
Tackling the “shadow pandemic”: the development of a positive duty on adults to report domestic violence

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SUMMARY

When disaster strikes women and young girls are often disproportionately affected in comparison to other societal groups. Over the past three years, it is women that have shouldered much of the burden that the pandemic placed on health and socio-economic conditions. In addition, the high incidence of violence against women during the pandemic has been alarming. Several studies have already been conducted to highlight the root causes of domestic violence. As such, this paper seeks to contribute to the discourse by examining the manner in which the pandemic has aggravated these factors in South African society. The central thesis here stems from the view that women should be recognised as a vulnerable group due to the high rate of femicide and domestic violence. In order to prevent further violence, there is a need for a combined effort from the state and its citizens. This paper, with reference to measures taken in other jurisdictions, seeks to advance the argument for a legal obligation on all adults to report knowledge of domestic violence. It is argued that not only would such a provision have served as an emergency when victims were unable to seek help during the national lockdown but incorporating such a provision into the law is likely to improve the efficacy of state responses to domestic violence. In response to numerous arguments against such a measure, this article will use psychological studies and case law to demonstrate the importance of mandatory reporting in society.

1 Introduction

The month of March, 2020 represented the beginning of an unprecedented era in South Africa. For the first time in the country's history, the President declared a nationwide lockdown in response to a pandemic. Amongst other things, the lockdown had the effect of constraining the country's inhabitants to their homes with the exception of essential trips for medical appointments and the purchase of necessities.¹ All industries deemed non-essential were closed thereby relegating employees to working from home.² The cancellation of social events and the closure of social spaces, combined with the shutting down

1 Disaster Management Act 57 of 2002: Amendment of Regulations issued in terms of s 27(2).

2 As above.

of schools sent levels of frustration soaring, creating volatility and anger.³ Self-isolation created the perfect storm in which violence against women escalated.⁴

The pandemic compounded the burdens faced by women such as high risks of economic insecurity, increased risks of violence, exploitation and abuse during times of lockdown.⁵ Past experiences with crises and natural disasters suggest that confinement measures often lead to increased or first-time violence against women and children.⁶ For example, evidence from the Ebola outbreak in West Africa during the 2014 to 2015 period indicates that women and girls experienced higher rates of sexual violence and abuse during the outbreak than in the preceding years.⁷

Similarly, in South Africa, the statistics of violence against women committed predominantly by men since the beginning of the lockdown are staggering. The South African Police Services received approximately 2,300 calls and complaints pertaining to gender-based violence (GBV) during the first week of the level 5 lockdown.⁸ With this upsurge, it is evident that South Africa battled a shadow pandemic of domestic violence amidst the national lockdown.

Prior to the COVID-19 pandemic, women and children were already very likely to endure violence at the hands of intimate partners. In 2019, during a parliamentary address, President Ramaphosa compared incidents of gender-based violence in South Africa to that of a “country at war.”⁹ That year, about 2,700 women and 1,000 children were reported to have been maimed and murdered, and about 100 raped daily.¹⁰ The current pandemic has only exacerbated this scourge.

The first section of this paper will entail a discussion of how the pandemic has aggravated the factors that contribute to domestic violence in South African society. Emphasis is placed on the role of the pandemic in further limiting victims’ access to justice. It will be argued that in taking a more interventionist approach to enforcing lockdown rules, the state

3 Onyango “Sexual and Gender-Based Violence during Covid-19: Lessons from Ebola” *The Conversation* (2020-05-10).

4 As above.

5 OECD “Women at the Core of the Fight against COVID-19 Crisis” https://read.oecd-ilibrary.org/view/?ref=127_127000-awfnqj80me&title=Women-at-the-core-of-the-fight-against-COVID-19-crisis (last accessed 2020-08-10).

6 As above.

7 See Onyango *The Conversation* (2020-05-10).

8 Nicholson “Lockdown: Many ‘Trapped in their Home with their Abuser” *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-04-08-lockdown-many-trapped-in-their-home-with-their-abuser/> (last accessed 2020-08-10).

9 Udo “COVID-19 Lockdown: South Africa Battles the Deadly Epidemic of Gender-Based Violence” <https://www.africanwomeninlaw.com/post/covid-19-lockdown-south-africa-battles-the-deadly-epidemic-of-gender-based-violence> (last accessed 2020-09-01).

10 As above.

should also have taken steps to safeguard women from abuse. Failure to do so resulted in the state violating its international and domestic obligations to prevent violence against women. The state's constitutional duty to protect women from violence will be discussed with reference to the *Carmichele* case.¹¹

This paper will conclude by suggesting measures that could have been taken by the state to protect women during the pandemic. The crux of this discussion is the recommendation that a legal obligation on adults to report knowledge of domestic violence (also known as mandatory reporting) would have protected victims who were unable to seek assistance during the national lockdown. Going forward, such a provision in our law will contribute to the efficacy of state responses to domestic violence.

2 Contributing factors exacerbated by the COVID-19 pandemic

The upsurge in domestic violence cases during COVID-19 was inevitable in the context of many pre-existing challenges such as deeply entrenched patriarchal attitudes and gender inequality. The pandemic simply buried its tentacles deep into our society and revealed the cracks therein. Therefore, it is not the root cause of gender-based violence, but rather a reinforcement and aggravator of the discrimination and injustice that already exist in society: after all, “viruses do not discriminate, societies and systems do.”¹² The next section examines some of the contributing factors to domestic violence, and how they intensified during the COVID-19 pandemic.

2.1 Patriarchal attitudes and gender inequality

The Constitutional Court has previously highlighted that domestic violence, to the extent that it is overwhelmingly gender specific, reflects and reinforces patriarchal domination in a particularly brutal form.¹³ Domestic violence further undermines the non-sexist society promised in the Bill of Rights.¹⁴ This view is consistent with feminist theory which argues that domestic violence is deeply rooted in patriarchal masculinities that lead to power and control of men over women.¹⁵ According to the feminist model, violence perpetuated by male partners within intimate relationships stems from past and current power

11 *Carmichele v Minister of Safety and Security (Centre for Appeal Legal Studies Intervening)* 2001 4 SA 938 (CC).

12 Schalatek “The Invisible Corona Virus Makes Systemic Gender Inequalities and Injustices Visible” <https://za.boell.org/en/2020/05/07/invisible-coronavirus-makes-systemic-gender-inequalities-and-injustices-visible> (last accessed 2020-09-01).

13 *S v Baloyi* 2000 2 SA 425 (CC) para 12.

14 As above.

15 OECD 13.

differences that keep women in a subordinate position through the use of control which includes physical, sexual, verbal, economic, and psychological abuse.¹⁶

In South Africa, a number of factors such as the legacy of racism and patriarchal indigenous laws interlinked “to spawn a particular kind of South African masculinity, which left women in a particularly vulnerable position.”¹⁷ In a country where women already constitute a vulnerable group, the lockdown provided an opportunity for abusers to control victims and alienate them from the external world. It is not surprising that perpetrators of violence would reassert their control and express the frustrations caused by the pandemic through increased episodes of violence.¹⁸ Therefore, the spike in GBV cases was predictable because any pandemic, conflict or a disaster exacerbates pre-existing gendered structural inequalities and power hierarchies.¹⁹ The rapidly increasing reliance on digital technology also made it easy to limit victims’ freedom.

On a positive note, digital interventions have offered “personalized real-time access to domestic violence screening, risk awareness, and support services.”²⁰ Technology-based interventions have also allowed domestic violence victims to access support services safely and privately, hence, most victims prefer the practicality and confidentiality of technology-enabled interventions. Digital technology assists women with the delivery of digital health interventions through mobile devices. As a result, women are now able to find help online and share information that helps them to access support services. Perpetrators are aware that online methods of seeking help exist and they will take measures to prevent victims from leaving abusive relationships.

Therefore, the darker side of technology lies in its ability to give abusers an opportunity to increase their control over victims.²¹ ‘Coercive control’ is a key element of domestic violence which involves enforcing dominance of the victim and limiting their independence.²² Technology can be used to achieve this objective through unauthorised surveillance and harassment in the form of unwarranted communication. Not only is

16 McPhail, Busch, Kulkarni and Rice “An Integrative Feminist Model: The Evolving Feminist Perspective on Intimate Partner Violence” 2007 *SAGE Publications* 818.

17 Andrews “Violence against Women in South Africa: The Role of Culture and Limitations of the Limitations of the Law” 1999 *CUNY Academic Works* 439.

18 Javed and Chattu “Patriarchy at the Helm of Gender-Based Violence during Covid-19” 2021 *AIMS Public Health* 33.

19 As above.

20 Emezue “Digital or Digitally Delivered Responses to Domestic and Intimate Partner Violence during COVID-19” 2020 *JMIR Public Health and Surveillance* 4.

21 Nyenti “Access to Justice in the South African Social Security System: Towards a Conceptual Approach” 2013 *De Jure* 908.

22 Penzey Moog and Slakoff “As Technology Evolves, so Does Domestic Violence: Modern-Day Tech Abuse and Possible Solutions” in Bailey, Flynn and Henry *The Emerald International Handbook of Technology-Facilitated Violence and Abuse* (2021) 644.

it possible to manage one's social life and access to help services through their mobile devices; the digital world also presents a unique opportunity to exploit and stalk victims. Most police officials are generally unfamiliar with online harassment and this crime does not get sufficient attention. As a result, legal recourse is not easily attainable for online harassment and other forms of violence.

2.2 Access to justice

For many victims, recourse against their abusers is a pipe dream due to a lack of economic resources. The accessibility of efficient dispute resolution institutions and processes is subject to socioeconomic conditions such as illiteracy, poverty, and geographical location.²³ It is for this reason that access to justice should be defined contextually, in light of the social and economic conditions of the people that will potentially rely on the justice system.²⁴ The continuum between access to legal services and access to justice cannot be ignored.²⁵

Access to justice focuses on two basic objectives of a legal system. Firstly, the legal system must be accessible to people from all levels of society and secondly, it should provide fair decisions and rules for people from all levels of society.²⁶ The first objective is impossible to achieve where social and economic conditions hinder victim's access to legal resources. Socio-economic inequalities result in "inadequate resources for legal aid provision, systemic operational inefficiencies, and lack of knowledge about legal rights, remedies and the legal system."²⁷ For instance, women residing in low-income areas generally struggle to obtain legal assistance due to their financial status and geographical locations.

These conditions were pronounced by the mobility restrictions created during the national lockdown. In other words, pre-existing socioeconomic conditions were compounded by the pandemic and formed an additional barrier to accessing justice institutions such as police station and court houses. The socioeconomic antecedents to domestic violence are recognised by the Domestic Violence Act which makes provision for economic abuse in its definition of domestic violence. Economic abuse is defined as unreasonably depriving the complainant of financial resources that he/she is unlawfully entitled to or requires out of necessity.²⁸ This form of abuse also applies where a

23 Nyenti 2013 *De Jure* 908.

24 As above.

25 Heywood & Hassim "Remedying the Maladies of 'Lesser Men or Women': The Personal, Political and Constitutional Imperatives for Improved Access to Justice" 2008 *South African Journal on Human Rights* 263.

26 Greenbaum "Access to justice for all: A reality or unfulfilled expectations?" 2020 *De Jure* 250.

27 As above.

28 S 1 of the Domestic Violence Act 116 of 1998.

perpetrator disposes household effects or property that a complainant has an interest in without due cause.

2 2 1 Cost-related barriers

An understanding of the interdependence between socioeconomic rights and civil rights shows that the protection of women's rights in the context of domestic violence requires the law to also address their socioeconomic rights to housing, social security, health and so forth. Pieterse notes that socioeconomic goods and services are often accessed through familial and other interpersonal relationships.²⁹ Such relationships "either function as sites of direct socio-economic provision (for example where one party to the relationship provides others with housing, food or medical care), or they enable, mediate or facilitate contractual access (for instance, where children or elderly members are assisted in entering into contracts...)"³⁰

Therefore, where the victim is economically dependent on her abuser, it is extremely difficult to escape or seek legal assistance. The negative consequences of COVID-19 such as higher unemployment, lost wages, and job insecurity are particularly dangerous for women in abusive relationships. Should the victim lose her means of income, this increases the abuser's power over her as economic control is one of the key tools used by abusers. Furthermore, without the funds to find alternative accommodation and meet other basic needs, most victims find themselves even more vulnerable with their abusers.

2 2 2 Social barriers

For the larger part of society, it is inconceivable that one of the most acute manifestations of violence exists within the confines of a loving relationship. The reality that many continue to turn a blind eye to is that the highest rate of violence against women occurs in the context of intimate relationships.³¹ The cycle of domestic violence generally begins with imperceptible degradation as the perpetrator primes his victim for the first onslaught of violence.³² As the cycle evolves, the episodes of violence intensify until the victim is simultaneously trapped by physical disability and mental despair.³³ In a nutshell, the recurrent violence becomes normalised, preventing the victim from reporting the violence and the authorities from recognising it.

Due to the complexity of domestic violence, there are several pervasive myths, and the "intentions of women" in reporting cases of violence and applying for protection orders. Many police and judicial

29 Pieterse "Relational Socio-economic Rights" 2009 *South African Journal on Human Rights* 202.

30 As above.

31 Meyersfeld *A Theory of Domestic Violence in International Law* (JSD Thesis 2006 Yale) 118.

32 As above.

33 As above.

officers are, therefore, immersed in misconceptions about domestic violence that may impede appropriate justice for applicants seeking protection. As a result, when victims choose to report domestic violence, they are faced with judicial stereotypes and biases. For instance, it is believed that some women apply for protection orders as a form of revenge against their husbands or partners for infidelity. Therefore, magistrates are reluctant to issue protection orders when there is evidence of extra-marital relationships.³⁴

Some magistrates also hold the preconceived belief that women often apply for emergency monetary relief when they fail to obtain maintenance from their partners.³⁵ Additionally, there is a notion in the South African judicial system that sexual violence is not common in marriage or long-term domestic relationships. It is possible that some applicants will attempt to abuse the remedies offered by the Domestic Violence Act, however, the default assumptions that applicants who are seeking these remedies do so as a revenge against their partners, or are equally abusive or in “no real danger” in the absence of physical abuse is a weak premise to base a decision.³⁶ Furthermore, relying on such position during the pandemic overlooks or undermines the vulnerability of women in abusive relationships.

2 2 3 Barriers faced by at-risk groups

Certain groups of women are generally more vulnerable to domestic violence compared to others. For instance, the greater poverty experienced by black women exacerbates the prevalence and pernicious effects of domestic violence for this group.³⁷ Research indicates that male perpetrators of domestic violence deliberately trap their female partners in poverty by sabotaging their efforts to attain educational qualifications and their attempts to become employed or progress in their jobs.³⁸ Likewise women in abusive relationships are sometimes barred by their partners from using contraceptives, resulting in more pregnancies, thus increasing their economic responsibilities and needs, while reducing their ability to earn an income.³⁹

It is evident from these cases that abusers understand that they can exercise more control if their victims remain economically dependent. As a result, women from poor backgrounds are more at risk of domestic violence. The pandemic exacerbates their vulnerability as it is difficult to gain employment or run small businesses with restrictions in place.⁴⁰

34 Artz 2004 *SA Crime Quarterly* 5.

35 As above.

36 As above.

37 Bonthuys 2014 *SAJHR* 117.

38 Raphael “Battering through the Lens of Class” 2003 *American University Journal of Gender, Social Policy and the Law* 369-372.

39 Albertyn “Using Rights and the Law to Reduce Women’s Vulnerability to HIV/AIDS” 2001 *Law, Democracy and Development* 179.

40 Bartik, Bertrand, Cullen, Glaeser, Luca and Stanton “The Impact of COVID-19 on Small Business Outcomes and Expectations” 2020 *PNAS* 17656.

The consequences of domestic violence impact even more severely on certain sub-groupings of poor women, such as rural women for whom there are few facilities and who may live in communities which tend to blame the female victims of domestic violence.⁴¹ These women also find it more difficult to access the protection provided by the criminal justice system and to obtain relief in terms of the Domestic Violence Act.⁴²

Immigrant women, especially undocumented immigrants, are also particularly vulnerable to certain forms of domestic violence and, when they are able to access the legal system, they may receive little sympathy and support from state officials.⁴³ The pandemic has made it difficult for immigrants to obtain necessary documentation or to travel back to their home countries. Although some countries have made repatriation available, this is not true for all states. Therefore, female immigrants in abusive relationships may find themselves trapped without the option to leave the country.

The treatment of migrant and rural women as second class can be attributed to the state's failure to enact protective policies. If these women are to be protected, then the state needs to actively improve their socio-economic conditions and ensure that their livelihoods do not expose them to exploitation. In the case of migrants, the state has a constitutional obligation to ensure that they access to basic services.⁴⁴ In addition, migrant women must be empowered to realise full inclusion and social cohesion. This will also ensure that they contribute to the sustainable development of the countries that they live in.

3 The State's positive duty to protect women from violence

As a point of departure, it is important to outline what positive duties entail. This is better understood in juxtaposition to negative duties. Negative obligations simply require the state and sometimes, non-state actors to respect an individual's fundamental rights. These parties are required to refrain from action that adversely affects one's exercise of their rights. For example, section 9(3) prohibits unfair discrimination, thereby creating a negative obligation not to discriminate.

By contrast, section 9(4) places a duty on the state to enact legislation that prevents or prohibits discrimination. Because this provision requires the state to take action for the protection of individuals' rights, this is a positive obligation. The difference between negative and positive

41 Pruitt "Place Matters: Domestic Violence and Rural Difference" 2008 *Wisconsin Journal of Law, Gender & Society* 347.

42 Raphael 2003 *American University Journal of Gender, Social Policy and the Law* 373-4.

43 Coker "Addressing Domestic Violence through a Strategy of Economic Rights" 2003 *Women's Rights Law Reporter* 188.

44 S26 and 27 of the Constitution of the Republic of South Africa, 1996.

obligations arises from the active role that the state plays in the latter. Positive obligations demand a more hands-on approach to ensure that rights are accessible to their holders. I argue in this paper that protecting women from violence requires the state to take decisive action, therefore, thereby imposing a positive duty on the state.

3 1 International obligations

The right of all human beings to freedom from violence is guaranteed in the Universal Declaration of Human Rights,⁴⁵ the International Covenant on Civil and Political Rights,⁴⁶ the International Covenant on Economic, Social and Cultural Rights,⁴⁷ and numerous other conventions. Among others, these instruments oblige states to respect human rights and to protect all individuals without any distinction. Some instruments address gender-based violence directly. For instance, the Convention on the Elimination of Discrimination against Women (CEDAW) confirms that violence against women constitutes an infringement of women's human rights.⁴⁸

It is generally accepted that domestic violence in international law refers to "systemic intimate violence."⁴⁹ Meyersfeld explains that systemic intimate violence contains the following elements: severe emotional or physical harm; a continuum of violence; committed within intimate relationships; where the victim is vulnerable to harm; and the violence is systemic as a result of the state's failure to intervene.⁵⁰ Meyersfeld further argues that even if suffering occurs at the hands of an abuser acting in his private capacity, the State should be held liable for breach of its international obligations if it failed to take proper measures for police protection and judicial enforcement.⁵¹

It is worth mentioning that state responsibility does not arise from all acts or omissions that take place within its territory however, the obligations in the above-mentioned human rights instruments have two important implications. Firstly, positive obligations are imposed on states to establish and maintain adequate legal and other measures through which the rights can be guaranteed. Secondly, states need to exercise due diligence to prevent the violation of human rights by private actors.⁵² Therefore, the obligation to respect rights and to prevent its violations also requires positive government action to overcome the infringement of rights by private individuals.

45 Universal Declaration of Human Rights, 10 December 1948.

46 International Covenant on Civil and Political Rights, 16 December 1966.

47 International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

48 South Africa signed the Convention in January 1993 and ratified the Convention on 15 December 1995.

49 Meyersfeld (2010) 111.

50 As above.

51 Meyersfeld (2010) 201.

52 Combrinck "Positive State Duties to Protect Women from Violence: Recent South African Developments" 1998 *Human Rights Quarterly* 670.

This view is consistent with General Recommendation 19 of the Convention on the Elimination of Discrimination against Women (CEDAW) which provides that “states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.” In accordance with international law, state responsibility arises when the conduct of the state breaches its international obligations, which arise from customary or treaty-based human rights law.⁵³ Therefore, states are not absolved from responsibility simply because they did not cause harm.

This principle was emphasised in the *Velasquez Rodriguez* case where the Inter-American Court of Human Rights held that the obligation to ensure the exercise of rights included the requirement that states “prevent, investigate and punish any violation of the rights recognised by the (American) Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”⁵⁴ Therefore, the court considered whether the state demonstrated a lack of due diligence when it allowed the human rights violation *in casu* to take place, either with its support or acquiescence, or by failing to take steps to prevent the act or to punish those responsible.⁵⁵

The Government of Honduras was found liable for failing to guarantee the rights to life and security of the person under the American Convention due to its lack of due diligence in preventing unexplained disappearances. This precedent establishes that the failure of a state to prevent predictable and extreme harm to an identifiable portion of the population constitutes an internationally wrongful act.⁵⁶ However, a state can only be held accountable in cases where the absence of conduct to prevent, protect and punish are “sustained and systematic,” for example where the police continuously fail to act with due diligence to prevent harm and the state fails to compel the police to remedy this.⁵⁷

In light of all the factors outlined above, the state failed to reasonably foresee how restrictions on mobility would exacerbate the vulnerability of women. It also failed to take proactive measures that protected women during the pandemic. Multiple resources were dedicated to enforcing lockdown measures leaving the potential threat of increased violence in the backseat. Therefore, domestic violence was exacerbated by the state’s unwillingness to recognise, understand and engage with

53 Crawford “Corollaries of breach of an international obligation. In State Responsibility: The General Part” 2013 Cambridge *Studies in International and Comparative Law* 93.

54 *Velasquez Rodriguez Case*, EI 166, Case 7920, Ser. C, No. 4, Inter-Am. Ct. H.R. 35, O.A.S. Doc. OEA/Ser.LV/III.19, doc. 13 (1988) (Judgment of 29 July 1998).

55 As above.

56 Meyersfeld (2010) 207.

57 As above.

women's rights. Inaction by the state resulted in its failure to discharge its international obligations to protect women against gender-based violence.

3 2 Domestic obligations

Freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms. Section 12(1) (c) of the South African Constitution provides that “everyone has the right to be free from all forms of violence from either public or private sources.” Thus, the state is required to protect individuals, both by refraining from such violations itself and by taking active steps to prevent violations by others. The subsection, read in conjunction with section 7(2) of the Constitution, places a positive duty on the state to protect everyone from violent crime.⁵⁸ Furthermore, section 12 imposes the correlative duties not to eliminate a person's security; to protect people against deprivation of security by others; and to provide for the security of those unable to provide for their own.⁵⁹ The *Carmichele* case clearly outlines how these obligations have developed in relation to violence against women.⁶⁰

3 2 1 *The Carmichele case: facts and background*

The accused, Francois Coetzee was charged with rape and released on bail. His release was not opposed by the court prosecutor, with the investigating officer recommending that Coetzee be released on his own recognisance, without evidence to justify that recommendation. Following his release, Coetzee attacked the plaintiff, Ms Carmichele with a pick handle and a knife and she suffered stab wounds, a broken arm and was badly beaten up before she managed to escape. Mr Coetzee was subsequently convicted of attempted murder.⁶¹ The Plaintiff's case was that the members of the police and the public prosecutors involved were under a legal duty to prevent Mr Coetzee from causing harm to her and that they had acted negligently in failing to comply with this duty. She alleged that the release of Coetzee without bail had been an omission by the police and prosecutors and she relied on the duties imposed on the police under the interim Constitution and on the state under the constitutional rights to life, equality, dignity, privacy and freedom and security of the person.⁶²

The *amicus curiae* to the Constitutional Court employed a gendered perspective in its submission regarding the constitutional duty of the state:

58 *S v Baloyi* para 11.

59 Combrinck 1998 *Human Rights Quarterly* 668-669.

60 *Carmichele v Minister of Safety and Security (Centre for Appeal Legal Studies Intervening)* 2001 4 SA 938 (CC) [*Carmichele 2*].

61 *Carmichele 2* para 23.

62 Maluleke and Madonsela “Gender Equality Jurisprudence in Landmark Decisions” http://www.justice.gov.za/docs/other-docs/2009_Women_law_court-decisions.pdf (last accessed 2020-09-13).

*“The police and the prosecuting authority bear a particular duty to protect the equality, dignity, personal security and freedom of all women against sexual violence and the threat of sexual violence and especially those whose vulnerability to sexual violence is aggravated by circumstances known to those authorities ... They bear an enhanced duty to protect women against the sexual violence precisely because of the particular vulnerability and exposure of women to sexual violence and the impact of sexual violence upon every facet of their lives...”*⁶³

It was the *amicus curiae*'s ultimate submission that if the common law duty to act was to be developed in line with the spirit, purport and objects of the Bill of Rights, it would need to be developed in a manner that “counters women’s characteristic vulnerability to sexual violence and fortifies their claim” for the protection from violence.⁶⁴ The Constitutional Court in *Carmichele 2* agreed with this submission.⁶⁵ The judgment reiterated that the police have an obligation to combat and investigate crime, to maintain public order, to protect and to secure the inhabitants of South Africa and their property.⁶⁶

This obligation requires the police to reasonably protect women from sexual violence, and their failure to do so results in liability. The Court also referred to South Africa’s obligation under international law to prohibit all gender-based discrimination and to take reasonable and appropriate measures to prevent the violation of those rights. When addressing these obligations in relation to dignity and the freedom and security of the person, the court highlighted that as one of the primary agencies of the state responsible for the protection of women against the violation of their fundamental rights by perpetrators of violent crime, the police had to discharge this obligation. The Court found that the South African Police Service (SAPS), therefore, had a duty to protect Carmichele.⁶⁷

In a similar vein, the court highlighted in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail & others*,⁶⁸ that since the *Carmichele* judgement, the Supreme Court of Appeal has expressly acknowledged that the constitutional value of accountability is one of the considerations relevant to the question of whether a legal duty exists. In terms of this principle, the government and those exercising public power must be held accountable to the broader community for the exercise of their powers.⁶⁹ The principle that government, and organs of

63 *Carmichele v Minister of Safety and Security, Submissions of the amicus curiae* para 17.

64 *Carmichele v Minister of Safety and Security, Submissions of the amicus curiae* para 18.

65 *Carmichele 2* para 40. The Constitutional Court held that it was implicit in the Applicant’s case that the common law had to be developed beyond existing precedent.

66 S205(3) of the Constitution of the Republic of South Africa, 1996.

67 *Carmichele 2* para 43.

68 *Rail commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359(CC).

69 *Rail commuters Action Group v Transnet Ltd t/a Metrorail* para 76.

state, are accountable for their conduct was held as an important principle that bears on the construction of the constitutional and statutory obligations.⁷⁰

Therefore, where proactive steps are not taken to protect potential victims of violence, then the state and its organs may be held liable. The development of the common law duty to act means that in cases of crisis such as the COVID-19 pandemic, the state is obliged to implement measures that address women's vulnerability to violence. This is particularly so in the case of recurring systemic intimate violence. There was clear evidence that domestic violence cases were increasing after the first week of lockdown; however, the state failed to take adequate measures such as proactive policing to prevent violence and protect victims. Although redress channels technically remained open, reporting a perpetrator during higher levels of lockdown became a complicated process as victims rarely had the opportunity to do so. For most victims, access to mobile devices or public transport in order to reach shelters or police stations was limited. Furthermore, victims feared that perpetrators would retaliate due to the lack of escape options or safe spaces.⁷¹

The legal and criminal intervention processes to address domestic violence became even more strained during lock-down with the limitation of physical interaction.⁷² The state, therefore, failed to prevent predictable and extreme harm to an identifiable portion of the population (women). In the absence of state's conduct to prevent and protect women from domestic violence, the police continuously failed in their duty to act with due diligence to prevent harm and the state also failed to compel the police to remedy this. Therefore, the state did not comply with its obligations.

3 2 2 Horizontal application of constitutional rights

In order to actively police domestic violence, the state could have enlisted the help of the community to identify cases of domestic violence as private citizens also have the obligation to protect fundamental rights. The direct horizontal application of constitutional rights to private individuals is a controversial and evolving constitutional subject. However, the South African Constitution explicitly endorses the horizontal effect of fundamental rights in section 8(2) which provides that "a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

70 *Rail commuters Action Group v Transnet Ltd t/a Metrorail* para 82.

71 Weiner "COVID-19 and Domestic Violence in South Africa" <http://ohrh.law.ox.ac.uk/covid-19-and-domestic-violence-in-south-africa/> (last accessed 2020-11-23).

72 As above.

In *Daniels v Scribante*,⁷³ the majority held that “[w]hether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the “potential of invasion of that right by persons other than the state or organs of state”; and, would letting private persons off the net not negate the essential content of the right?”⁷⁴ Thus, the court recognised the possibility of the direct horizontality of positive obligations.

An application of the factors highlighted in *Daniels v Scribante* requires an analysis of the right to freedom from violence. Section 12(1) of the Constitution is set against the background of South Africa’s apartheid past which is characterised by violence from both public and private sources. The right therefore seeks to ensure the security of all citizens from any form of violence. Although it would be irrational to place a duty on private parties to prevent public violence, a duty to prevent violence from private sources may be justifiable. When read together with section 8(2) of the Constitution, it is evident that the nature of section 12(1)(c) and the duties it imposes warrant horizontal application thereof. As Pieterse points out, “the constitutional entrenchment of a horizontal right to freedom from violence arguably does in certain circumstances extend private responsibility beyond the scope of traditional common-law liability or explicit statutory duties.”⁷⁵

Since section 8(2) is broadly phrased thereby leaving open key questions relating to the circumstances in which such direct application arises, the role of citizens in preventing domestic violence could be cemented by imposing a legal duty on adult persons to report knowledge or reasonable suspicion of domestic violence.

4 Mandatory reporting of domestic violence

In South Africa, the mandatory reporting of abuse currently applies only in cases involving minors. Section 110 of the Children’s Amendment Act places an obligation on certain individuals such as medical practitioners, teachers and religious leaders, to make a report if they conclude on reasonable grounds that a child has been abused in a manner that causes physical injury, sexual abuse or deliberate neglect. Furthermore, section 54 of the Sexual Offences and Related Matters Act also provides that a person who has knowledge that a sexual offence has been committed against a child must immediately make a report to a police official. The rationale behind the legal duty to report abuse committed against children arises from their vulnerability in society.

73 *Daniels v Scribante* 2017 4 SA 341 (CC).

74 *Daniels v Scribante* para 39.

75 Pieterse “The Right to Be Free from Public or Private Violence after Carmichele” 2002 *South African Law Journal* 30.

In light of the ever-increasing incidents of domestic violence committed against women, the same justification can be used to impose a legal duty on others to report domestic violence committed against women, whose vulnerability was exacerbated during the pandemic. The South African legislature has shown its willingness to do so as seen from the recently introduced Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill which provides that females under the age of 25 are a vulnerable group.⁷⁶ Furthermore, the Domestic Violence Amendment Bill imposes a legal obligation to report domestic violence on anyone who has knowledge or reasonable suspicion that an act of domestic violence has been committed against a child, a disabled or an older person.⁷⁷ More importantly, for the purposes of this paper, a person with knowledge of the commission of domestic violence committed against an adult must report this to a social worker or the SAPS.⁷⁸

Despite the positive side of the proposed amendments, it is unclear why the Criminal Law (Sexual Offences and Related Matters) Amendment Bill only seeks to recognise females under the age of 25 as a vulnerable group. Studies indicate that women from different age groups are vulnerable to domestic violence.⁷⁹ Therefore, it is also imperative for the provisions of the Domestic Violence Amendment Bill which introduced the mandatory reporting of domestic violence to expressly mention that this obligation applies to domestic violence committed against all women as well. An express provision creating a mandatory obligation to report domestic violence against women would, in practice, change the public perception of domestic violence being a private family matter and would be helpful particularly during the pandemic, for the purpose of bringing domestic violence to the attention of the criminal justice system.

In the context of the pandemic, mobility restrictions that arose from strict lockdown measures prevented most victims of domestic violence from personally seeking assistance. In such instances, a duty on adults to report the commission of domestic violence would have assisted such victims. Such a duty would make it mandatory for other family members, neighbours, colleagues and other persons who are more likely to be aware of such incidents, to report domestic violence. In jurisdictions such as Australia that have introduced mandatory reporting of violence in their legislation, there is an indication that such an obligation allows citizens to actively partake in the prevention of domestic violence.

76 Clause 5(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill.

77 Clause 2B (1) (a) of the Domestic Violence Amendment Bill [B20 – 2020].

78 Clause 2B (1) (b) of the Domestic Violence Amendment Bill [B20 – 2020].

79 Fagbadebo “A discourse on the plight of South African women in the face of abuse and neglect” 2021 *Law Democracy and Development* 105.

5 Foreign jurisprudence on the mandatory duty to report domestic violence

The former Northern Territory Government was the first in Australia to introduce mandatory reporting of domestic violence for the purpose of changing community beliefs and misconceptions towards domestic violence.⁸⁰ This was achieved by taking away the privacy that is normally afforded to domestic violence and reinforcing the unacceptable nature of the crime. Family violence laws in the Northern Territory (NT) criminalise any adult's failure to report to the police, a belief based on reasonable grounds that a person has caused, or is likely to cause harm to someone that they are in a domestic relationship with, and/or a belief that the life or safety of another person is under serious or imminent threat due to the commission or imminent commission of domestic violence.⁸¹ Australian authorities have justified the mandatory reporting of domestic violence by arguing that combatting domestic violence is the responsibility of the entire community.⁸²

An evaluation of the mandatory reporting of domestic violence taken in 2012 found that there was a 19% increase in domestic and family violence-related reports to the NT Police since the introduction of mandatory reporting.⁸³ Similar effects have been identified in the USA where Kentucky, along with five other states including California, New Hampshire, New Mexico, and Rhode Island, have mandatory reporting laws that specifically address the issue of reporting when domestic violence is suspected.⁸⁴ Kentucky's law provides that "any person having reasonable cause to suspect that an adult has suffered abuse, neglect or exploitation from a spouse shall report to the department for social services."⁸⁵

Since its implementation, the Kentucky law has had the following effects;⁸⁶

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- 80 Northern Territory Government "The Northern Territory's Domestic, Family and Sexual Violence Reduction Framework 2018-2028" https://territoryfamilies.nt.gov.au/__data/assets/pdf_file/0006/464775/Domestic,-Family-and-Sexual-Violence-Reduction-Framework.pdf (last accessed 2021-02-01).
- 81 S 124 and 125 of the Domestic and Family Violence Act, 2007.
- 82 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2008 (C Burns—Justice and Attorney-General).
- 83 KPMG, *Evaluation of the impact of mandatory reporting of domestic and family violence*, http://www.nt.gov.au/justice/documents/publications/2013/evaluation_of_the_impact_of_mandatory_reporting_of_domestic_and_family_violence.pdf (last accessed 08-02-2021)
- 84 Antle, Barbee, Yonkeelov and Bledsoe "A Qualitative Evaluation of the Effects of Mandatory Reporting of Domestic Violence on Victims and Their Children" 2010 *Journal of Family Social Work* 58.
- 85 Kentucky Statutes 209.030 – Administrative regulations.
- 86 KPMG (2012) 11.

- It has engaged the entire society, by holding all citizens, accountable to help victims of domestic violence and to prevent future incidence of such abuse.
- The law helps locate victims of domestic violence and promotes early identification of vulnerable adults and children;
- It decreases isolation of such victims and prevents child abuse

6 Criticisms against the mandatory reporting of domestic violence

In order to understand the necessity of a measure such as the mandatory reporting of domestic violence, it is important to examine why most victims do not seek help from outside sources.

6.1 Infringement on the autonomy of victims

Studies have shown that domestic violence imposes short-term, autonomy-undermining psychological states in abused persons.⁸⁷ Friedman defines ‘autonomy’ as the ability to reflect on one’s “deeper values and concerns and act on them”.⁸⁸ She also highlights that domestic violence undermines the abused person’s autonomy in three ways: (1) it threatens the abused person’s survival and safety, (2) it focuses the abused person’s attention on the interests of the abuser, preventing her from pursuing the basic human goals of survival, safety, self-actualisation, and wellbeing; and (3) it submits the abused person to the will of the abuser, causing her to prioritise his goals above her own basic human needs.⁸⁹

Although victims retain autonomy over some aspects of their lives, it is common for them to experience symptoms of impaired autonomy such as: (1) low self-efficacy, (2) learned helplessness, (3) obedience to authority (4) social-role conformity, and (5) reward-seeking behavior/dependency.⁹⁰ Therefore, it is evident that the psychological state of a victim typically prevents them from reporting their abusers or seeking assistance. In this context, it would then be justifiable to prioritise the survival and well-being of the victim over their autonomy, which is most likely impaired due to abuse. Furthermore, some of the conditions which activate these impaired mental states include the escalation of violence, and social isolation.⁹¹ These conditions were created and exacerbated by the pandemic thus triggering the mental states that often prevent victims from seeking assistance. Under these unique circumstances, the mandatory reporting of domestic violence is justifiable.

87 Friedman *Autonomy, Gender, Politics* (2003) 141.

88 As above.

89 As above.

90 As above.

91 Ciurria “The Loss of Autonomy in Abused Persons: Psychological, Moral, and Legal Dimensions” 2018 *Humanities* 6.

Most submissions made in response to mandatory reporting in the Domestic Violence Bill also expressed concern that such a measure would fuel violence by perpetrators.⁹² Critics of the legal obligation to report domestic violence committed against adults believe that such reports place patients at risk for retaliation and deter patients from seeking medical care for their injuries.⁹³ Although more studies need to be conducted in order to analyse the full impact of mandatory reporting on victims, it is worth noting that this measure enhances their safety because in the absence of such reports, violence only escalates. Furthermore, precautions can be taken to ensure the safety of the victim when a report is made. For instance, appropriate support in the form of therapy, financial support and/or protection orders should be prioritised when mandatory reporting takes place.

6 2 Infringement of victims' right to privacy

In response to criticisms that mandatory reporting infringes the privacy of victims, it is important to note that historically, the notion of privacy has been used to shield batterers from legal intervention.⁹⁴ State actors previously operated from the belief that violence between intimate partners is a private matter that should be handled within the family. This led to the creation of the public/private dichotomy within the criminal justice system. The privacy and intimacy afforded to the home provided both the opportunity for violence and the justification for non-interference.⁹⁵

More so, male violence against women, often occurs with impunity within the family setup. Thus, a central theme of feminist scholarship on the private/public dichotomy in the context of violence against women is the identification of the patriarchal family as the primary source and site of women's oppression.⁹⁶ Consequently, feminist theory argues that domestic violence is one aspect of the family sphere that should be displaced across the private/public dividing line, so that the otherwise "private" sphere becomes subject to state intervention and scrutiny.⁹⁷

Despite progressive legislation, one of the enduring consequences of the public/private divide is law enforcement's reluctance to implement preventative and at times, protective measures against domestic violence as seen in *S v Baloyi*.⁹⁸ In this case, the court highlighted that

92 Henson "Mandatory Reporting of Domestic Violence: Helpful or Harmful" <https://www.news24.com/news24/columnists/guestcolumn/opinion-mandatory-reporting-of-domestic-violence-helpful-or-harmful-20201020> (last accessed 2021-02-05).

93 As above.

94 Bailey "It's Complicated: Privacy and Domestic Violence" (2012) *American Criminal Law Review* 4.

95 *S v Baloyi* para 16.

96 Pateman "Feminist Critiques of the Public/Private Dichotomy" in Benn & Gaus (eds) *Public and Private in Social Life* (1985) 281-303.

97 Schneider "The Violence of Privacy" in Fineman & Mykitiuk (eds) *The Public Nature of Private Violence* (1994) 36-53.

what distinguishes domestic violence from other crime is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It is so often concealed that it frequently goes unpunished which is why there needs to be a duty to report on persons who have knowledge of its commission. This measure is not suggested as a panacea to ending domestic violence. However, it is a response that will improve the effectiveness of existing laws against domestic violence.

Based on the increased prevalence of domestic violence during the pandemic, it is apparent that existing legislation has not substantially reduced domestic violence. In order to combat the existing culture of violence, the state must employ an integrated approach which targets social and cultural norms as well as perceptions and attitudes that contribute to the high rates of domestic violence. To this end, mandatory reporting will challenge existing social barriers that lead to the stigmatisation of victims in communities and court rooms.

7 Conclusion

Most of the measures adopted by the Government and the resources allocated towards achieving the aims of these measures have been directed towards ensuring that inhabitants comply with lockdown regulations, whilst neglecting the Government's constitutional and international duty to protect women from systemic violence. In light of the above discussion, it is evident that the Government fell foul of its obligations by failing to take *active* measures to prevent domestic violence. At the beginning of the pandemic, it was evident that existing barriers faced by victims would be exacerbated by the pandemic. Due to the forced isolation and restricted movement of the persons during the nationwide lockdown, it became more difficult for victims to seek assistance. What is more, multiple studies have proven that control of the victim is a significant part of the cycle of domestic violence and it was thus foreseeable that incidents of domestic violence incidents would escalate as the measures adopted in response to the COVID-19 pandemic enabled perpetrators to maintain such control.

This paper argued that the mandatory reporting of domestic violence would have ensured that police officials are alerted as soon as the people closest to the victim became aware of incidents of domestic violence. An additional benefit of such a measure is that it would improve social attitudes and beliefs towards domestic violence as mandatory reporting draws the attention of citizens to the prevalence of violence in family settings and encourages them not to turn a blind eye when domestic violence occurs. Despite numerous concerns around the mandatory reporting of domestic violence, this paper has provided evidence to the effect that such an intrusive measure is justifiable as it ensures that

victims are able to get much needed assistance. Although the autonomy and privacy of the victim is compromised by such a measure, the gravity of domestic violence in South Africa – particularly at the time of the COVID-19 pandemic has made the encroachment of these rights justifiable and necessary.