns about privacy, as new technologies make possible novel kinds and magnitudes of privacy violations.⁴⁹ For victims of crime this implies that their VIS is

46 Lee 48.

47 Lee 51.

48 Fried "Privacy" (1984) in Schoeman *Philosophical Dimensions of Privacy: an Anthology* 204-206; De George "Privacy, Public Space and Private Information" in Cudd and Navin *Core Concepts and Contemporary Issues in Privacy* (2018) 108; Moore 2003 *American Philosophical Quarterly* 222. Similar definitions to that of Lee have been provided by other scholars, for example Fried described privacy as not simply an absence of information about us "in the minds of others: rather it is the control we have over information about ourselves". De George described it as being able to limit the access of unwanted intrusion in areas of our lives. Moore argued that privacy should be seen as the ability to present oneself to public as you wish and to have "control over access to oneself and to information about oneself".

49 Hubbard "The Need for Privacy Torts in an Era of Ubiquitous Disclosure and Surveillance" in Cudd and Navin *Core Concepts and Contemporary Issues in*

part of the public record. For an underage victim, like Marli van Breda, this could potentially have meant that, as soon as the age of majority is reached, her most intimate thoughts, feelings and the impact of crime, will once again be plastered all over the media. A VIS as part of the public domain, and evidently the potential of electronic depositories, will be stored in multiple locations. Therefore, digital technology enables the process in which neither the VIS nor the victim can be forgotten. Cyberspace therefore adds additional complexity to the notion of privacy and makes the control over personal information both more difficult and all that more important.

3 1 The importance of privacy

When discussing privacy in accordance with the given definition, it becomes clear that the emphasis is not on privacy as simply a right, but rather a condition in which access and personal information control exists. It is from this premise that a discussion will now follow of, firstly, the importance of privacy in general and secondly, the importance of privacy within the unique psychology of the victim.

3 1 1 The potential benefits of privacy

“Therefore, both the threat of an information leak and the threat of decreased control over decision-making can have a chilling effect on my behaviour. If this is correct, then the desire to protect a sanctuary for ourselves, a refuge within which we can shape and carry on our lives and relationships with others – intimacies as well as other activities – without the threat of scrutiny, embarrassment, and the deleterious consequences they might bring, is a major underlying reason for providing information control ... and control over decision making.”⁵⁰

A fundamental question is whether personal privacy is merely something that we want, or is it something that we need to function within society?

Concerning personal development and our existence within the social sphere, the literature seems to agree on the vital role information privacy plays. Fried describes violations of privacy as having the potential to injure our very humanity.⁵¹ A vast amount of personal development takes place within the realm of private spaces,⁵² whether it be physical or within the parameters of one’s own private thoughts and convictions.⁵³ For the development of a unique and self-determined

Privacy (2018) 137-158; Bélanger and Crossler “Privacy in the Digital Age: a Review of Information Privacy Research in Information Systems” 2011 *MIS Quarterly* 1017-1042; DeVries “Protecting Privacy in the Digital Age” 2003 *Berkeley Technology Law Journal* 285.

50 Cudd and Navin 28.

51 Fried “Privacy” 1968 *Yale Law Journal* 475.

52 Margulis “Privacy as a Social Issue and Behavioral Concept” 2003 *Journal of Social Issues* 246; Fried 1968 482; Moore 2003 *American Philosophical Quarterly* 215.

53 Cudd and Navin 27; Lee 50, 58; Hubbard 148.

person,⁵⁴ one needs a degree of protection from public scrutiny and potential embarrassment.⁵⁵ There needs to exist a barrier in which a person can decide which information about themselves will be known only by those intimate to them and the public.⁵⁶ In many instances, the exploration of one's own complex personality will move into areas that do not conform to accepted norms of one's community or inner circle.⁵⁷ There needs to be a degree of protection and leeway given to each person for this vital exploration to take place, without this there will exist undue pressure to conform and developmental behaviour can be placed under censure.⁵⁸ Although it may seem counter indicative, this development is needed for social cooperation.⁵⁹ It seems that there is a degree of a social mask required to ultimately fit into the social sphere. This privacy has also been described as crucial to sustaining intimate personal relationships,⁶⁰ the stable development of self-esteem and personal autonomy.⁶¹ The absence of this could have detrimental effects, both individually and communally.⁶²

Personal information privacy, therefore, seems to be inherent to the human condition. Humans have a desire to conduct their private affairs free from intrusion. This desire can be fulfilled by giving a person, within the limits of the law, control over their personal information and the ability to deny others access to yourself.

3 1 2 The potential harms of privacy protection

One must however, also acknowledge the harms or potential costs of privacy protection. It holds dangers for public security, private security, and psychological well-being. Privacy concerns do have the potential to interfere with the efforts of the courts to ensure the ends of justice are served. Within the spectrum of VIS, however, we must keep in mind that it is just one of the factors influencing the sentence. It will not have an effect on the guilty plea or investigation. We have two conflicting concerns being uncertain. The court, and lawmakers, as therapeutic agents must acknowledge this. The balance of the two concerning a VIS must be determined taking into account the victims involved.

54 Margulis 2003 *Journal of Social Issues* 244; Fried 1968 *Yale Law Journal* 478; Cudd and Navin 20; Gavison "Privacy and the Limits of Law" in Schoeman *Philosophical Dimensions of Privacy: an Anthology* 359.

55 Cudd and Navin 28; Lee 53; Hubbard 148.

56 Moore 2003 *American Philosophical Quarterly* 217; Cudd and Navin 28; Hubbard 148.

57 Margulis 2003 *Journal of Social Issues* 247; Moore 2003 *American Philosophical Quarterly* 220; Hubbard 148-149.

58 Cudd and Navin 28; Nagel *Concealment and Exposure* (2002) 28.

59 Moore 2003 *American Philosophical Quarterly* 220; Lee 55, 57.

60 Fried 1968 *Yale Law Journal* 477.

61 Margulis 2003 *Journal of Social Issues* 254; Lee 55.

62 Fried 1968 *Yale Law Journal* 477; Margulis 2003 *Journal of Social Issues* 254; Moore 2003 *American Philosophical Quarterly* 215.

A discussion of the importance and potential harms of an overemphasis of personal privacy would be incomplete without acknowledging the feminist argument that privacy has been used to facilitate crime and oppression of the vulnerable.⁶³ The strongest advocate of the argument is Catharine MacKinnon,⁶⁴ in *Towards a Feminist Theory of the State* (1989); she famously argued that privacy claims could enable the oppression of women due to the public/privacy split. Privacy becomes a dangerous ideal when used to cover up the various violent actions against women; privacy has been used as a shield to keep the state from intervening in domestic matters.⁶⁵ By choosing to keep some information private, because it is “personal” many women are oppressed within their own homes. Win-chiat Lee,⁶⁶ supported this argument by analysing how distinguishing between zones of privacy can, in fact, protect criminal action and instances of abuse. The resolve is that privacy should be considered “only appropriate for practices or conduct that is already deemed morally acceptable”.⁶⁷

This argument is especially significant in the protection of victims of domestic violence, sexually motivated crimes and gender-based violence. However, within the parameters of a VIS, the crime has already become known. The private has already been made public. It is therefore important to note that this article in no way supports the notion that some things should be kept private in any attempt to protect the perpetrator or to facilitate the oppression of crime. However, this paper explores the limits of the public/private sphere and the limits to which a victim should be exposed to making the private and horrific public.

3 2 Privacy as an individualised concept

Considering the aforementioned discussion, it is evident that privacy is more than a mere need. In fact, it can be argued that it is vital to our very development as human beings. However, privacy is a deeply personalised concept and, as such, the need for privacy will differ from one person to the next.

63 Cudd and Navin 25; Lever “Feminism, Democracy and the Right to Privacy” 2005 *Minerva: An Online Journal of Philosophy* 1-31.

64 MacKinnon *Towards a Feminist Theory of the State* (1991) 171-183.

65 Macleod 35.

66 Lee “Criminal Acts, Reasonable Expectation of Privacy, and the Private/Public Split” in Cudd and Navin *Core Concepts and Contemporary Issues in Privacy* (2018) 252-255.

67 Cudd and Navin 4.

A person's personality traits, background,⁶⁸ culture,⁶⁹ and social identity,⁷⁰ will determine their vulnerability to and the detrimental effect that privacy protection or violations will have. Accordingly, the value that we, individually and collectively, grant to privacy will be linked to various factors and will be an individualised concept. One must keep in mind that not every penetration of the personal space or information is deemed as harmful by every individual, and what will be experienced as a violation by one person, can be within the comfort zone of another.

Xu oa explains this by means of the Information Boundary Theory (IBT):⁷¹

"Depending on the situational and personal conditions, an attempt by an external entity to penetrate these boundaries may be perceived by the individual as intrusion. The motivation to reveal or withhold information is governed by "boundary opening" and "boundary closure" rules. These rules involve dynamic psychological processes that are affected by the nature of the relationship, the expected use of the disclosed information, and the benefits of disclosing the information. Thus, it is important to note that the rules emerge from an individual's articulation of a personal "calculus" of boundary negotiation, which is influenced by the conditions in which disclosure is deemed acceptable or unacceptable. The conditions "depend in part upon the status of the relationship between the sender and the audience (individual or institutional) receiving it"; thus they are context specific."

This is one of the difficulties in trying to develop personal privacy legislation and regulations. It is inevitable that confusion will exist surrounding the parameters of a right that is definition has been as wide as it has been contentious. Privacy is amorphous and ultimately subjective. The privacy regime of a country will therefore be influenced by the value its members place on it. This becomes even more contentious within a culturally diverse country like South Africa.

When relating this to the VIS, it is important to realize that victim reactions to information sharing and a VIS will be highly variable, dependent on their personal boundaries at the time of sentencing. Attempting to make any prediction on how a victim will react to sharing

68 Lee 52; Altman "Privacy Regulation: Culturally Universal or Culturally Specific?" 1977 *Journal of Social Issues* 68; Laufer and Wolfe "Privacy as a Concept and a Social Issue – Multidimensional Developmental Theory" 1977 *Journal of Social Issues* 26; Xu, Dinev, Smith and Hart "Examining the formation of individual's privacy concerns: Toward an integrative view" 2008 *ICIS 2008 Proceedings* 2. Xu et al, described it as "... depending upon context, and dynamic in the sense that it varies with life experience".

69 Moore 2003 *American Philosophical Quarterly* 221; Lee 52; Bellman, Johnson, Kobrin, and Lohse "International Differences in Information Privacy Concerns: A Global Survey of Consumers" 2004 *Information Society* 322; Dinev, Bellotto, Hart, Russo, Serra and Colautti "Internet Users' Privacy Concerns and Beliefs About Government Surveillance: An Exploratory Study of Differences Between Italy and the United States" 2006 *Journal of Global Information Management* (14:4) 62-64.

70 Cudd and Navin 5, Xu et al 2008 *ICIS 2008 Proceedings* 5.

71 Xu et al 5.

such intimate information is problematic, if not impossible. The question should therefore not be, should there be a VIS, but rather how can the court facilitate this, whilst respecting the mental health, personal boundaries and well-being of the individual victim.

3 3 Privacy needs of a victim of crime

Walklate,⁷² highlights that victims' needs will vary according to their own personal coping skills and those of people around them. In other words, needs, even in the case of the vulnerable, are not fixed entities.

The discussion thus far has highlighted the importance of privacy for social cohesion, personal autonomy and development, as well as pointing to the subjective nature thereof. Within this frame, a brief analysis will be given of the importance of privacy information control for the victims of crimes.

Control as a psychological concept has been at the centre of numerous fields of psychology, with social psychologists having written a large body of research on the importance of a sense of personal control over one's situation for the psychological wellbeing of a person.⁷³ Control over information about oneself and one's life is paramount to all people, but the importance of having and regaining control within the psychology of a victim, especially a victim of violent crime cannot be overstated.⁷⁴ Providing in depth discussion of the psychological treatment methods and the healing of victims is outside of the scope of this article. However, the research and treatment continuously emphasises the importance of establishing a sense of control for the victim.

Green and Roberts,⁷⁵ unfold this by explaining that for a victim of crime, many of the assumptions they have based their lives on, that ground their very beings, are challenged and many times shattered. This causes, amongst others, feelings of disequilibrium and loss of a sense of control. A victim must rebuild not only their lives, but redefine who they

72 Walklate *Imagining the Victim of Crime* (2006) 105.

73 For further reading see Bates and Baltes *The Psychology of Control and Aging (Psychology Revivals)* (2014); Osman *Future-Minded: The Psychology of Agency and Control* (2014); Green and Ventura *The Adaptive Self* (2005) (specifically chapter 5); Thompson, Sobolew-Shubin, Galbraith, Schwankovsky and Cruzen "Maintaining perceptions of control: Finding perceived control in low-control circumstances" (1993) *Journal of Personality and Social Psychology*.

74 See Green and Roberts *Helping Victims of Violent Crime: Assessment, Treatment, And Evidence-Based Practice* (2008) where the word "control" is used 76 times, and 71 of these refer to loss or regain of control. This is an elementary illustration of the importance of regaining control to victim healing. The book refers to various diverse psychological theories and treatment approaches to facilitate healing for different victims of crime, however in each theory one finds some reference to loss and gain of control.

75 Green and Roberts, 34-36.

are and what their barriers will be. The level of personal development that must take place is vast and of paramount importance to their healing. As discussed above, this development can only take place when a person has access to private spaces and control over who has access to their private information.⁷⁶ Green and Roberts further emphasise that victims should “not be coerced or confronted into action until they have stabilized and dealt with the initial crisis and trauma reactions”.⁷⁷ McGill,⁷⁸ supports this by identifying the regaining of a sense control as one of the fundamental steps to healing and treating a victim of crime.

The right to privacy as defined above is phrased as having control over what information about oneself is made public. So within the criminal justice system, part of the control that is taken from a victim, will be the loss of information control. It is expected of a victim, for whom regaining of control is vital to their healing, to surrender private information, which leaves them vulnerable. The information contained in a VIS becomes co-owned by every other party to the court proceedings. Some victims could experience this as a complete loss of control of privacy. The potential of harm will be personality dependent and situational, but still it can be detrimental to the victim of crime and will in fact, as argued in the *van Breda* case, limit a victim's right to privacy.

Within the spheres of the legal system and the VIS, the courts should, therefore, be aware and sensitive to the psychological needs of the victim and should refrain against causing more harm to an already injured individual.

“Involvement in legal proceedings constitutes a significant emotional stress for even the most robust citizen. For victims of violent crime, who may suffer from psychological trauma as the result of their victimization, involvement in the justice system may compound the original injury. Many anecdotal accounts describe the experience of the victim in the justice system as a “revictimization”. Indeed, if one set out intentionally to design a system for provoking symptoms of post-traumatic stress disorder, it might look very much like a court of law.”⁷⁹

The criminal justice system has been notorious for the mental harm it has caused victims. The treatment has even been described as the double

76 See 3 1 above.

77 Green and Roberts 153. Similar sentiments can be found widely in victim treatment literature, for further readings see Miller *Counselling Crime Victims: Practical Strategies for Mental Health Professionals* (2008) (specifically chapter 7 and 10); Hall *Victims of Crime: Construction, Governance and Policy* (2018) (specifically chapter 3).

78 She also discusses the healing of talking about the crime and victims' experiences of it, however, she places emphasis that this should always be done in a safe space. Similar sentiments can be found in Roberts “Bridging The Past And Present To The Future Of Crisis Intervention And Crisis Management” in Roberts *Crisis Intervention Handbook: Assessment, Treatment and Research* (2005) 3–35.

79 Herman “The Mental Health of Crime Victims” 1992 *Journal of Traumatic Stress* 159.

victimization of victims, first by the crime and later by the criminal justice system.⁸⁰ It is a “lack of control and subsequent trauma,”⁸¹ that victims of crime experience and are exposed to during the criminal justice process.

The justice system can assist in restoring control and facilitate healing, but not if this is done in a manner that does not fit within the specific personality and psychology of that victim. The court must acknowledge the victims need to control information about oneself and access to oneself. The moment VIS has been read in an open court, the victim has, yet again, lost control over the information about himself or herself. The content of a VIS is centred on the aftermath of the crime, the part of their lives that they should have absolute control over. When a crime has been committed, and it has developed to the stage of going to court, the privacy of the victim is no longer protected in the same manner as before. In order for justice to be served and the court procedures to fully take their place, the account of the crime has to be repeated, analysed and pulled apart. This cannot be changed. However, the repercussion of the crime, the extent to which it has left a permanent mark on the victim’s life, does not necessarily have to become public record. It is here that the victim should have control over which information about himself/herself and their lives are made public. Victims, especially, should have a reasonable expectation of privacy within the public sphere. The alternative is that the VIS, although public record, should be given privacy protection.

4 Recommendations and further research

The unique pathology and experience of a victim of crime, as opposed to a member of the public, poses a host of interesting challenges to understanding when privacy is valuable and when it can be harmful. Victims of sexual or degrading crimes especially, may stand in an ambivalent relation to privacy. On the one hand, privacy rights seem to protect them from reliving the crime or being exposed to public scrutiny. It also has the potential to allow them to deal with the events in their own

80 McGrath “Psychological Aspects of Victimology” in Turvey *Forensic victimology: Examining Violent Crime Victims in Investigative and Legal Contexts* (2013) 207; Green and Roberts 31: “Thompson, Norris, and Ruback (1996) conducted a study exploring the experiences of homicide survivors (family members of the murdered), including the criminal justice system and activities therein. The authors also found that fragmented services provided by the criminal justice system increased levels of distress, which could in turn lead to long-term emotional difficulties. They found that fragmented services often lead to the victims’ loss of control, lack of social support, and fear, resulting in increased levels of low self-esteem, depression, and complicated grief. Therefore, services provided within the criminal justice system can impact the recovery of victims.”

81 Turvey “Victimity: Entering the Criminal Justice System” in Turvey *Forensic victimology: Examining Violent Crime Victims in Investigative and Legal Contexts* (2013) 48.

way. A VIS has the potential, due to its public nature of further reinforcing stigma and shame. On the other hand, using the right to privacy to withhold the VIS may frustrate the ends of justice, as a VIS has had tremendous influence on sentencing.

One must keep in mind that, although no member of the public may ever access a victim's VIS, the perpetrator still will be privy to it. The psychological effects for a victim in having the aftermath of the crime being exposed to a court of people, especially the criminal, may be profound. There is an argument for allowing a victim of crime to be able to choose if any further details of their life should be provided to a criminal. Some victims might find release in this, but for some it might be detrimental. It would depend largely on the type of crime and the personality of the victim. Although we cannot expect of the law to cater for each personality, a victim of crime has already been exposed. The choices have already been taken away from them. Should they not be given the choice to determine the access the public and the perpetrator has to their personal information? It is here that the court system should embrace the opportunity to act as a therapeutic agent.

When revisiting the definition of privacy as provided above, one should think of the many layers of control lost by a victim: physical and psychological control during the crime and later loss of control of the process and the information given during a court proceeding. The victim has lost control of access to the self, whilst they can be given control over information of the self. Victims must be given the power to keep details of their lives from others, and more specifically the court and the perpetrator. There is no clear indication that a VIS will assist all victims in the healing process. As explained previously, healing from trauma is as unique as the victims of trauma. The court, as therapeutic agent, should not attempt to follow a one size fits all approach. The decision surrounding a VIS should acknowledge the fact that disclosure has both benefits and risks. It will necessarily involve a complex calculation and informed decision making by all stakeholders. It is in this calculation that further research will have to be done, especially surrounding the aftermath of a VIS experience.

5 Conclusion

This article demonstrated a potential tension between the courts' need for information contained in an impact statement and that victim's privacy interests. It is, on the one hand, an accepted practice, especially in interpersonal violent crimes carrying minimum sentences, for justice to be served and court procedures to fully take place. On the other hand, it requires not only that the after-effects of the crime have to be repeated, analysed and pulled apart in front of the accused, but also that the extent to which it has left a permanent mark on the victim's life, then becomes part of public record.

This article contends that victims should have control of what information about themselves and their lives are made public, and that they should have a reasonable expectation of privacy within the public sphere. It is recommended that an individualised approach should be followed where victims are first properly informed of the consequences of making an impact statement and then allowed to make an informed decision about their own statement or/and an assessment by a professional.