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Access to justice for black women in South Africa: A feminist social justice perspective

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UNIVERSITY OF PRETORIA DECLARATION OF ORIGINALITY



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LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights, 1981
ACRWC	African Charter on the Rights and Welfare of the Child, 1990
ACHPR	Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
African Commission	Commission African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' rights
AHRLJ	African Human Rights Law Journal
APDF	Association Pour le Progrès et la Défense Des Droits Des Femmes Maliennes
BCEA	Basic Conditions of Employment Act 75 of 1997
BEE	Black Economic Empowerment
CCR	Constitutional Court Review
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women, 1979
CGE	Commission for Gender Equality
Constitution	Constitution of the Republic of South Africa, 1996
Criminal Law Act	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
DEVAW	Declaration on the Elimination of Violence against Women, 1993
EEA	Employment Equity Act 55 of 1998
EFF	Economic Freedom Fighters
Equality Act	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
EWN	Eye Witness News
FHR	Foundation for Human Rights
GBV	Gender-based violence
Harassment Act	Protection from Harassment Act 17 of 2011
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966

ICJ	International Court of Justice
IDLO	International Development Law Organisation
IHRDA	Institute for Human Rights and Development in Africa
KwaZulu Act	KwaZulu Act on the Code of Zulu Law 16 of 1985
LRC	Legal Resources Centre
Maputo Protocol	Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 2003
Natal Code	Natal Code of Zulu Law published in Proclamation R151 of 1987, GG No. 10966
NGOs	Non-governmental organisations
NWMI	New Women’s Movement Initiative
OHCHR	UN Human Rights Office of the High Commissioner
Palermo Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
Trafficking Act	Prevention and Combating of Trafficking in Persons Act 7 of 2013
UN Women	Entity for Gender Equality and Empowerment of Women
UN	United Nations
UNGA	United Nations General Assembly
Universal Declaration	Universal Declaration of Human Rights, 1948
UNODC	UN Office on Drugs and Crime
UNSSC	United Nation system Staff College
VAW	Violence against women
WHO	World Health Organisation

CHAPTER ONE: INTRODUCTION

1.1 Research problem

The right to access justice is a fundamental right that should be guaranteed to all women in the world. This is in line with the legal provisions of the Convention on the Elimination of all Forms of Discrimination against Women, 1979 (CEDAW).¹ CEDAW further stipulates that women's access to justice is a fundamental element of the rule of law.² Therefore, to realise this fundamental human right, international human rights law requires member states to take steps to ensure the effective implementation of national, regional, and international laws relating to women's access to justice rights.³

These national and international instruments include the Universal Declaration of Human Rights, 1948 (Universal Declaration), African Charter on Human and Peoples' Rights, 1981 (ACHPR),⁴ CEDAW, the Declaration on the Elimination of Violence against Women, 1993 (DEVAW), as well as section 9(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to mention but a few.

Despite all these legislative and policy frameworks, women's human rights continue to be violated in different ways. Moreover, young girls around South Africa are still subjected to physical and emotional abuse. As a result, it is understood that

¹ See website of the United Nations (UN) "Entity for Gender Equality and Empowerment of Women" also known as "UN Women" (unknown) <https://www.un.org/youthenvoy/2013/07/un-women-the-united-nations-entity-for-gender-equality-and-the-empowerment-of-women/> (accessed 13 March 2020). The CEDAW defines discrimination against women as "[...] any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". See UN Women "Convention on the Elimination of all Forms of Discrimination against Women – Overview of the Convention" (unknown) <https://www.un.org/womenwatch/daw/cedaw/> (accessed 13 March 2020).

² A Rudman "Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol" (2018) 18 *AHRLJ* 320-345.

³ Rudman (2018) 18 *AHRLJ* 319. See B Meyersfeld "Domesticating international standards: The direction of international human rights law in South Africa" (2015) *CCR* 399-400: Meyersfeld discusses the three steps that the executive and the legislature must take for the international treaty to become part of the South African law. First, the executive signs the treaty, followed by parliament approving the treaty in order for the treaty bind South Africa. Finally, the legislation is enacted by parliament to form part of the domestic or municipal South African law. See sec 231 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

⁴ C Heyns and M Killander *Compendium of key human rights documents of the African Union* (2016) 29. See also ACHPR (article 1) page 30.

women who seek justice are confronted by a complex landscape of laws, systems, and institutions.⁵

In South Africa, particularly, violent crimes (such as the rape and murder of Anne Booyesen in 2009 and Banyana National female football team player, Eudy Simelana, and the murder of Reeve Steenkamp) convey a particular message of the lack of justice and protection of women.⁶

These devastating incidents are evidence of the violation of women's rights in South Africa.⁷ Wielenga *et al* refer to feminist scholar, Akachi Ezeigbo who developed the feminist term "snail-sense".⁸ Akachi Ezeigbo uses the analogy of a snail withdrawing itself into a shell for protection whenever danger arises.⁹ Ezeigbo's choice of the snail analogy is adopted from the theory of snail-sense feminism used to encourage women in Nigeria to adopt a snail pace whenever they are confronted with difficult situations as a result of the patriarchal society they live in.¹⁰

Ezeigbo encourages Nigerian women to try and use the snail approach of confronting the difficulties in dealing with men in a rather slow mode just like the speed of a snail.¹¹ Egbo also encourages Nigerian women to adopt a survival mechanism to protect themselves against danger, just like the snail, withdrawing itself whenever danger arises.¹² In this way, women in Nigeria are supposedly able to live a very good and healthy life.¹³ This indicates that when a woman is

⁵ See UN Women "The theories and practice of women's access to justice programming" (2018) www.ohchr.org (accessed 05 June 2019) at 9.

⁶ N Sibanda-Moyo, E Khonje and M Brobbey (eds) *Violence against women in South Africa: A country in crisis* (2017) 11.

⁷ PD Ggola *Rape: A South Africa nightmare* (2015) 192.

⁸ C Wielenga (ed), B Bae, R Murambadoro, Z Matsimbe, C Matshaka and E Dahlmans *Women in the context of justice: Continuities and discontinuities in Southern Africa* (2018) 5-19.

⁹ Wielenga *et al* (2018) 14.

¹⁰ N Ezenwa-Ohaeto "Fighting patriarchy in Nigerian cultures through children's literature" (2015) 10 *Studies in Literature and Language* 59-66, See also R Ochieng "Just the beginning. Understanding African feminism to create more visibility for women in technology" (2018) https://medium.com/@roi_nochieng/just-the-beginning-bca28235b280 (accessed 11 May 2020).

¹¹ Ezenwa-Ohaeto (2015) 10 *Studies in Literature and Language* 62: Ezenwa-Ohaeto further explains that when a snail moves from one place to another it goes through a lot of obstacles to reach its destination such as hard surfaces, rocky, wet thorns, bushy, rough and smooth areas, yet it still manages to effectively overcome its obstacles without any damages. Furthermore a snail moves with its house carrying it on its back from one place to another without any complaints or feeling any strain. A snail moves from one place to another without damaging its lubricated tongue. If danger arouses then it crawls back into its shell for safety. That method of a snail is what Ezenwa-Ohaeto encourages Nigerian women to adopt as a skill to deal with the patriarchal society in which they live.

¹² Ezenwa-Ohaeto (2015) 10 *Studies in Literature and Language* 62.

¹³ Wielenga *et al* (2018) 14.

threatened in society, she has to withdraw from that situation to be protected. This withdrawal includes women subjected (and being submissive) to social patriarchy.¹⁴

Consequently, this dissertation critically examines the reasons why female victims of human rights violations find it difficult to access justice. The analysis is conducted through a social justice feminist approach to challenge the social injustice experienced by women in South Africa.

I also consider the international and national legal positions to determine the effectiveness of these international and national legal instruments in ensuring access to justice for women in Africa.¹⁵

Even though the provisions of international law seem to be available to all victims, access to the international courts may only be granted when local remedies are exhausted.¹⁶ Therefore, this dissertation is motivated by the lack of access to justice that the victims of human rights violations currently experience.

Justice, in itself, is a complex concept that entails different ways of defining human relations.¹⁷ Justice is a process of coordinating people or joining people together to find a right or fair way to live with each other.¹⁸ Concerning justice, the rights of individuals in society are protected but at the same time, everyone is given the same opportunity to equally enjoy those protected rights.¹⁹ In other words, justice refers to how people live together in the same society, guided by different values and traditions within the societies they live in.²⁰

¹⁴ As above.

¹⁵ The instruments I refer to in this regard (pertaining to access to justice for women) are the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003 (Maputo Protocol); CEDAW; UN Security Council Res 1325 (2000) on the role of Women in promoting peace and security; Dakar Declaration of 1994; Beijing Declaration and Platform of Action, Fourth World Conference on Women, 1995; and any other relevant declarations, recommendations, regional and sub-regional instruments, resolutions as well as the decisions, which stipulate and underpin the duty of African member states to ensure that there is an equal and full participation of African women in the equal development of the African continent.

¹⁶ See ACHPR art 56(5); see also International Court of Justice (ICJ): Jurisdictional Immunities of the State (*Germany v Italy: Greece intervening*) (3 February 2012) paras 37-51. A summary of the judgment is available at <https://www.icj-cij.org/files/case-related/143/16899.pdf> (accessed 13 April 2020). The Court held that Italy violated the right to immunity of Germany by allowing compensation and reparation claims, by victims/heirs to be instituted in the Italian civil court. See also R Pavoni "Simoncioni v Germany" (2015) *The American Journal of International Law* 400-406.

¹⁷ KK Ghai "Speech on justice: Meaning and types of justice" (unknown) <http://www.yourarticlelibrary.com/speech/speech-on-justice-meaning-and-types-of-justice/40361> (accessed 22 April 2020).

¹⁸ As above.

¹⁹ As above.

²⁰ As above.

Access to justice, on the other hand, refers to the right of people to obtain a remedy from either formal or informal institutions of justice.²¹ These concepts (justice and access to justice) are discussed in detail in the literature review below.

1.2 Assumptions

The Universal Declaration has played a significant role to create a worldwide roadmap to provide an environment that protects dignity, freedom, and equality for all persons, including women.²² Although the Universal Declaration is not a treaty, it serves as an expression or reference point regarding the common fundamental principles shared amongst member states.²³

The adoption of the Universal Declaration prompted the creation of international agreements to protect human rights and values as guided by the Universal Declaration. After the adoption of the Universal Declaration in 1948, it sparked several very important international treaties relating to race, gender, equality, *etcetera*.²⁴ The adoption of the Universal Declaration further lead to the recognition of human rights, women were allowed to vote, several human rights institutions were established all over the world, as well as the freedom of the press (which was recognised and incorporated in the constitutions of many countries, including South Africa).²⁵

However, the Universal Declaration has also created a significant challenge in the way these rights are implemented and adhered to.²⁶

²¹ E Shearer “Access to justice: A decade for justice: We start with four key facts” (2020) *Queensland Law Society Journal* 39. See also Foundation for Human Rights (FHR) Anonymous <https://www.fhr.org.za/tag/access-to-justice/> (accessed 22 April 2020).

²² See Anon “How has the Declaration of Human Rights changed the world?” *Politics & Society* (24 September 2018) <https://www.thebigq.org/2018/09/24/how-has-the-declaration-of-human-rights-changed-the-world> (accessed 24 November 2021) (hereafter Anon “How has the Declaration of Human Rights changed the world?”).

²³ See Australian Human Rights Commission “What is the Universal Declaration of Human Rights?” (unknown) <https://humanrights.gov.au/our-work/what-universal-declaration-human-rights> (accessed 12 May 2020).

²⁴ See Anon “How has the Declaration of Human Rights changed the world?” See also arts 1 and 2 of the Universal Declaration.

²⁵ See Anon “How has the Declaration of Human Rights changed the world?” See also arts 1, 2, 6-8, 13 and 16 of the Universal Declaration.

²⁶ K Annan “Human rights challenges in Larger Freedom: Towards Development, Security and Human Rights for All” (unknown) <https://www.humanrights.com/voices-for-human-rights/human-rights-challenges.html> (accessed 12 May 2020) (hereafter Annan “Human rights challenges”). See also *Special report of the Secretary-General on elections in the Democratic Republic of the Congo* 2005/320 (26 May 2005) <https://www.un.org/securitycouncil/content/secretary-generals-reports-submitted-security-council-2005> (accessed 12 May 2020).

The national and international instruments mentioned above also play a significant role in the justice system for women.²⁷ Instruments, such as, *inter alia*, the CEDAW and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003 (Maputo Protocol) are established to assist women to fight for their fundamental rights by using these international human rights instruments.²⁸ However, the above-mentioned international tools have created many challenges that contribute to the problem of women accessing the very justice that is at the forefront of these human rights instruments.²⁹

A social justice feminist approach seems to provide a solution to the lack of access to justice. Social justice feminism is concerned with social change; everyone is allowed to do good and at the same time empowered with the necessary resources to succeed.³⁰ Ideally, the achievement of social change results in equal protection of people against human rights violations.³¹ In this context, the question arises: is an entirely different implementation approach to the entire justice system the answer?³²

²⁷ See international human rights instruments such as CEDAW, DEVAW, UDHR, and ACHPR. See further International Covenant on Civil and Political Rights, 1966 (ICCPR), and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).

²⁸ See International Bill of Human Rights, 1948; and the Maputo Protocol as adopted based on arts 2, 18, 61 and 61 of the ACHPR. The Maputo Protocol further reaffirms the issue of promoting gender equality in Africa. It is a legally binding framework, which binds all African government signatories to the Protocol for any violations of the rights of women and girls in Africa.

²⁹ Annan "Human rights challenges" refers to challenges, such as intimate partner violence, discrimination against women at work, discriminatory family laws, discriminatory property regimes, gaps in legal identity, and the exclusion of women from decision-making. See also IDLO "Justice for Women High-level Group Report" 9-15.

³⁰ M Gray, K Agllias and K Davis "Social Justice Feminism" in M Reisch (ed) *The Routledge International Handbook of Social Justice* (2014) 173-185.

³¹ As above.

³² Many of our international, regional, and national legal instruments are more directed towards punishment or consequences against a wrong act against the morals of the community. While the concept of restorative justice is one of the systems aimed at restoring social change, dignity, identity, feelings, and the rights of victims of human rights abuse(s), it also provides the wrongdoer with an opportunity to truthfully admit their wrong, and correct their mistakes towards the victims. To effectively implement restorative justice, community empowerment is at the forefront to ensure a successful execution of social change in their communities. Another approach could be a strict implementation of art 11 of the Convention Against Corruption. Implementation Guide and Evaluative Framework for article 11, 2015, which emphasis the explicit judicial independence, uprightness, and culture based on fairness, integrity and lawfulness. Perhaps strengthening the judiciary would effectively deal with corruption, which is one of the contributing factors to the violation of human rights. In addressing corruption, the judiciary can have a positive impact on achieving social change. See UN Office on Drugs and Crime (UNODC) "Topic one - Concept, values and origin of restorative justice" (unknown) <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html> (accessed 20 July 2020). See also Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (Res 2000/14, UN Doc E/2000/INF/2/Add.2); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (GA res 40/34 of 29 November 1985); and the Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider UN Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation (GA Resolution 70/174 of 2015).

To address the problem of access to justice for women in South Africa, current South African laws, rules, policies, cultural norms, case law, and journal articles are explored. This also aims to provide a broader perspective on current occurrences of human rights violations against women.

1.3 Research questions

In an attempt to explore the challenges regarding women's lack of access to justice, and in the context of a social justice feminist approach, this research is guided by the following research questions:

- 1.3.1 What is the South African legal framework for women's access to justice rights?
- 1.3.2 How accessible is the Regional legal framework to ensure that black South African women's access to justice rights is fully realisable?
- 1.3.3 What social and cultural challenges affect access to justice for women, particularly black women in South Africa?

1.4 Literature review

1.4.1 Why is it important for women to have access to justice and how does South African law recognise women's access to justice rights?

1.4.1.1 Meaning of justice

What is the meaning of justice? There is more than one way to define the concept of justice. In this research, the definition of justice is premised on a multidisciplinary approach. According to Hurlbert and Mulvale,³³ "justice" is a word that is commonly used in our daily lives. Many people refer to justice when commonly referring to arrest, prosecution, and imprisonment.³⁴ Others refer to justice to examine how a person landed in trouble in the first place.³⁵

Some refer to justice as a person's behaviour against societal values, either individually or on a broader societal level.³⁶ Justice can also refer to the descriptions of crimes and who is to be

³³ MA Hurlbert and JP Mulvale "Defining justice" (unknown) <https://fernwoodpublishing.ca/files/pursuingjustice.pdf> (accessed 11 November 2019) 9-19. (hereafter Hurlbert and Mulvale "Defining justice").

³⁴ Hurlbert and Mulvale "Defining justice" 9.

³⁵ As above.

³⁶ Hurlbert and Mulvale "Defining justice" 14.

prosecuted in our society.³⁷ Hurlbert and Mulvale further refer to justice as a reward for hard work, such as farming and invention. Retailers, as well as the government, receive revenue and profits from hard work, which can also be described as justice.³⁸

Employees in developing countries are paid according to their hard work or by long work hours.³⁹ Therefore, receiving a low reward if one works short hours may also be described as a form of justice.⁴⁰ A successful renegotiation of the benefits towards the developing countries as a result of the supply of their natural resources to the developed countries could also be described as justice.⁴¹

Hurlbert and Mulvale then define the concept of justice in four ways, namely (1) desert; (2) fairness; (3) equality; and (4) moral righteousness.⁴² The “desert” aspect of justice derives from the notion that “you get what you deserve”.⁴³ “Desert” is used to describe instances of rewarding good deeds, such as a person doing voluntary work and is recognised as an influencer in the society, or a heroic deed of rescuing a child from a collapsing bridge or drowning.⁴⁴ When a person is recognised for the good they do and rewarded, it is believed that the rewarded person deserves that promotion, recognition, praise, or award, which is a positive desert of justice.⁴⁵

“Desert” does not only have a positive effect; it can also result in negative consequences (for example, if a repeat offender is sentenced to prison, given a fine, or another form of penalty, which that particular person deserves). Such a sentence or punishment could be described as justice.⁴⁶

The “fairness” aspect of justice is derived from the idea of treating people equally.⁴⁷ Equality must be exercised in employment opportunities and equal pay to all without any

³⁷ Hurlbert and Mulvale “Defining justice” 10.

³⁸ As above.

³⁹ Hurlbert and Mulvale “Defining justice” 9.

⁴⁰ As above.

⁴¹ Hurlbert and Mulvale “Defining justice” 10: Hurlbert and Mulvale posit that developed countries have and continue to take advantage of the developing countries when it comes to the supply of their natural resources and call for a change in the distribution as well as the benefits of the trade guided by the international human rights to the equal benefit parties. Finally, Hurlbert and Mulvale call for more studies in terms of the environmental impact consequence towards the developed countries to be help more accountable.

⁴² Hurlbert and Mulvale “Defining justice” 9.

⁴³ Hurlbert and Mulvale “Defining justice” 14.

⁴⁴ As above.

⁴⁵ As above.

⁴⁶ As above.

⁴⁷ Hurlbert and Mulvale “Defining justice” 15.

differentiation based on, *inter alia*, race, gender, age, and ethnicity.⁴⁸ Fairness in the context of providing accessible legal services to all persons (and fair representation of those who cannot afford legal representation) also forms part of the fairness aspect of justice.⁴⁹ In other words, the fairness aspect of justice also includes the provision of accessible legal representation to all, especially those who are unable to afford it.

The “equality” aspect of justice advocates for equal citizenship rights, such as the right to vote, the right to obtain essential services such as health services, education, and medical insurance.⁵⁰ “Equality” further refers to the social and economic dimensions, which should ensure that everyone has equal access to the labour market, access to adequate and affordable housing, safe water, and other essential services.⁵¹ When all essentials and other developmental programmes (provided through governmental plans) are equally accessible, such an achievement could also be described as justice.⁵²

The “moral righteousness” aspect of justice concerns the “individual virtue and ethical conduct” of a person.⁵³ A person engaging in noble behaviour that positively influences a community (or sets a positive example for children or individuals in society) creates and encourages an environment guided by moral righteousness and a spirit to do good.⁵⁴ The positive influence on society can be small things, such as providing water for the community or taking care of family, which renders that person a role model in society.⁵⁵ The achievement or effects of a positive community influence can also be described as justice.⁵⁶

From the different definitions of justice described above, it seems that “justice” is a concept that changes over time with an emphasis on the process of assessing the fairness of relations between individuals. In this dissertation, the “justice” advocated for is one based on social justice

⁴⁸ As above.

⁴⁹ As above.

⁵⁰ Hurlbert and Mulvale “Defining justice” 16.

⁵¹ As above.

⁵² As above.

⁵³ Hurlbert and Mulvale “Defining justice” 17.

⁵⁴ As above. The selfless conduct of people like Nelson Mandela, Mary Teresa Bojaxhiu (Mother Theresa), Malcom X, Martin Luther King Jr, Julius Nyere, Hosea Kutako, Hendrick Witbooi, Patrice Lumumba, John R Lewis, Louis Farrakhan, and many other noble individuals that helped to create better societies all over the world are all examples of moral righteousness. You do good to create a better society and in that way justice is achieved. See also B Solanki and V Pandey “Who was Mother Teresa?” (4 September 2016) <https://www.bbc.com/news/av/world-asia-india-37255760/who-was-mother-teresa> (accessed 21 July 2020).

⁵⁵ Hurlbert and Mulvale “Defining justice” 17.

⁵⁶ As above.

feminism. The concept of social justice requires an impartial and unbiased relationship between society and individuals. Such a “just and fair” relation is measured by assessing the different opportunities afforded to that particular individual, such as wealth distribution, opportunities, privileges, and protection, *etcetera*.

When a fair and just relation between an individual and society is not established due to oppressive issues, such as discrimination based on race, gender, sexual orientation, or religion, *etcetera*, it is said that there is a violation of human rights; therefore social justice has been denied towards the particular individual.⁵⁷ Social justice feminism identifies the specific discriminative issues that contribute towards denying an individual to establishing a fair and just relation with society.⁵⁸

Social justice feminism further allows for the inclusion of a wider audience of groups or movements of women.⁵⁹ In practice, social justice feminists identify issues of oppression relating to race, class, sexism, citizenship, and any other issues that deny women a just and fair relation in society.⁶⁰ One way to achieve a just and fair society is to advocate for the inclusion of all women regardless of class, position, race etcetera, which can be achieved when parliament empowers women through law reform.⁶¹

This dissertation focuses on the lack of access to justice for women, in particular black women that are subjected to many human rights violations.⁶² The justice I advocate for in this dissertation is the protection of women subjected to human rights abuses in South Africa, as well as a fair, equal, just, and balanced safe space for these women.⁶³

⁵⁷ See International Development Law Organization (IDLO) “Justice for Women High-level Group Report” (27 March 2019) <https://www.idlo.int/publications/justice-women-high-level-group-report> (accessed 24 July 2020) (hereafter IDLO “Justice for Women High-level Group Report”) at 9-23 and specifically “Social Institutions and Gender Index by region 2019” at 6-7 of the report.

⁵⁸ See also JD Lawton “Teaching Social Justice in Law Schools: Whose Morality Is It?” (2017) *Indiana Law Review* 813-848. See also N Sultany “What Good is Abstraction: From Liberal Legitimacy to Social Justice” (2019) 67 *Buffalo Law Review* 823.

⁵⁹ Lawton (2017) *Indiana Law Review* 818. See also OM Fiss “What is Feminism?” (1994) *Arizona State Law Journal* 413.

⁶⁰ As above. See also SM Wildmant “Practicing Social Justice Feminism in the Classroom” (2014) *Freedom Centre Journal* 59-60.

⁶¹ IDLO “Justice for Women High-level Group Report” 69-83.

⁶² IDLO “Justice for Women High-level Group Report” 36.

⁶³ IDLO “Justice for Women High-level Group Report” 36 and 45-48.

Overall, an inclusive environment must be established where women feel safe and protected and can freely and adequately access justice whenever their human rights are violated.⁶⁴

1.4.1.2 What is social justice feminism?

Social justice can be described as examining the basic structure of society and articulating significant principles to construct a social framework that is fair and just.⁶⁵ A just and fair social framework would be a transformed society that protects and promotes human rights, dignity, and the equal allocation of resources, diversity, and anti-discrimination initiatives.⁶⁶ Feminism, on the other hand, can be described as the advocacy for the rights of women.⁶⁷ Furthermore, feminism is defined as collective movements aimed to define and establish equal opportunities for women in terms of politics and economic- and social rights.⁶⁸ In other words, feminism advocates the desire for increased autonomy for women.⁶⁹

McGuire, a historian, used the term “social justice feminism” to describe a movement that was led by working- and middle-class activists in the late nineteenth and early twentieth centuries.⁷⁰ Initially, the social justice feminist movement focused mainly on labour reform by seeking to reduce women’s work hours and increase their work conditions and minimum wages.⁷¹ The appointment of Florence Kelley as general secretary of the National Consumers’ League in 1899 kick-started this movement.⁷² Although they faced numerous obstacles to ascertain what the movement advocated for, this dissertation does not explore those obstacles.

The term “social justice feminism” was further adapted by Roberts and Callahan who modified social justice with feminism to emphasise or articulate an approach to address the issues of law and policies, and the concerns of systemic inequality.⁷³ Roberts and Callahan further argue that feminist social justice is more superior to liberal feminism and liberalism because it focuses

⁶⁴ IDLO “Justice for Women High-level Group Report” 2.

⁶⁵ K Kalsem and VL Williams “Social Justice Feminism” (2010) *UCLA Women's Law Journal* 131.

⁶⁶ Kalsem and Williams (2010) *UCLA Women's Law Journal* 149.

⁶⁷ Kalsem and Williams (2010) *UCLA Women's Law Journal* 141.

⁶⁸ N Black *Social Feminism* (2019) Cornell University Press 164-222.

⁶⁹ Black (2019) 164.

⁷⁰ Kalsem and Williams (2010) *UCLA Women's Law Journal* 151.

⁷¹ As above.

⁷² As above.

⁷³ Kalsem and Williams (2010) *UCLA Women's Law Journal* 157.

more on individual liberty without recognising other important considerations, such as social and political equality for all.⁷⁴

Subsequently, feminist social justice is based on the notion of respecting another person; it is not limited to “giving someone space” as it necessitates attending to those conditions to allow that particular person to succeed.⁷⁵ Roberts and Callahan describe social justice feminism as a reflection of dissatisfaction centred more directly on liberal feminism.⁷⁶ Liberal feminism, on the other hand, focuses more on the white middle-class heterosexual female, which examines the status of such woman compared with her male counterpart.⁷⁷

In doing so, liberal feminism in its emphasis on formal equality fails to effectively address the other social and political structures that support the notions of patriarchy.⁷⁸ Thus, social justice feminism aims to expose and dismantle the very structures of liberal feminism (mentioned above), such as white privilege, heterosexualism, able-ism, and classism.⁷⁹

Social justice feminism identifies issues that contribute to systematic subordination and aims to develop structures for change.⁸⁰ In this dissertation, change is advocated for through the lens of social justice feminism to eradicate human rights abuses, such as discrimination, inequality (including social and economic inequality), sexual assault, violence against women, *etcetera*. The human rights abuses mentioned above are experienced daily by most South African women. Most women who face these violations lack access to justice; therefore, I examine the social challenge of access to justice faced by women in South Africa — specifically black women.⁸¹

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ As above.

⁷⁷ As above.

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ Kalsem and Williams (2010) *UCLA Women's Law Journal* 161.

⁸¹ The choice of black women is derived from the definition of the term “black people” by the Broad-Based Black Economic Empowerment Act 53 of 2003 which defines black people as a generic term used to describe Africans, coloured, and Indians. I therefore derive my definition of “black women” from the concept of the Black Economic Empowerment (BEE) definition of black people. The “black women” definition does not advocate for skin colour or identification of race. The choice of “black women” is selected simply because they are mostly subjected to hardship and human rights violations.

1.4.1.3 What is access to justice and why is it important for women to have access to justice?

The principle of “access” can be defined in many ways and through different angles. Ribot and Peluso provide a theory of access, which they describe as “the right to benefit from things”.⁸² The theory of access is defined through the lens of analysing property and natural resources.⁸³ “Access”, as described by Ribot and Peluso, seems to facilitate the notion of who benefits from things and the process used to benefit from those things.⁸⁴ The concept of access further focuses on the issue of “who does (and who does not) get to use what, in what ways, and when”.⁸⁵ In other words, access focuses on the ability to use and enjoy a certain benefit or stream.⁸⁶ In terms of resources, access refers to those (people or institutions) who control access to resources.⁸⁷

People who do not fit within the categories of owning resources can only access these resources through certain people or institutions that own the resources. The importance of access analysis is to determine why certain people or institutions have access to certain resources even if they do not own these resources.⁸⁸

The meaning of access can change when used in combination with different words. The context of “access” placed with “justice” describes the ability of a person whose human rights have been violated to access the necessary or preferred recourse.⁸⁹ The access advocated for in this dissertation is the ability for women to access justice — where women’s voices can be heard and they can exercise their rights and the ability to challenge discrimination and hold those who (including decision-makers) violate their human rights accountable.⁹⁰

For example, a woman is not recruited as a bus driver based on her sex or gender or a husband beats his wife simply because she refuses to cook. The women in both these scenarios must be able to utilise the applicable tools or mechanisms, freely ask questions, and obtain answers for the committed injustices.

⁸² JC Ribot and NL Peluso “A Theory of Access” (2003) *Rural Sociological Society* 153-181.

⁸³ Ribot and Peluso (2003) *Rural Sociological Society* 154.

⁸⁴ As above.

⁸⁵ As above.

⁸⁶ As above.

⁸⁷ Ribot and Peluso (2003) *Rural Sociological Society* 156.

⁸⁸ As above.

⁸⁹ As above.

⁹⁰ UN and the Rule of Law “Access to Justice” (unknown) <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (accessed 06 June 2020). See also UNODC “Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems” (2013) https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf (accessed 06 June 2020).

Access to justice for black women refers to the legal and constitutional framework which guarantees, and at the same time creates, an environment that enables women to access justice whenever their human rights are violated.⁹¹ Access to justice for these women cannot be achieved without education, awareness of rights, and the decision-making power of women. Many women are unable to claim their rights, obtain legal aid, or access the courts.⁹² Other related issues that also engulf South Africa include poverty, inequality, and unemployment. Amid these issues, women and children are affected the most.⁹³

This means that women are greatly exposed and more vulnerable than males.⁹⁴ To improve this inequality, women require access to justice and equal access to the courts.⁹⁵ This can be achieved through the constitutional realisation of rights and support of community-based organisations, which assist women to access justice.⁹⁶ Since women are the most affected by these injustices, they require access to the system, regardless of whether they are rich or poor, to be protected and report incidents of human rights violations.⁹⁷

Access to justice is so important that it must be achieved before one can speak of access to equality and dignity.⁹⁸ The right of access to justice allows the politically and economically marginalised to protect and vindicate their fundamental rights, which the vulnerable people formally have but are unable to enjoy.⁹⁹ Differently worded — access to justice not only improves and protects the lives of affected women but also promotes security, power, capacity, and the culpability of people to make informed decisions.¹⁰⁰

Access to justice also assists vulnerable women faced with the challenges of social-economic hardships, general human rights abuses, and discrimination to be equipped with the

⁹¹ M Becker “Access to Justice for Battered Women” (2003) *Washington University Journal of Law & Policy* 63-98.

⁹² See European Institute for Gender Equality “Equal access to justice for women and men” (unknown) <https://eige.europa.eu/thesaurus/terms/1103> (accessed 13 November 2019).

⁹³ “Access to justice” is defined as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards”. See FHR anonymous <https://www.fhr.org.za/index.php/programmes/access-justice/> (accessed 28 June 2019).

⁹⁴ As above.

⁹⁵ As above.

⁹⁶ As above.

⁹⁷ As above.

⁹⁸ M Ameerma “Being able to access justice is a human right” (12 February 2015) <https://mg.co.za/article/2015-02-19-being-able-to-access-justice-is-a-human-right> (accessed 28 June 2019) (hereafter Ameerma “Being able to access justice is a human right”); see also UN Digital Library “Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona: addendum” (2013) <https://digitallibrary.un.org/record/755530?ln=en> (accessed 28 June 2019).

⁹⁹ Ameerma “Being able to access justice is a human right” 1.

¹⁰⁰ As above.

necessary tools to protect themselves against human rights violations. Access to justice allows these women access to the courts and their processes and to use the law to enforce rights and responsibilities.¹⁰¹

1.4.1.4 Discussion

In the *Bhe* case, Langa DCJ held that

The subjection by native law of women to tutelage and the denial of *locus standi in judicio* unaided is neither ‘inconsistent with the general principles of civilisation recognised in the civil world’ nor is the custom one which occasions evident injustice, or which is ‘in conflict with the accepted principles of natural justice’, [...].¹⁰²

The above Court’s remark suggests that many years ago, South African women had little (if any) access to justice. The Court, therefore, acknowledges that the need exists to afford South African women the same legal standing and equal access to justice. This can be achieved by broadening and developing rules, norms, and social perceptions about women in the country.

South Africa is a signatory to all the above-mentioned regional and international instruments. This means that South Africa is bound by the Constitution, African regional instruments as well as international principles to afford adequate access to justice for women.

The World Health Organisation (WHO) conducted a study into women’s violence. The WHO found that 60 000 women and children are victims of domestic violence in South Africa. Of this, 45.9% constitutes violence associated with intimate relationships. In July 2020, African Check conducted a similar study in the country.¹⁰³ The study categorised violence into (1) emotional-; (2) physical-; (3) sexual-; and/or (4) economic violence. The survey indicates that 51.3% of women in the Gauteng province reported experiencing either emotional-, physical-, sexual-, and/or economic violence in their lifetime.

African Check found that 26% of women experienced one or more of these forms of violence. Physical violence is the most prevalent form of violence experienced by victims (21%). This is followed by emotional violence (17%) and sexual violence (6%). Notably, these numbers

¹⁰¹ As above.

¹⁰² *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC) para 62 (hereinafter the *Bhe* case).

¹⁰³ Africa Check “Africa Check sorts fact from fiction” (unknown) <https://africacheck.org/> (accessed 28 June 2019).

vary from province to province. The Gauteng province paints a picture of the serious daily violations of women's rights in South Africa.

The question that arises is whether the South African government is doing enough to fulfil the constitutional and international obligations (i.e. women's access to justice)? Although South Africa has enacted legislative measures to curb the spread of gender-based violence (GBV) it is not sufficient. This is because it is trite in South Africa that every one out of three women is killed daily. This is not acceptable, especially when considering the obligations imposed by the Constitution and international instruments. It is clear that crimes of this nature rapidly increase. Hence, the response to crimes of this nature must also increase. It is argued that more effective implementations of enacted legislation must be taken to afford equal access to justice for the most vulnerable groups.

The above figures clearly indicate that currently, South African women are more likely to experience serious GBV than any other woman in the world.

Nhlapo rightly posits that protecting people from distortions masquerading as a custom is imperative, especially for those they disadvantage so gravely, namely, women and children.¹⁰⁴

1.4.1.5 How does South African law recognise women's access to justice rights?

South African laws such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) are not only in line with the Constitution but also with the international instruments and regional jurisprudence,¹⁰⁵ including the protection of women and children's rights.¹⁰⁶ This protection is entrenched into our Constitution, including, *inter alia*, the right to life,¹⁰⁷ human dignity,¹⁰⁸ freedom and security,¹⁰⁹ bodily and psychological integrity,¹¹⁰ and protection from slavery and forced labour.¹¹¹

¹⁰⁴ T Nhlapo "African customary law in the interim Constitution" in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 162.

¹⁰⁵ See, *inter alia*, arts 2-6, 8, 9 and 11-18 of the Maputo Protocol.

¹⁰⁶ See, for example, the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC).

¹⁰⁷ Sec 11 of the Constitution.

¹⁰⁸ Sec 10 of the Constitution.

¹⁰⁹ Sec 12(1) of the Constitution.

¹¹⁰ Sec 12(2)(b) of the Constitution.

¹¹¹ Sec 13 of the Constitution.

Furthermore, other legislative measures have been advanced to ensure that the rights of vulnerable groups are protected. These include the Domestic Violence Act 116 of 1998;¹¹² the Equality Act; and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Criminal Law Act).

The protection is further provided in other forms such as the Protection from Harassment Act 17 of 2011 (Harassment Act) and the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (Trafficking Act). In South Africa, it is noted that all branches of government (including our judiciary) must assist to protect women and children.¹¹³

I now evaluate how the current laws, rules, policies, and cultural norms inform or affect women's access to justice rights. Therefore, one needs to look at the existing laws and the impact it has on the rights of women to access justice. In other words, the question is whether the South African legal approach is sufficient to promote and protect women's access to justice rights in the country. The South African legal approach refers to the Constitution and legislation guiding decisions to ensure that access to justice for all persons is achieved. Notably, like any other country, South Africa experiences a high volume of cases of human rights violations, such as GBV.¹¹⁴

According to South Africa Crime Statistics, on average, one out of five women older than eighteen has experienced physical violence in South Africa.¹¹⁵ However, the picture of gender-based attacks varies according to the marital status and wealth of women.¹¹⁶ It should be pointed out that this challenge does not only originate from societal attitudes of patriarchy and chauvinism, but also the ineffectiveness and inefficiency of government programmes and interventions.

¹¹² Hereafter the Domestic Violence Act. Notably, the Domestic Violence Act repealed the Prevention of Family Violence Act 133 of 1993. It is important to note that in terms of the Preamble of the Domestic Violence Act, it aims "to afford the victims of domestic violence the *maximum* protection from domestic abuse that the law can provide, and introduce measurements which seek to ensure that the relevant organs of the state give full effect to the provision of this Act, and thereby to convey that the State is committed to the elimination of domestic violence" (own emphasis added).

¹¹³ As a starting point see sec 28 of the Constitution. See *Bhe* where the Court declared sec 23 of the Black Administration Act 38 of 1927 unconstitutional (sec 23 only allowed legitimate children to inherit from their testator's estate, but excluded children born out of the marriage). See also *Shibi v Sithole* 2005 (1) SA 580; and *Masiya v Director of Public Prosecutions Pretoria (The State)* 2007 (5) SA 30 (CC) where the Court extended the definition of rape to also include anal penetration. For recent developments in South Africa's common and customary law of succession see MC Schoeman-Malan "Recent development regarding South African common and customary law of succession" (2007) *PELJ* 1-33.

¹¹⁴ See Statistics South Africa "Crime Statistics Series Volume V: Crime against women in South Africa (Report No 03-04-05)" (June 2018) <https://www.statsa.gov.za> (accessed 05 June 2019).

¹¹⁵ As above.

¹¹⁶ As above.

Therefore, I evaluate to what extent the legal system and social-economic and government interventions perpetuate the violation of women’s human rights.

This dissertation is guided by scholars, such as Kalsem and Williams, who speak about the origins of social justice feminism in the early twentieth century.¹¹⁷ Ideally, social justice feminism has many similarities that it shares with feminist legal theories, particularly critical race theory.¹¹⁸

Therefore, I look at feminist theorists, such as Harris who brought in the word “race” intervention in the discussion of feminism.¹¹⁹ Harris states that as much as feminism is about advocating for the rights of women when feminist discussions are conducted, the issue of race should be included.¹²⁰ By including race in the discussion, challenges of systematic oppression experienced by women of colour are identified and included in advocating for women’s human rights.¹²¹ Critical race theory shares some similarities with social justice feminism on the issues of recognising and addressing the multiple oppressions and inequality.¹²²

This dissertation also refers to Crenshaw and Harris who speak about the concept of “intersectionality and anti-essentialism” to emphasise the multiple forms of subordination aimed against women, which are also shared by social justice feminism to identify the factors that contribute to a lack of access to justice for women.¹²³

I also refer to feminist scholars (Akachi Ezeigbo and Ezenwa-Ohaeto) who speak about the patriarchal society women live in and how it contributes to the lack of access to justice.¹²⁴ The purpose of referring to different scholars is to identify the different challenges that women endure (such as systematic subordination, inequality, and the injustices hindering women from obtaining justice), which contributes to the entire system of women’s lack of access to justice.¹²⁵

¹¹⁷ Kalsem and Williams (2010) *UCLA Women's Law Journal* 134. In 2007 the New Women’s Movement Initiative (NWMI) conference was held in America. The purpose of the meeting was to address the divisions amongst the women movements to build trust and analyse strategies to revive US feminism. During the conference, it was noted that many of the feminist who gathered at the conference were women of colour. Although the conference was about feminism, bringing many women from all works of life to deliberate on the issues of women, it come to the forefront of the participants who soon realised that they had different meanings of what feminism was all about and that is how the meaning of feminism started to expand.

¹¹⁸ Kalsem and Williams (2010) *UCLA Women's Law Journal* 139.

¹¹⁹ Kalsem and Williams (2010) *UCLA Women's Law Journal* 157-158.

¹²⁰ As above.

¹²¹ Kalsem and Williams (2010) *UCLA Women's Law Journal* 158.

¹²² As above.

¹²³ As above.

¹²⁴ Ezenwa-Ohaeto (2015) 10 *Studies in Literature and Language* 62.

¹²⁵ Kalsem and Williams (2010) *UCLA Women's Law Journal* 158-161.

Social justice feminism aims to identify this injustice, systematic subordination, and inequality to develop theories or strategies to change the narrative of black women's lack of access to justice.¹²⁶ It is imperative to critically examine the feminist theorist and critical race theory to understand social justice feminism.

1.5 How accessible is the South African Legal framework in ensuring that black South African women's access to justice rights are fully realisable?

The Maputo Protocol emphasises the promotion of gender quality, elimination of all forms of discrimination, and GBV against women. The Maputo Protocol further places a duty on member states to create effective opportunities for women to access justice.¹²⁷ It seems that the Maputo Protocol encourages first exhausting the national laws and opportunities; if all other avenues have been exhausted, women can approach the African Court on Human and Peoples' rights (African Court).¹²⁸

On 18 May 2018,¹²⁹ for the first time since its inception,¹²⁹ the African Court issued a judgment in the matter of *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA) versus the Republic of Mali*.¹³⁰ The judgment is remarkable as the Court ruled on a violation of the Maputo Protocol for the first time.¹³¹ The Malian Family Code (adopted in 2011), allowed girls to

¹²⁶ Kalsem and Williams (2010) *UCLA Women's Law Journal* 161.

¹²⁷ See also arts 2, 5 and 8 of the Maputo Protocol, which emphasises the importance of women to have an equal protection and benefit of the law.

¹²⁸ See also art 56(5) of the Maputo Protocol, which refers to the exhaustion of local remedies unless the procedure are unreasonably prolonged.

¹²⁹ A Badoo "Association Pour le Progrès et la Défense Des Droits Des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali (Afr. Ct. H.P.R.)" (2018) 57 *The American Society of International Law* 1097-1130.

¹³⁰ Application 46/2016 11 May 2018 (Afr Ct HPR) (hereafter the *APDF v IHRDA* case). See A Banens "African Court issues its first judgment on women's rights" (13 September 2018) <https://ilg2.org/2018/09/13/african-court-issues-its-first-judgment-on-womens-rights/> (accessed 28 June 2019) (hereafter Banens "African Court issues"). In *APDF v IHRDA*, an application was submitted to the African Court against the Republic of Mali for promulgating the 2011 Malian Family Code, which violated several international human rights instruments of which Mali was a signatory. The Applicant relied on several provisions of the Maputo Protocol, such as art 6(b), which stipulates 18 years as the minimum age for marriage; arts 1(3), 2 and 21 of the ACRWC; arts 16(a)-(b) of CEDAW, which address the rights to consent to marriage, as well as several provisions of the ACHPR.

¹³¹ Banens "African Court issues". See also *ACRWC v IHRDA* para 135: the Court unanimously concluded that the State violated the several international human right provisions and ordered the State to amend the impute laws and

be married at the age of sixteen, and at times the minimum age could be lowered to fifteen, and consent from the intended child bride is not a requirement for the validity of the marriage.¹³²

The African Court held that the provisions under the 2011 Malian Family Code violate the Maputo Protocol and should therefore not be followed.¹³³ In the same vein, the African Court also addressed the issue of inheritance, Islamic law, and customary practices referring to the entitlement of women and children to inherit.¹³⁴ The Court further indicated that the 2011 Malian Family Code is discriminatory and supports practices or traditions that are harmful towards women and children, in violation of the Maputo Protocol.¹³⁵ The Court ordered the Mali government to amend its legislation to be in line with the Maputo Protocol.¹³⁶

The decision by the African Court establishes a progressive step for the recognition of women's rights in Africa.¹³⁷ In *ACRW v IHRDA*, the African Court also touched on one specific procedural aspect of interest, namely "reasonable time".¹³⁸ Article 56(6) of the African Charter requires that matters submitted to the commission must be completed within a reasonable time.¹³⁹

The Court, on numerous occasions, confirmed its position of "reasonable time" and that "reasonable time" is determined on an *ad hoc* basis.¹⁴⁰ However, in *ACRW v IHRDA* the Court adopted a more flexible approach and allowed the matter to be heard four years after the applicant acquired knowledge of the discriminatory law.¹⁴¹ Thus, the Court relaxed the requirement to bring

to harmonise its laws confined with international instruments and to take appropriate measures to remedy and end the violations committed.

¹³² Banens "African Court issues". See also *ACRW v IHRDA* para 117: in the instant case were the Applicant asserts that the 2011 Malian Family Code allowed girls age 16-17 years to be married with only the father's consent even though the mother opposes to the marriage as a father's decision supersede any other, thus making the early marriage of girls easier. The Applicant further compared the requirement of the 2011 Malian Family Code to the 1962 Malian Family Code where permission from both parents for the conclusion of a valid marriage was a requirement, which made it difficult for young girls to be married at such a tender age even though the age requirement was 15-17 it placed a more stringent protection for the girls.

¹³³ Banens "African Court issues". See art 2(2) of the Maputo Protocol; arts 1(3) and 21 of the ACRWC; and art 5(a) of CEDAW.

¹³⁴ Banens "African Court issues".

¹³⁵ As above. See further *ACRW v IHRDA* para 125.

¹³⁶ Banens "African Court issues". See also art 27(1) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 1998, which grants power to the African Court to make appropriate orders to remedy violation of human rights including orders of a fair compensation or reparations as it has happened in this case.

¹³⁷ Banens "African Court issues".

¹³⁸ As above. See *ACRW v IHRDA* paras 45-54.

¹³⁹ Banens "African Court issues". See art 56(6) of the ACHPR, which requires for matters to be brought to the Commission to be heard within a reasonable time or otherwise if a certain period passes the matter can no longer be heard.

¹⁴⁰ Banens "African Court issues".

¹⁴¹ As above.

an application to the African Court within a reasonable time (in this case, four years later).¹⁴² The Court indicated that “reasonable time” was not a fixed rule and that certain exceptions could be made to the requirement, as evident from this case.¹⁴³ The decision of the Court serves as good news for women because it signalled a message of hope; regardless of the hardships experienced or endured nationally (domestically) seeking justice without success, eventually, access to justice for women would be achieved.¹⁴⁴

In this case, the Court established the relevance and importance of the Maputo Protocol as well as the Court’s flexible interpretation of procedural matters to benefit the effective protection of human rights.¹⁴⁵ Furthermore, the Maputo Protocol and national (local or domestic) laws afford vast protection for women against human rights violations in Africa.¹⁴⁶ Sadly, however, women still find it difficult to access justice, as evident from the *ACRW v IHRDA* case (where it took four years to access justice).¹⁴⁷ Up until the final judgment of the Court, human rights violations against the women of Mali continued. This then raises the question: why are women unable to successfully access justice?

As noted above, human rights violations against women (including their right to access justice) can occur in different forms. It is noteworthy to consider the definition of “violence against women” (VAW) as provided in the DEVAW as it is arguably broad enough to include all forms of human rights violations. The definition of VAW is provided as follows:

[A]ny act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.¹⁴⁸

The importance of this definition is that it depicts the underpinnings of the human rights scope and other instruments, which specifically address women’s access to justice.¹⁴⁹ Furthermore, this definition seems to expand on the protection provided by the DEVAW, Universal

¹⁴² As above.

¹⁴³ As above.

¹⁴⁴ As above.

¹⁴⁵ As above.

¹⁴⁶ As above.

¹⁴⁷ As above.

¹⁴⁸ Art 1 of the Declaration on the Elimination of Violence against Women, 1993 (DEVAW).

¹⁴⁹ Amnesty International “Gender, Sexuality, & Identity” (unknown) <http://amnestyusa.org/our-work/issues/women-s-rights/violence-against-women/violence-against-women-information> (accessed 05 June 2019).

Declaration,¹⁵⁰ CEDAW, and the Beijing Declaration and Platform of Action, Fourth World Conference on Women, 1995.

Notably, the South African regional and international legal instruments cannot, on their own, achieve the maximum protection of women and children in the country. Laws, policies, and norms must be cultivated by factors including, *inter alia*, a national united shift towards achieving this purpose. Therefore, I consider the extent to which South African legislation and international and regional instruments ensure access to justice for women.

1.6 What social and cultural challenges affect access to justice for women, particularly black women in South Africa?

Multiple factors contribute to the increase of injustices against women and children. As a result, it is not easy to single out one factor (e.g. lack of legislative implementation). As indicated above, some countries (like South Africa) have domestic laws in place. Regrettably, the violation of women's access to justice rights in South Africa remains very prominent. The question remains, what exactly contributes to this increase? Is it legal, social, and/or economic challenges? If so, how must this issue be addressed?

Sibanda-Moyo and Khonje provide that many social and economic factors contribute to the violation of women's access to justice rights.¹⁵¹ These include the quality of support and assistance received by the victims after they report cases.¹⁵² Another reason pointed out is the fear of negative social sanctions and intimidation from neighbours, as well as the families of the perpetrators.¹⁵³ Furthermore, the absence of comprehensive national strategies, funding issues, and organisational isolation negatively affect the South African government's efforts to combat VAW and assist women to effectively access justice.¹⁵⁴

Patriarchy is one of the main contributing aspects leading to an increase in VAW. As rightly pointed out by Ferraro,

¹⁵⁰ Universal Declaration of Human Rights

¹⁵¹ Sibanda-Moyo, Khonje and Brobbey (2017) 15.

¹⁵² As above.

¹⁵³ S Bollen and L Artz (eds) *Violence against women in Metropolitan South Africa: A study on impact and service delivery* (1999) 41.

¹⁵⁴ Sibanda-Moyo, Khonje and Brobbey (2017) 18.

VAW stems from a patriarchal culture that supports the view that male is the centre, as such he has unlimited power over his family.¹⁵⁵

Accordingly, one cannot deal with VAW without also addressing overarching male domination.¹⁵⁶ Legal, social, and economic factors are interlinked or interrelated to determine the cause of lack of access to justice, which continues to increase women's human rights violations.

1.7 Approach or methodology

This dissertation is motivated by the lack of access to justice that victims of human rights abuses are currently experiencing. In this dissertation, I use a social justice feminism approach to explore the reasons for the lack of access to justice that the victims of human rights currently experience.

This research considers how social justice feminism seeks to eradicate the human rights violation of women's access to justice as well as its impact on ensuring that South African black women's access to justice rights are achieved. The research examines scholarly sources for a better understanding of the meaning of "access to justice" by viewing it through a social justice feminism lens.

This research also evaluates the current South African laws, rules, policies, and cultural norms that inform or affect women's access to justice rights to better understand the dynamics of the past and shape a better future where all women enjoy access to justice. This research relies on secondary sources, such as foreign case law, legislation, local and international journal articles, textbooks, and reports by international organisations (such as the United Nations (UN) and European publications).

1.8 The proposed structure

Chapter 1 introduces the research topic and provides a brief overview of the research topic. The lack of access to justice for women, on its own, is a human rights violation. This fundamental right (access to justice) for women is well articulated on paper but for most women, access to justice remains a big challenge. This chapter explores the problem statement, research questions, and research methodology.

¹⁵⁵ K Ferraro "Review Essay: Culture, Feminism, and Male Violence" (1990) 17 *Social Justice* 70-84.

¹⁵⁶ See T Angless and M Maconachie "Battered women: Problems and proposals" in L Glanz and A Spiegel *Violence and family life in contemporary South Africa: Research and policy issues* (1996) 151-166.

Chapter 2 explores the South African legal framework on women's access to justice rights. This chapter examines the South African legal framework on women's access to justice rights by analysing the importance of women's access to justice in South Africa. Furthermore, this chapter evaluates how the South African legal system recognises women's access to justice rights by examining the current legislative framework, the Constitution, commentaries, journal articles, and relevant case law.

Chapter 3 examines the regional instruments that ensure women's access to justice. This chapter explores the regional legal framework and the role each instrument plays to ensure that women have access to justice. It further analyses the protection provided by the regional instruments and the effectiveness thereof in ensuring women's access to justice.

Chapter 4 explores the social and cultural challenges and the prospects of the realisation of women's access to justice in South Africa — particularly black women. This chapter identifies the social, economic, and cultural challenges faced by black women in South Africa in accessing justice. These challenges are discussed in detail regarding how they are interlinked or interrelated to determine the causes of difficulties in accessing justice. Lastly, the chapter explores the reasons behind the increase in human rights violations against women.

Chapter 5 provides the conclusion and recommendations. This chapter concludes this research and contains a summary and recommendations.

CHAPTER TWO: THE SOUTH AFRICAN LEGAL FRAMEWORK ON WOMEN'S ACCESS TO JUSTICE RIGHTS

2.1 Introduction

Chapter 2 examines the South African legal framework on women's access to justice rights by analysing the importance of access to justice for women in South Africa. It further evaluates how the South African legal system recognises women's access to justice rights by examining the current legislative framework, the Constitution, commentaries, journal articles, as well as relevant case law.

The main goal of this research is to assess whether the South African legal system provides sufficient access to justice for women. As noted above, "access to justice" refers to the idea that women can freely exercise their rights to, amongst other things, be heard; challenge any decisions that unfairly discriminate against them; and — without fear or prejudice — hold accountable anyone who violates their rights. This can be achieved if effective legislation is in place. To this extent, South Africa has several pieces of legislation, which are analysed below.

First, the importance of access to justice, particularly concerning the plight of women in South Africa, is explored. Thereafter, the Constitution is discussed as it is the foundation of various rights, including the right of access to justice and equal protection for all persons in South Africa.

Hereafter, I continue to discuss the South African legal framework concerning the Domestic Violence Act 116 of 1998, as it is one of the pivotal laws enacted to prevent and protect women against domestic violence. The Equality Act aims to tackle unfair discrimination, harassment, and hate speech; it works towards the transformation of the South African society in line with the ideals of equality as expressed in the Constitution. This chapter also touches on the successes and failures of the Equality Act in the context of women's access to justice.

The Criminal Law Act is also briefly discussed in the context of protecting women who fall victim to sexual offences and their access to justice. The remedies available to the victims of sexual offences are discussed with reference to the advantages and disadvantages of the Criminal Law Act in facilitating access justice for women. Furthermore, the Harassment Act is discussed concerning its provision for the protection of all persons against harassment.

Finally, this chapter briefly touches on the Trafficking Act as many victims of human trafficking are women. This short discussion aims to determine whether the Trafficking Act is effective in preventing women from falling victim to human trafficking.

2.1.1 The background: Apartheid period or Pre-Constitutional Democracy

During the apartheid era, discrimination and inequality — especially against black women — triumphed. Black women were prohibited from owning land and were denied entry into urban areas, cities, and towns in their search for work opportunities.¹⁵⁷ A widow could forfeit her rights of occupation in the homestead if she remarried or left the marital home.¹⁵⁸ Women who were allowed access into cities from the rural area's (township) were not allowed to be accompanied by their husbands or vice versa. Notably however “bachelor” dormitories were made available for men and not for women; this exacerbated the existing poverty and accommodation problems for women.¹⁵⁹ There existed very few employment opportunities for black women in urban areas compared to their white women counterparts (in the same urban areas). Black women were restricted to low-paying jobs that nobody wanted.¹⁶⁰ If a black woman held the same or a similar job as her counterpart, her salary was significantly lower.¹⁶¹

2.1.2 The democratic dispensation

With the new democratic dispensation in 1994, the apartheid laws were abolished and the current Constitution was enacted. The South African Constitution outlines the values and principles of human dignity, freedom, and the advancement of human rights and equality. To give effect to the constitutional values and principles of democracy, legislation such as the Equality Act, Domestic Violence Act, Criminal Law Act, and Harassment Act were enacted.

¹⁵⁷ ES Landis “African Women under Apartheid” (1975) *Southern Africa Perspectives* <https://projects.kora.matrix.msu.edu/app/files/210/808/10627/1600876660.al.sff.document.af000006.pdf> (accessed 02 July 2021) (hereafter Landis “African Women under Apartheid”). Pass laws are laws that were passed to prohibit people's movements within the urban area. It was a very serious offence during apartheid work around without a pass and likely to end up in prison.

¹⁵⁸ Landis “African Women under Apartheid” 6.

¹⁵⁹ As above.

¹⁶⁰ As above.

¹⁶¹ As above.

Women now have equal opportunities as opposed to what transpired during the apartheid era.¹⁶² This new democratic dispensation means that women can now, amongst other things, travel to the urban areas in search of work, own land, and more importantly, access justice and all other opportunities they previously had no access to.¹⁶³

In this chapter, I examine the South African legal framework on women's access to justice rights by analysing the South African legal system in the context of access to justice for women. I evaluate how the South African legal system recognises women's access to justice rights by examining the current legislative framework, the Constitution, commentaries, journal articles, as well as relevant case law.

In conclusion, it is clear that the South African legal framework provides sufficient access to justice for women. It is evident that these rights are guaranteed in the Constitution and the legislation mentioned above gives effect to the rights as guaranteed in the Constitution.

2.2 The importance of access to justice for women

This section briefly discusses the importance of access to justice with particular reference to the plight of women in South Africa.

The rule of law, a cornerstone of good governance and democracy, requires that laws must be in place to ensure accountability (from an individual level to all spheres of government).¹⁶⁴ However, for millions of women and girls around the world, the reality is that the rule of law means little in practice.¹⁶⁵ There are two areas in which women's rights are least protected and the rule of law is ineffective (and men's privilege is often most entrenched):

- (1) women's rights in the private and domestic sphere including women's right to live a life free of violence, and to enjoy equal rights with their partner in marriage and divorce;¹⁶⁶ and

¹⁶² Landis "African Women under Apartheid" 5-6. See Equality Act; Domestic Violence Act; Criminal Law Act; and the Harassment Act.

¹⁶³ Landis "African Women under Apartheid" 5-6.

¹⁶⁴ T Nagel "Equality Moral Luck" in Canto Classics (eds) *Mortal Questions* (2012) Cambridge University Press 24-38.

¹⁶⁵ Nagel "Equality Moral Luck" 27.

¹⁶⁶ As above

- (2) women's rights to decent work, inheritance, control, and ownership of land, and the protection and enjoyment of their reproductive health rights.¹⁶⁷

Enhancing women's ability to access justice is essential to combat gender inequality and discrimination, and develop human security.¹⁶⁸ Women's empowerment in every aspect of their lives relies upon systems of law and justice that support and protect them.¹⁶⁹

Progress has been made to strengthen the promotion and protection of women's human rights. However, for millions of women across the country, justice regrettably remains out of their reach.¹⁷⁰ The constraints on women's access to justice must be addressed to advance the Sustainable Development Goals (SDGs) and combat discrimination against women.¹⁷¹ To ensure the empowerment of women in our pluralistic justice system, all forms of discrimination and stereotypes must be eliminated. This aims to create an environment of equality and fairness based on equality and fairness.¹⁷²

Fairness and equity for women in society create an opportunity to access equal economic opportunities, education, safety, and a secure environment.¹⁷³ Under the law, every person in South Africa has the right to equal and fair treatment, regardless of their gender, race, sexual orientation, age, religious beliefs, or any other personal characteristic.¹⁷⁴ The failure to tackle discrimination and provide equal opportunities harms individuals and families, and negatively impacts our community and economy.¹⁷⁵ Consequently, these important rights enshrined in the Constitution would become meaningless. Arguably, this is because the very same rights on paper are not properly implemented, protected, or vindicated in practice. Evidently, inconsistencies exist between the rights on paper and practice. The rights enshrined in the Constitution become elusive and abstract due to a lack of proper implementation, protection, and vindication.

¹⁶⁷ Landis "African Women under Apartheid" 6.

¹⁶⁸ Landis "African Women under Apartheid" 5-6.

¹⁶⁹ As above.

¹⁷⁰ WHO "Violence against women. Key facts" (9 March 2021) <http://www.who.int/mediacentre/factsheets/fs239/en/> (accessed 28 July 2021) (hereafter WHO "Violence against women. Key facts").

¹⁷¹ As above.

¹⁷² As above.

¹⁷³ UNSSC "Fact Sheet on the importance of women's access to justice and family law" (unknown) <https://www.unssc.org/sites/unssc.org/files/UNWomenFactSheet.pdf> (accessed 29 July 2021).

¹⁷⁴ As above.

¹⁷⁵ As above.

2.3 Outline of the South African legal framework on women’s access to justice rights

Reiterating the importance of women’s access to justice in South Africa, it is vital to inspect the laws enacted to protect and promote the access and vindication of those important remedies for women. South African law provides a legal framework that caters to women’s access to justice rights. The Constitution confers the right of access to justice and the enabling legislation expands on this right, as discussed below.

2.3.1 Various South African Laws that protect women’s access to justice rights

2.3.1.1 Constitution

The Constitution aims to protect the rights of all persons in South Africa and to affirm the democratic values of our democratic society regarding human rights, dignity, equality, freedom, non-racialism, and non-sexism.¹⁷⁶ The final Constitution was passed by parliament in 1996 and contains the essential rules of our political system.¹⁷⁷ It protects the rights of all its people and, at the same time, it stipulates correlating duties and obligations.¹⁷⁸ The Constitution further outlines the different institutions of South Africa, their powers, and how those defined powers are used. As a result, the government has the power and duty to protect, respect, promote, and fulfil the rights of all persons as set out in the Bill of Rights.¹⁷⁹

The right of access to access justice, as enshrined in the Constitution, is essential to protect and empower vulnerable and economically and politically marginalised groups; institutions are established to promote and protect these rights.¹⁸⁰

Section 34 of the Constitution protects access to justice for all to improve the livelihood of all persons living in poverty through empowering vulnerable persons. Access to justice helps address the challenges experienced by marginalised and vulnerable persons in society who often suffer economic hardship, widespread general human rights abuses, and (present and past)

¹⁷⁶ Ameerma “Being able to access justice is a human right”.

¹⁷⁷ ConstitutionNet “Constitutional history of South Africa” (unknown) <https://constitutionnet.org/country/south-africa> (accessed 18 May 2021).

¹⁷⁸ As above.

¹⁷⁹ Ameerma “Being able to access justice is a human right”.

¹⁸⁰ Sec 34 of the Constitution states that everyone has the right for their disputes to be heard and decided in a fair public hearing in a court of law.

discrimination. Access to justice for women means that women must be treated the same and enjoy the same equal economic opportunities as their male counterparts.

Access to justice for women also means that women must have the same access to resources, education, and employment opportunity as their male counterparts.

2.3.1.2 Domestic Violence Act

Violence against women in South Africa continues to occur rampantly despite all the human rights-focused laws and regulations enacted by parliament. Consequently, a brief reflection of the Domestic Violence Act is appropriate as it aims to protect women against violence.

The purpose of the Domestic Violence Act is to afford the maximum protection to victims of domestic violence, by ensuring that adequate measures are put in place by the relevant organs of state to give effect to the provisions of the Act, which aims to eliminate domestic violence.¹⁸¹ The violation of women's rights does not necessarily only refer to the physical offences against women, the Act includes sexual abuse; emotional abuse; psychological abuse; GBV; intimidation; damage to property; harassment; stalking; and financial abuse.¹⁸² Therefore, domestic violence is defined as aggressive behaviour that involves the violent abuse of a spouse, partner, or another where such conduct harms or may cause harm to a complainant's wellbeing, health, or safety.¹⁸³

The Act, amongst other things, (1) acknowledges different forms of violence against women, which often take place in varying relationships (e.g. domestic relationships); (2) confers powers to the court to issue protection orders to prohibit the perpetrator from entering the

¹⁸¹ Sec 1 of the Domestic Violence Act.

¹⁸² WHO "Violence against women. Key facts". See also Australian Government "National Plan to Reduce Violence against Women and their Children" (unknown) <https://plan4womenssafety.dss.gov.au/resources/what-is-violence-against-women/> (accessed 12 November 2020). The DEVAW provides the following definition of violence against women: "The term violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life". See S Zulu "Malema criticises women's continued struggle for recognition in SA's economy" (11 August 2020) *Eyewitness News* <https://ewn.co.za/2020/08/09/malema-criticises-women-s-continued-struggle-for-recognition-in-sa-s-economy> (accessed 18 September 2020). The Julius Malema (Economic Freedom Fighters (EFF) leader) addressed a small number of people gathered at Mama Winnie Madikizela-Mandela's grave at Four Ways Memorial Park Graveyard in commemoration of Women day's in SA. Malema emphasised on the great progress that was made since 1956 on the rights of women in South Africa. African women, black in particular, continue to struggle for an economic recognition. Malema further touched on the issues of land redistribution, economic empowerment for women, and that SA's legal system is failing women and children when it comes to gender based violence. See additionally also WHO "Global and regional estimates of violence against women. Situation report" (20 October 2013) <https://www.who.int/publications/i/item/9789241564625> (accessed 25 November 2021) 20.

¹⁸³ Sec 1(a) of the Domestic Violence Act.

complainant's residence, place of work, and in cases of a shared (or common home) from entering or remaining in the shared residence; and (3) from committing any other acts specified by the Act.¹⁸⁴ The Act confers the powers to the court to impose obligations on the perpetrator to financially maintain the complaint while remaining in the shared home.¹⁸⁵

The Act gives the South African Police Service (SAPS) the power to seize any firearms or dangerous weapon(s) in the perpetrator's custody to avoid further damage or harm to the victim.¹⁸⁶ Furthermore, the Act imposes specific duties to be performed by the SAPS and consequences for the failure to carry out such tasks.¹⁸⁷ The Act recognises that domestic violence is not a private matter but is a serious crime against society and the Act confers powers to peace officers to arrest alleged perpetrators without warrant of arrest.¹⁸⁸ The Act broadens the definition of domestic violence to include married women, children, and unmarried women involved in relationships or living with their partners, persons in same-sex relationships, mothers and their sons, and other people who share a living space.¹⁸⁹

The 2019-2020 SAPS crime statistics (31 July 2020) indicate a shocking picture regarding the violence against women and children in South Africa.¹⁹⁰ The crime statistics suggest that about 18 231 crimes of violence against women are committed in one year, of which half occur in private homes.¹⁹¹ In his statement, Minister of Police, Bheki Cele, indicated that in one week of lockdown, more than 87 000 cases of GBV were reported across the country.¹⁹²

The crime statistics indicate precedence to argue that human rights laws and regulations put in place by the government to protect women have continuously failed to protect women against human rights abuses. From the abovementioned statistics it is evident that the Act is not effective to ensure the protection and safety of women. However, this high number of reported

¹⁸⁴ Sec 7(1) of the Domestic Violence Act.

¹⁸⁵ Sec 7(4) of the Domestic Violence Act.

¹⁸⁶ Secs 7(1)(a) and 7(1)(b)(i)-(ii) of the Domestic Violence Act.

¹⁸⁷ As above 581-582. See D Smythe "Norms and architecture: Limits on rape law reform in South Africa" (June 2004) Paper presented at annual meeting of the Law and Society Association, Chicago, IL580-590. See also secs 2(a)-(c) of the Domestic Violence Act.

¹⁸⁸ S Stone-Mediatore "Women's Rights and Cultural Differences" (2004) *Studies in Practical Philosophy* 111-113.

¹⁸⁹ Stone-Mediatore (2004) *Studies in Practical Philosophy* 112.

¹⁹⁰ S Shoba "Increase in rape and assault a grim marker of rising levels of gender-based violence" (3 August 2020) *Daily Maverick News* <https://www.dailymaverick.co.za/article/2020-08-03-increase-in-rape-and-assault-a-grim-marker-of-rising-levels-of-gender-based-violence/> (accessed 25 November 2021).

¹⁹¹ As above.

¹⁹² RSA Gov "Minister Bheki Cele: Release of 2018/19 annual crime statistics" (12 September 2019) <https://www.gov.za/speeches/minister-bheki-cele-release-201819-annual-crime-statistics-12-sep-2019> (accessed 22 August 2021).

cases indicate that more women are aware of their rights and have come forward to exercise and vindicate their rights.

The Act's implementation remains a challenge in practice due to various cultural and religious aspects which contribute to the lack of involvement, reluctance to come forward, and lack of public awareness.¹⁹³ Other limitations to the implementation of the Act are the unavailability of (1) adequate shelters for victims of domestic violence; (2) trained personnel to deal with the victims; and (3) appropriate facilities for effective implementation.¹⁹⁴ Limited and inadequate government funding also hinders the Act's effectiveness; consequently, the protection of women against domestic violence cannot be adequately exercised.¹⁹⁵

(a) Impact of Covid-19 on Domestic violence

The declaration of the National State of Disaster in March 2020 meant that measures had to be taken to combat the spread of the Covid-19 virus.¹⁹⁶ Numerous restrictions were implemented during this "lockdown" period, such as, *inter alia*, travel restrictions; a total ban of alcohol sales; remote working; and the closure of schools.¹⁹⁷ Restrictions in other countries like China and the United Kingdom (UK) meant that people had to isolate themselves; consequently, victims of domestic violence were restricted to online helplines, which remains difficult to access in some areas.¹⁹⁸ According to the UK domestic abuse non-government organisation, "Refuge", an estimated 700% increase in calls from victims of domestic violence were reported.¹⁹⁹

It was expected that in South Africa the number of domestic violence cases would remain the same as in UK but it did not, it dramatically decreased. Perhaps it was due to the ban of alcohol sales which reduced the number of domestic violence cases as generally alcohol abuse is a contributing factor to domestic violence.²⁰⁰ The lockdown also reduced the opportunity for

¹⁹³ B Kruger "Addressing domestic violence: to what extent does the law provide effective measures?" (2004) *Journal for Judicial Science* 152-173.

¹⁹⁴ Kruger (2004) *Journal for Judicial Science* 170-171.

¹⁹⁵ As above.

¹⁹⁶ B Clark "Gender-based Violence and COVID-19 in South Africa, The Clash of Pandemics" (2020) *Lexisnexis* https://www.lexisnexis.co.za/__data/assets/pdf_file/0005/820373/LN_ROL_CAFE_White_Paper_20201202.pdf (accessed 22 August 2021) (hereafter Clark "Gender-based Violence") 2-10.

¹⁹⁷ Clark "Gender-based Violence" 6.

¹⁹⁸ As above.

¹⁹⁹ As above.

²⁰⁰ As above.

perpetrators to rape women and children as they stayed at home.²⁰¹ The Department of Social Development and other non-governmental organisations (NGOs) worked together to ensure that the domestic violence centres remain open to assist victims of domestic violence.²⁰²

The other reason for the decrease in cases is the police presence in the streets to patrol and enforce the Covid-19 lockdown regulations.²⁰³ Many women also feared that they could contract Covid-19 and bring the virus home to their children, thus opting to rather stay at home and not report the violation.²⁰⁴ Another reason could be that access to telephone devices, especially for women in rural areas, remains a challenge; not many could call the helpline.²⁰⁵ Travel restrictions (and the limited capacity of public transport) also impact most persons (if a person is not an essential worker they were required to carry a travel certificate).²⁰⁶ The required travel permits made it difficult for women to travel to the police station to report the incidents or for the courts to enforce protection orders.²⁰⁷

However, it should be noted that the decrease in the number of reported domestic violence cases during the pandemic does not indicate that there was a reduction in cases. Arguably, situation have worsen and women need help now, more than ever. The Act's implementation remains a challenge in practice due to various cultural and religious aspects, which contribute to a lack of public awareness and involvement.²⁰⁸ Other limitations to the implementation of the Act are the unavailability of adequate shelters for victims of domestic violence, trained personnel to deal with the victims, and appropriate facilities for effective implementation.²⁰⁹ Limited and inadequate government funding also hinders the Act's effectiveness. Consequently, women are not adequately protected from domestic violence.²¹⁰

²⁰¹ As above.

²⁰² As above.

²⁰³ As above.

²⁰⁴ As above.

²⁰⁵ As above.

²⁰⁶ As above.

²⁰⁷ As above.

²⁰⁸ Kruger (2004) *Journal for Judicial Science* 152-173.

²⁰⁹ Kruger (2004) *Journal for Judicial Science* 170-171.

²¹⁰ As above.

(b) Success of the Act

For the Domestic Violence Act to be effective, monitoring policies by civil organisations need to be strengthened. All stakeholders must receive appropriate training, and public support and an adequate budget must be provided at all levels of government. Only then can the Act be successfully implemented and gain public confidence to ensure the protection of women against domestic violence.²¹¹ The Domestic Violence Act has not made a massive impact on ordinary black women.

The violations of their rights randomly continue as many women are trapped in toxic environments. Moreover, women are threatened by the perpetrators if they report cases or apply for protection orders. The Act does not provide a very good protection system if the victim remains in the perpetrator's residence or the same neighbourhood. Victims often come from disadvantaged and poor backgrounds and a lack of education and awareness regarding their rights and the law contribute to the continued violation of their rights.

2.3.1.3 Promotion of Equality and Prevention of Unfair Discrimination Act

The legislature enacted the Equality Act to give effect to section 9 of the Constitution, which seeks to advance equality for all persons in the public and private sphere.²¹² The Act provides a framework to tackle unfair discrimination, harassment, and hate speech and aims to transform South African society in line with the ideals expressed in the Constitution.²¹³ The Act defines “unfair discrimination” as the act or omission that burdens or disadvantages a particular person or group, or eliminates an opportunity or a benefit to a person (or group of persons) based on the prohibited grounds in the Constitution.²¹⁴

“Harassment” is defined in the Act as any unwanted conduct that creates a hostile environment or a diminishing or humiliating situation to another, which creates or induces a calculated persistent submission based on the prohibited grounds in the Constitution.²¹⁵ In terms

²¹¹ As above.

²¹² Sec 9 of the Constitution; and secs 2(a)-(b) of the Equality Act.

²¹³ Secs 24-28 of Equality Act.

²¹⁴ Sec 1 of the Equality Act; and sec 9(3) of the Constitution.

²¹⁵ As above: the grounds as prohibited by the Constitution are sex, gender, sexual orientation and many more. Harassment is so harmful that a person subjected to such persistent pressure to submit may be induced even after resisting for a long time to submit to the demands of the harasser in the fear that he/she might lose their job or no promotion, cash bonus, leadership position and so many other disadvantages that could accompany the

of the Act, “hate speech” is defined as the publication, communication, or advocating of hurtful information, which causes or incites harm or promotes propagated hatred.²¹⁶

The Act provides remedies to people whose rights are infringed due to unfair discrimination, harassment, and hate speech.²¹⁷ Most importantly, the Act provides for the establishment of equality courts to achieve social-economic justice and equality for all.²¹⁸ Equality courts were created by parliament to establish a body that facilitates the social-economic transformation of South African society.²¹⁹

The Act provides that any person (acting in his own capacity) or on behalf of another, or person acting as a member, group of persons or class may institute legal proceedings in the equality court.²²⁰ In addition, any member of the public, an association, South African Human Rights Commission (SAHRC), Gender Equality Commission, or any other person with an interest in the matter may also institute legal proceedings in the equality court.²²¹ In terms of the Act, the presiding officer may hold an inquiry to determine if there is unfair discrimination, harassment, hate speech, depending on the circumstances, and provide effective redress.²²²

The Act provides that the equality court may award damages to an individual or organisation and creates room for the complainant to seek alternative legal redress.²²³ In other words, the complainant can pursue both civil redress and criminal sanction with the same cause of action.²²⁴ The Act sets a time limit for the conclusion of cases in the equality court.²²⁵ The Act also provides for the alternative referral of the matter to an alternative forum to deal with the matter.²²⁶ The alternative forums include the SAHRC, Advertising Standard Agency, and the Broadcasting Complaints Commission²²⁷

complainant if they refuse to adhere to the demands. A very sad situation that happened to many women in our societies.

²¹⁶ Sec 10 of the Equality Act.

²¹⁷ Sec 2(c)-(d) of the Equality Act.

²¹⁸ Secs 16 and 21(1) of the Equality Act.

²¹⁹ L Botha and A Kok “An empirical study of the early cases in the pilot equality courts established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000” (2019) *AHRLJ* 319.

²²⁰ Secs 20(1)-(2) of the Equality Act.

²²¹ As above.

²²² Sec 21 of the Equality Act. See *Harksen v Lane* 1998 (1) SA 300.

²²³ R Krüger “Small Steps to Equal Dignity: The Work of the South African Equality Courts” (2011) *The Equal Rights Review* 31.

²²⁴ As above.

²²⁵ Krüger (2011) *The Equal Rights Review* 31-32.

²²⁶ As above.

²²⁷ Krüger (2011) *The Equal Rights Review* 30.

(a) Successes of the Equality Act

The fight against apartheid aimed to eradicate the systematic, social, and economic inequality experienced by African people at the time. In doing so, the democratic legislature had to implement measures necessary to achieve social transformation in South Africa.²²⁸

To demonstrate the efforts made by the Equality Act, the sections relevant to women's access to justice are explored. Section 7(e) of the Equality Act prohibits any person from being denied the right to services or contractual opportunities and obliges decision-makers to take reasonable steps to ensure access to opportunities for all.²²⁹ This section ensures that all persons, including women, equally enjoy service delivery and opportunities; it was not possible in the past.²³⁰

In addition, the Equality Act protects women's property rights; section 8(c) states that no women shall be discriminated against in terms of property rights.²³¹ Many women now bear knowledge regarding their property rights and many institutions are established to assist women to realise their property rights.²³²

Moreover, section 8(e) of the Act prohibits any policy or conduct that unfairly limits women's access to land rights, finance, and other resources.²³³ Currently, more options to own land are available to women through utilising various institutions.²³⁴ The policies have drastically changed for women in South Africa; for example, the government's commitment to equal representation of women in parliament.²³⁵ To improve the imbalances of the past, various pieces of legislation were introduced such as the Employment Equity Act,²³⁶ and the Basic Conditions of Employment Act.²³⁷ During apartheid, black women were confined to rural areas with very few opportunities. Women were unable to buy houses on their own or own title deeds and could not occupy higher positions in society.

²²⁸ A Kok "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislature-driven societal transformation?" (2008) *Stell LR* 122.

²²⁹ As above.

²³⁰ As above.

²³¹ As above.

²³² As above.

²³³ As above.

²³⁴ CL Morna, D Glenwright and L Makamure (eds) *SADC Gender Protocol 2018 Barometer* (2018) 47.

²³⁵ Sec 9 of the Constitution.

²³⁶ 55 of 1998 (hereafter EEA).

²³⁷ 75 of 1997 (hereafter BCEA); Kok (2008) *Stell LR* 126.

Another success of the Act is the establishment of equality courts. The equality court deals exclusively with matters relating to unfair discrimination, harassment, and hate speech.²³⁸ These courts aim to seek redress and remove major barriers to judicial access.

(b) Failures in equality

The Equality Act has made some positive changes to women's lives; however, it also contains many gaps that must be filled for women to fully benefit from the social-economic equality intended in the Constitution. Section 8(g) provides that women should not be discriminated against in accessing social services or benefits such as health, education, social security. The legislature intends to ensure sufficient access to resources such as health, education, and social security. However, many black women (especially in the rural areas) are uneducated. Most are unaware of their rights and cannot fully access health facilities and social security, basic needs, justice *etcetera*.²³⁹

Furthermore, according to the 2005 and 2009 empirical study on the early cases in the pilot equality court and its clerks (from different areas who participated in the survey),²⁴⁰ the general public is aware of the Act, but not the purpose of the equality courts, which renders it difficult to establish the circumstances when the equality court may be approached.²⁴¹ Thus, there is insufficient marketing of the equality courts. Consequently, the equality court is underutilised and does not achieve equality for all in South Africa.²⁴² Many people are unaware of their rights which renders it difficult to recognise discrimination and report incidents.

In conclusion, the Equality Act has made some progress for black women especially considering the past (apartheid) situation. Sadly, however, the impact is slow and must be fast-tracked to achieve success. One setback of the equality court is that it is still relatively new and information on its processes has not yet reached the majority of women, especially in rural areas. The number of cases heard by the equality court (as mentioned above) remains low as confidence and trust in the court's effectiveness must be promoted and strengthened, especially in rural areas.

²³⁸ Sec 16 of the Equality Act.

²³⁹ Kok (2008) *Stell LR* 126.

²⁴⁰ Botha and Kok (2019) *AHRLJ* 321.

²⁴¹ Botha and Kok (2019) *AHRLJ* 322-330.

²⁴² Botha and Kok (2019) *AHRLJ* 322-330.

The expertise of court officials and the adjudication of the entire judicial process remains a challenge. To achieve access to justice for women, recruitment of police officials, justice official's experts in the specific field must be increased to ensure the successful implementation of the equality court.

Therefore, as discussed above concerning the Equality Act, some improvements regarding women's rights are evident. However, these improvements are slow and insufficient and the Act is yet to successfully achieve its aims. The Act does not provide sufficient protection, which creates an environment for the exploitation of women.

2.3.1.4 Criminal Law (Sexual Offences and Related Matters) Amendment Act

The purpose of the Criminal Law Act is to review and amend all aspects of the law related to sexual offences in a single statute.²⁴³ The Criminal Law Act now includes more sexual offences to offer more protection to women.²⁴⁴ Crimes such as rape (which was previously only limited to sexual penetration) have been extended to include forced oral penetration and other sexual acts.²⁴⁵

Furthermore, the Act ensures that victims of sexual violence and their families are protected and not exposed to secondary trauma and victimisation.²⁴⁶ The protection is achieved by establishing a cooperative response between all government stakeholders to effectively implement the Act.²⁴⁷ The Act further ensures that effective investigations are conducted, medical assistance is provided, complemented by a sensitive criminal justice system to assist victims of sexual violations.²⁴⁸ Most importantly, the Act provides for the establishment of the National Register for Sex Offenders, to ensure that persons convicted of sexual offences are not employed in an environment that poses a danger to children and mentally disabled persons.²⁴⁹ In addition to sexual offences, the Act also deals with sexual offences against children and mentally disabled persons.

The services provided to victims of sexual offences include the compulsory HIV (human immunodeficiency virus) testing of alleged offenders.²⁵⁰ The Act also provides for the

²⁴³ Sec 2(a) of the Criminal Law Act. See further L Artz and S Roehrs "Criminal Law (Sexual and Related Matters) Amendment Act (No. 32 of 2007): Emerging issues for the health sector" (2009) 27(10) *CME* 464-467.

²⁴⁴ Sec 2 of the Criminal Law Act.

²⁴⁵ Sec 2(c) of the Criminal Law Act.

²⁴⁶ Sec 2(c) of the Criminal Law Act.

²⁴⁷ Sec 2(d) of the Criminal Law Act.

²⁴⁸ Secs 2(e) and 30 of the Criminal Law Act.

²⁴⁹ Sec 2(g) of the Criminal Law Act.

²⁵⁰ Sec 32 and 34 of the Criminal Law Act.

establishment of the sexual offences courts and provides for the appropriate sentencing and punishment of offenders.²⁵¹

(a) Success of the Act and the government effort to combat sexual offences

For the past 25 years, the government has attempted to ensure that access to justice is achieved,²⁵² by establishing new courts with services that exclusively deal with the GBV and the resuscitation of the sexual offence court.²⁵³ The launch indicates some commitment from the government to deal with violence against women.²⁵⁴ President Cyril Ramaphosa recently announced the opening of the Booysen's Magistrate's Court, which aims to offer a range of services for victims of GBV, including the victim-centric sexual offences court.²⁵⁵

In combating human rights violations, especially against women and children, the government upgraded more regional courts, namely Randburg Magistrate's Court, Roodepoort Magistrate's Court, Germiston Magistrate's Court, and the Booysen's Magistrate's Court, with an establishment of about 89 sexual offences courts since August 2013.²⁵⁶ Minister of Police (Bheki Cele) revealed that education institutions had become the hotbeds of sexual violence.²⁵⁷ About 380 cases of sexual violence reported in 2018/19 happened at training institutions, schools, and daycare centres respectively.²⁵⁸ This exemplifies the importance of access to justice for women and children in South Africa.²⁵⁹

²⁵¹ Sec 56A and 55A of the Criminal Law Act.

²⁵² P Kambula "Court's tackle gender violence" (11 April 2019) <https://www.gov.za/blog/courts-tackle-gender-violence> (accessed 12 November 2020) (hereafter "Courts tackle gender violence").

²⁵³ As above.

²⁵⁴ As above.

²⁵⁵ As above.

²⁵⁶ H Isilow "S.Africa announces gender based violence law Country has one of the highest incidences of rape and domestic violence" (07 September 2020) <https://www.aa.com.tr/en/africa/safrica-announces-gender-based-violence-law/1965718> (accessed 13 November 2020).

²⁵⁷ South African Police Service (SAPS) "Speaking notes by Minister of Police at the release of the annual crime statistics 2019/2020" (31 July 2020) <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=27228> (accessed 12 November 2020). According to SAPS crime statistics, in 2019/20 had a significant increase of 1.7% cases of sexual offences in comparison to the sexual offences cases reported in 2018/19 which was 4.6%. See further SAPS "Crime statistics crime situation in republic of South Africa twelve (12) months (April to March 2018)" (2018/19) https://www.saps.gov.za/services/april_to_march2018_19_presentation.pdf (accessed 12 November 2020).

²⁵⁸ As above.

²⁵⁹ As above.

(b) Disadvantages of the Act

The sexual offences cases reported to the SAPS, by province, for 2013/14 to 2017/18 are shocking.²⁶⁰ In 2014 the Western Cape reported 7 369 sexual offences cases compared to 7 049 cases in 2019.²⁶¹ The Eastern Cape reported 9 224 cases in 2014 compared to 7 043 cases in 2019.²⁶² The Northern Cape reported 1 578 cases in 2014 compared to 1 578 cases in 2019, and the Free State reported 4 094 cases in 2014 compared to 3 457 cases in 2019.²⁶³ In 2014 KwaZulu-Natal reported 9 079 cases compared to 9 308 cases in 2019, and the North West reported 4 584 cases in 2014 compared to 4 021 cases in 2019.²⁶⁴ Gauteng reported 9 902 cases in 2014 compared to 10 752 cases in 2019 and it is the province with the highest number of sexual offences cases during that period.²⁶⁵ Mpumalanga reported 3 474 cases in 2014 compared to 3 470 cases in 2019, and Limpopo reported 4 312 cases in 2014 compared to 4 060 cases in 2019.²⁶⁶ The total number of sexual offences cases reported in South Africa from 2014 is 53 617 compared to 52 420 cases in 2019.²⁶⁷

Section 42 of the Act provides for the establishment of the National Register for Sex Offenders.²⁶⁸ According to the Act, the National Register is not available to the general public and only accessible upon request by employers or prescribed persons with interest in the matter.²⁶⁹ Many sexual offenders especially repeated sexual offenders are dangerous and need to be monitored closely.²⁷⁰ People have the right to protect themselves against these perpetrators especially those who are unable to reform.²⁷¹

Therefore the availing of the national register for sex offenders helps the public to make informed decisions.²⁷² The 2014 report of the Institute for Security Studies indicates that sexual

²⁶⁰ SAPS “Crime Crimestats” (2020/21) <https://www.saps.gov.za/services/crimestats.php> (accessed 10 August 2021) (hereafter SAPS “Crime Crimestats”).

²⁶¹ As above.

²⁶² As above.

²⁶³ As above.

²⁶⁴ As above.

²⁶⁵ As above.

²⁶⁶ As above.

²⁶⁷ As above.

²⁶⁸ Sec 40 of the Criminal Law Act.

²⁶⁹ Sec 44 of the Criminal Law Act.

²⁷⁰ N Mollema “The viability and constitutionality of the South African national register for sex offenders: a comparative study” (2015) 18(7) *PELJ* 2727.

²⁷¹ As above.

²⁷² As above.

offences and rape cases are under-reported.²⁷³ Victims often relive the trauma during the investigation and the court processes and this contributes to under-reporting and exemplifies the weakness of the Act.²⁷⁴ Victims are not adequately protected by the government during and after the abuse and victims are often threatened to withdraw their cases by the perpetrators or face further abuse.²⁷⁵ The Act's purpose is to protect women from sexual violations and to support victims; however, the Act has failed to fulfil its purpose.

Judging from the number of sexual offences committed per year from 2014 to 2018/19, it is evident that women have been denied protection. The Act's purpose is to criminalise and include other sexual acts that were not initially included by common law. After the inclusion, the cases increased, even more, when it was supposed to prevent most reported sexual offences. Perhaps the efficiency of the Act is the problem and the lack of an intensive implementation of the Act contributes to the lack of access to justice. The proper implementation of the Act and the involvement of community-based forums, traditional leaders, and communities could contribute to the realisation of access to justice for women.²⁷⁶ The effective implementation of the Act will allow imposing harsher punishments or maximum sentences for perpetrators.

2.3.1.5 Protection from Harassment Act

The purpose of this Act is to prevent and protect all persons against harassment.²⁷⁷ The protection is achieved by affording the victims of harassment effective remedies, which extends to household and workplace environments.²⁷⁸ The Act defines harassment as the indirect or direct conduct that a respondent knows (or has known) would cause harm to another (or inspires that damage) and includes loitering outside of the complainant's building (such as residence, or place of work or studies).²⁷⁹ The definition of harassment extends to the communication of any electronic or telecommunication devices; the sending of letters, telegrams, fax mails, or any other means of communication to the complainant or related person; sending the messages with other persons; or

²⁷³ O Yebis and V Balogun "Marital rape: a tale of two legal systems" (2017) 38(3) *Obiter* 541.

²⁷⁴ As above.

²⁷⁵ As above.

²⁷⁶ M Malan "I will rape them personally, those drunkard women in the short dresses" (20 July 2017) <http://bhekisisa.org/article/2017-07-20-diepsloot-i-will-rape-them-personally-those-drunkard-women-in-the-short-dresses> (accessed 15 November 2020).

²⁷⁷ See Preamble of the Harassment Act.

²⁷⁸ Secs 1(a) and 2(1)-(2) of the Harassment Act.

²⁷⁹ Secs 1(a)-(b) of the Harassment Act.

leaving it at places where the complainant would find it or would be given to them, amounts to sexual harassment.²⁸⁰

The Act provides for two remedies, namely the issuing of a protection order against the perpetrator, and effective enforcement measures to the relevant state organs to give effect to the provisions of the Act.²⁸¹ The protection order aims to prevent the perpetrator from committing other acts of violence or sexual harassment against the victim.²⁸² The protection order prevents the perpetrator from entering the joint residence, or a specific part of the residence. If they do not live together, it prevents the perpetrator from entering the home of the complainant.²⁸³ The prohibition extends to the place of employment of the victim and prohibits the perpetrator from having contact with the children if it would be in the child's best interest.²⁸⁴ To obtain the protection order the procedure is as follows:

- (i) The complaint or any person with a material interest in the matter applies to court for a protection order.²⁸⁵
- (ii) The clerk of court then lodges the application together with the affidavit and submits it to the court.²⁸⁶
- (iii) Once all the formalities of the application are fulfilled, an interim protection order is issued together with a suspended warrant of arrest.²⁸⁷
- (iv) The respondent is served with the interim protection order, which calls on the respondent to explain why the interim protection order should not be made final.²⁸⁸
- (v) After considering all the evidence the court will issue a protection order.²⁸⁹
- (vi) Once the protection order is granted and the victim still resides with the perpetrator, the Act empowers the SAPS to accompany the victim to the joint residence for the sole purpose of collecting personal belongings from the commonplace.²⁹⁰

²⁸⁰ As above.

²⁸¹ Secs 2-7 of the Harassment Act.

²⁸² SAPS "Applying for Protection Order" (unknown) https://www.saps.gov.za/services/protection_order.php (accessed 04 August 2021) (hereafter SAPS "Applying for Protection Order").

²⁸³ As above.

²⁸⁴ As above.

²⁸⁵ Secs 2(1)-(7) of the Harassment Act.

²⁸⁶ As above.

²⁸⁷ Sec 11(1)(a) of the Harassment Act.

²⁸⁸ Sec 3(c) of the Harassment Act.

²⁸⁹ Sec 3 of the Harassment Act.

²⁹⁰ SAPS "Applying for Protection Order".

Another advantage of the Act relates to the powers afforded to the SAPS to seize any firearm in possession of the perpetrator until such a time that the court declares it safe to return the firearm to the owner through a court order.²⁹¹

If the perpetrator ignores the protection order and commits or contravenes any act as stipulated and prohibited by the protection order, the perpetrator is arrested by the police.²⁹² Due to the increase in cybercrime, the Act extends its protection to victims by obliging the electronic communication agencies to provide the personal information of the harasser (if his identity is unknown) for prosecution; this creates better protection for the victims.²⁹³

The protection order is not the only remedy available to the victims of harassment. The complainant may also lay criminal charges if the violence/sexual harassment constitutes a criminal offence (such as rape or assault).²⁹⁴ The protection order does not preclude the victim from laying criminal charges from the onset (when investigation and prosecution commence immediately).²⁹⁵

The victim can use both remedies simultaneously or use either one (whichever is more suitable) because both remedies are available to the complainant without distorting the other.²⁹⁶

In *Liberty Group LTD v M*,²⁹⁷ the court held that in instances where the employer was informed of the alleged harassment and the employer did not act or take the necessary steps to consult the affected parties immediately, after the report of sexual harassment was brought to the attention of the employer, the employer will be held liable to the complainant.²⁹⁸ Although the matter was dealt with in terms of the EEA and the Liberty Group Ltd Code of Conduct, it is important to indicate how the offences of harassment are dealt with when they occur in work environments.²⁹⁹

Harassment in the workplace is dealt with in terms of the EEA as it covers vicarious liability against the employer who fails to take action after a sexual harassment case was brought

²⁹¹ Sec 12 of the Harassment Act; see also the Firearms Control Act 60 of 2000.

²⁹² Secs 10 and 18(1)(a)-(b) of the Harassment Act.

²⁹³ Sec 4(1)(b) of the Harassment Act.

²⁹⁴ SAPS "Applying for Protection Order".

²⁹⁵ As above.

²⁹⁶ As above.

²⁹⁷ (JA105/2015) (2017) 10 BLLR 991 (LAC) (hereafter the *Liberty Group v M* case).

²⁹⁸ *Liberty Group v M* paras 23-24.

²⁹⁹ *Liberty Group v M* paras 23-24: Sexual harassment means any unwelcome sexual behaviour in the workplace. This could be physical conduct and advances, demanding or requesting sexual favours or using inappropriate sexual language.

to his attention.³⁰⁰ The EEA defines harassment as a form of discrimination, and described the procedures to follow where complaints of sexual harassment have been made and the consequences if procedures are not followed the employer would be held liable.³⁰¹

In the *Liberty Group LTD v M* matter above, the employer was informed about the sexual harassment in the workplace; however, the employer failed to take action until the complainant had to resign.³⁰² As a result, the complainant had to undergo gross cross-examination to ascertain whether the alleged sexual harassment was committed — and the complainant relived the whole incident, which was disturbing and emotional.³⁰³ In the end, however, justice was achieved as stipulated in the Harassment Act.³⁰⁴

Furthermore, instances of harassment also take place in school environments, despite the different codes of conduct and the Regulations to Prohibit Initiation Practices in Schools, and the Guidelines for the Prevention and Management of Sexual Violence and Harassment of Learners in Public Schools, which all provide guidelines for handling harassment at schools.³⁰⁵

In the context of harassment in schools, the challenges relate to capacity and expertise to assist the victims.³⁰⁶ Often, harassment cases in schools remain unresolved or protection orders are delayed. This may also lead to severe increases in sexual harassment (for example, learners are often sexually harassed with the threat of failing grades or subjects if they do not comply).³⁰⁷ Therefore, if the school does not take action or is not in the position to assist the victim, the harassment continues and the victim continues to suffer - justice is denied.³⁰⁸

In addition, challenges also extent to providing victims of sexual harassment with shelter, especially in cases where complainant shares a residence with the perpetrator.³⁰⁹ In the work environment, the victim has to report the incident and wait for the employer to take the necessary

³⁰⁰ Secs 60(2)-(3) of the EEA.

³⁰¹ As above.

³⁰² *Liberty Group v M* paras 59-64.

³⁰³ As above.

³⁰⁴ As above.

³⁰⁵ A de Wet “Understanding harassment and bullying of learners in school: An education law perspective” (2016) *Child Abuse Research in South Africa* 24-35.

³⁰⁶ de Wet (2016) *Child Abuse Research in South Africa* 26-27.

³⁰⁷ de Wet (2016) *Child Abuse Research in South Africa* 31-32.

³⁰⁸ As above.

³⁰⁹ UN Human Rights Office of the High (OHCHR) “Commissioner Protection orders and shelters Country visits information” (unknown) <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/CountryVisitExperience.pdf> (accessed 10 August 2021).

steps.³¹⁰ If the employer fails to take action, the matter remains unresolved and, consequently, the victim remains subject to harassment in the workplace while some victims choose to resign.³¹¹

2.3.1.6 Prevention and Combating of Trafficking in Persons Act

The Trafficking Act aims to prevent, protect, and assist victims of trafficking, especially women and children, by providing effective enforcement measures to combat the trafficking of persons.³¹² Moreover, the Act provides for the appropriate coordination of combating trafficking and gives effect to South Africa's international obligations by enacting national laws and policies to combat human trafficking.³¹³ Furthermore, the Act provides for the prosecution and appropriate penalties of persons who are found guilty of committing offences related to trafficking as prescribed by the Act.³¹⁴ Another significant advantage of the Act is that it provides for the suspension of parental responsibilities if the court establishes that the parent or caregiver is responsible or involved in the trafficking of a child.³¹⁵ The Act also provides for severe fines, enabling the state to confiscate all profits and assets obtained from the trafficking activities.³¹⁶

The Act further provides for the extraterritorial jurisdiction of our courts,³¹⁷ regardless of whether the human trafficking is committed in another country or is regarded as a crime in that jurisdiction (or not).³¹⁸ The extraterritorial jurisdiction of our courts only applies if the crime of human trafficking was committed against a South African national or an ordinary resident of South Africa.³¹⁹ As defined in the Palermo Protocol UN General Assembly 2002,³²⁰

'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction,

³¹⁰ *G v Minister of Safety and Security* (D495/06) (2010) ZALC 312.

³¹¹ *Liberty Group v M* paras 59-64.

³¹² Sec 3(c) of the Trafficking Act.

³¹³ Secs 3(d)-(g) of the Trafficking Act.

³¹⁴ Secs 3(a)-(b) of the Trafficking Act.

³¹⁵ AM Mangu and SCT Mbata "States' compliance with the Palermo Protocol on trafficking in persons and protection of the rights of the child in the SADC region" (2016) 17(2) *Child Abuse Research in South Africa* 13-36.

³¹⁶ P Patricia "Protecting victims of human trafficking — is South Africa doing enough?" (23 March 2016) *De Rebus* <https://www.derebus.org.za/protecting-victims-human-trafficking-south-africa-enough/> (accessed 10 August 2021).

³¹⁷ Sec 1 of the Trafficking Act.

³¹⁸ As above.

³¹⁹ As above.

³²⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, UNGA res 55/25 of 15 November 2000 (Palermo Protocol).

of fraud, of deception, of the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.³²¹

Any person in the execution of his duty or an accredited organisation who comes into contact either directly or indirectly or who suspects or ought to have known that an adult is a victim of trafficking must immediately, after such knowledge or suspicion, report the matter to the police for investigation.³²²

A person who has been convicted of the crime of traffic of a person shall be sentenced to either 5 years or 10 years imprisonment or a fine of R100-million or imprisonment without an option of a fine or both, depending on the circumstances and the seriousness of each case.³²³ Other additional offences (such as rape, sexual offences, and kidnapping) are dealt with in terms of the applicable law and the Criminal Procedure Act 51 of 1977 where applicable.³²⁴

According to the Global Slavery Index, South Africa ranks 110/167 on the world scale of countries affected by trafficking.³²⁵ According to the 2016 figures on trafficking of persons in South Africa, about 155 000 people are subject to modern slavery in South Africa alone.³²⁶ On the worldwide scale, approximately 40.3 million people live in modern slavery of which 71% are women and 29% are men; notably more than half of the victims are women.³²⁷ According to the USA Report (2018), 399 victims of trafficking were identified and referred to care in South Africa during 2017 compared to 220 victims in 2016.³²⁸ Of the 399 victims of trafficking, 305 were used in forced labour, 66 were victims of sex trafficking, and 19 were victims of domestic servitudes exploitation. The majority of the victims were South African nationals followed by Lesotho, Ghana, Mozambique, Ethiopia, Nigeria, Tanzania, and Thailand.³²⁹

³²¹ As above, see Sec 1 of Trafficking Act.

³²² Secs 19(1)(a)-(b) of the Trafficking Act.

³²³ Secs 13(1)(a)-(e) and 13(1)(cA) of the Trafficking Act.

³²⁴ Sec 13(2) of the Trafficking Act.

³²⁵ M Venter and W Semmelink "Human Trafficking and the Church: Towards a Biblical and Practical Christian Response" (2020) 29 *Conspectus — The Journal of the South African Theological Seminary* 64. See Walk Free Foundation "Global slavery index. Modern slavery: a hidden, every day problem" (2018) <https://www.globalslaveryindex.org/> (accessed 12 August 2021).

³²⁶ Venter and Semmelink (2020) *The Journal of the South African Theological Seminary* 64-65.

³²⁷ As above.

³²⁸ A Kempen "Trafficking in persons is real, WE all have a duty to act" (2019) 112(7) *Servamus* 15-19.

³²⁹ Kempen (2019) 112(7) *Servamus* 15.

The vulnerability of a person is one of the main reasons why trafficking thrives in the world.³³⁰ According to The Salvation Army International Social Justice Commission, most trafficking takes place in areas of economic crisis, disaster, war, and conflict.³³¹ Sadly, most of the victims of trafficking are vulnerable women and children, migrants, and refugees.³³² The crime is perpetuated and rooted by unjust systems in many countries, including South Africa, where the unemployment rate is very high amongst young people, gender inequality persists, and inadequate education systems remain unchanged.³³³

Although this dissertation is not solely concerned with human trafficking, it is worth mentioning some human trafficking statistics to indicate the severity of the problem that necessitates the urgent protection of women and children.³³⁴ According to the Human Trafficking Awareness Index, in 2015 alone, 93 cases of trafficking into and within South Africa were reported of which 76 were women, and 17 were children.³³⁵ 54 cases of migrant smuggling for sexual exploitation were reported in the same year. Among the 54 cases of migrant smuggling, 24 were likely victims of sexual exploitation consisting of 16 women and 8 girls.³³⁶

6 potential victims were identified to be used for forced labour of which 6 were women and 1 a girl.³³⁷ Two potential victims of forced marriage were identified, and two potential victims of body parts trafficking used for rituals were identified in 2015.³³⁸

(a) Covid 19 and its impact of Trafficking of Persons

The Covid 19 pandemic has placed a lot of pressure on the world.³³⁹ Travel restrictions, lockdowns, and the compulsory wearing of face masks forced human traffickers to adapt their strategies in the trafficking of persons.³⁴⁰ In Brazil, a “delivery or drive through” service was created for the sexual

³³⁰ Venter and Semmelink (2020) *The Journal of the South African Theological Seminary* 65.

³³¹ As above.

³³² As above.

³³³ Venter and Semmelink (2020) *The Journal of the South African Theological Seminary* 64-65.

³³⁴ N Manyathi-Jele “Analysis of the Human Trafficking Awareness Index report” (1 June 2015) *De Rebus* <https://www.derebus.org.za/analysis-of-the-human-trafficking-awareness-index-report/> (accessed 10 August 2021) 1.

³³⁵ Manyathi-Jele (1 June 2015) *De Rebus* 9.

³³⁶ As above.

³³⁷ As above.

³³⁸ Manyathi-Jele (1 June 2015) *De Rebus* 9-10.

³³⁹ K Geldenhuys “Human trafficking during pandemics and disasters” (2021) 114(2) *Servamus* 36-38. See Challenges of Covid 19 and trafficking of persons (2021) Sabinet Legal. https://reliefweb.int/sites/reliefweb.int/files/resources/The_effects_of_the_COVID-19_pandemic_on_trafficking_in_persons.pdf?

³⁴⁰ Geldenhuys (2021) 114(2) *Servamus* 36.

exploitation of women and children.³⁴¹ Lockdown restrictions, social distancing, curfews, and self-isolation created perfect conditions for the traffickers to control their victims, and identifying victims of trafficking has become very difficult.³⁴² Consequently, trafficking of persons has increased (especially commercial sexual exploitation and exploitation of domestic servitudes).³⁴³

One of the main areas of trafficking in South Africa is from rural to urban areas, mostly Bloemfontein to Maseru and Rustenburg, Pretoria, and Johannesburg.³⁴⁴ It is difficult to detect the victims of human trafficking as most of the victims, especially children, are trafficked by their parents.³⁴⁵

(b) Failures and challenges of the Act

The immigration officials are incapacitated and as a consequence are unable to adequately deal with and scrutinise all the documents thoroughly with the influx of many people entering and exiting South Africa.³⁴⁶ Consequently, many possible cases of trafficking of persons can occur and remain undetected at the ports of entry.³⁴⁷

According to the USA Report (2018), the government of South Africa had made little progress in the response and prosecuting of traffickers connected to international syndicates.³⁴⁸ The global alliances involve Nigerians, Bulgarians, Russians, Taiwanese, and Chinese, who are predominantly involved in the sex trafficking of women and girls in various cities of South Africa.³⁴⁹ Various NGOs also report that SAPS officials are involved in bribery activities, hindering the process and the efforts made to catch the perpetrators.³⁵⁰ The 2018 USA report also indicates that police stations often fail to investigate trafficking cases despite the provision of

³⁴¹ As above.

³⁴² As above.

³⁴³ RA Stein “COVID-19 and rationally layered social distancing” (2020) *International Journal Of Clinical Practice* 1-3.

³⁴⁴ DN Swart “Human trafficking and the exploitation of women and children in a Southern and South African context” (2012) 13(1) *Child Abuse Research in South Africa* 62-73.

³⁴⁵ Swart (2012) 13(1) *Child Abuse Research in South Africa* 63-64.

³⁴⁶ J Mofokeng and A Olutola “Expert reflections on challenges experienced to address human trafficking in South Africa prior to the implementation of the prevention and combating of trafficking in persons act 7 of 2013” (2014) 1 *Acta Criminologica* 114-135.

³⁴⁷ Mofokeng and Olutola (2014) 1 *Acta Criminologica* 126-129.

³⁴⁸ Kempen (2019) 112(7) *Servamus* 16.

³⁴⁹ As above.

³⁵⁰ As above.

adequate information; this may be due to the lack of resources and training about the Act, which hinders combating trafficking.³⁵¹

Many law enforcement agencies lack understanding, resources, and awareness of the Act, which remains a massive barrier to the implementation of the Act.³⁵² The available data on the seriousness of the crime in the country is unreliable, which renders it very challenging for law enforcement and other agencies to understand the multi-layered extent and reality of the problem, and even more challenging to produce a comprehensive plan of action.³⁵³

The prosecution process is long, and witnesses may have to attend several court hearings before finalising the case. As a result, many witnesses need resources and shelter, which is difficult to provide at times.³⁵⁴

(c) Successes and advantages of the Act

Some of the Act's successes relate to the increase in the number of investigated and concluded cases.³⁵⁵ In *S v Aldina Dos Santos*,³⁵⁶ the accused was convicted of sexual exploitation of children and was sentenced to life imprisonment in 2011.³⁵⁷ In *S v Vukile Shembe*,³⁵⁸ the accused was convicted and sentenced to 23 years imprisonment for the trafficking for sexual exploitation.³⁵⁹ In *S v Gwambe*,³⁶⁰ the accused was sentenced for trafficking for the sexual exploitation of children to 15 years in 2013.³⁶¹

In *S v Nahima Allima*³⁶² the accused was sentenced to life imprisonment for sexual exploitation.³⁶³ In *S v Foster Simelane*,³⁶⁴ the accused was sentenced to 30 years imprisonment for

³⁵¹ As above.

³⁵² As above.

³⁵³ As above.

³⁵⁴ Venter and Semmelink (2020) *The Journal of the South African Theological Seminary* 67.

³⁵⁵ Mangu and Mbata (2016) 17(2) *Child Abuse Research in South Africa* 25.

³⁵⁶ 2018 (1) SACR 20 (GP) (hereafter the *Aldina Dos Santos* case).

³⁵⁷ Mangu and Mbata (2016) 17(2) *Child Abuse Research in South Africa* 25.

³⁵⁸ *Shembe v Shembe* (AR250/2017) [2018] ZAKZPHC 45 (12 April 2018).

³⁵⁹ Mangu and Mbata (2016) 17(2) *Child Abuse Research in South Africa* 25.

³⁶⁰ *Gwambe (nee Tshabalala) and Another v Premier of the North West Province* (43/2007) [2010] ZANWHC 12 (5 October 2010).

³⁶¹ Mangu and Mbata (2016) 17(2) *Child Abuse Research in South Africa* 25.

³⁶² *S v Nahima Allima* (Nongoma Regional Court, KwaZulu-Natal)

³⁶³ See HJ Jeffery "Address by the Deputy Minister of Justice and Constitutional Development" (14 April 2015) https://www.unodc.org/documents/congress/workshops/workshop2/Statement_J_Jeffery_South_Africa_.pdf (accessed 10 August 2021).

³⁶⁴ *S v Foster Simelane* (Potchefstroom Regional Court, North West).

sexual exploitation.³⁶⁵ In *S v Mvumelezi Jezile*³⁶⁶ the accused was sentenced to 22 years imprisonment for sexual exploitation of a child, forced marriage, and rape.³⁶⁷ In *S v Lloyd Mabuza*,³⁶⁸ the accused Mabuza and co-accused Violet Chauke were sentenced to eight life sentences and 20 years imprisonment respectively, for trafficking;³⁶⁹ the heaviest sentence ever handed down for human trafficking in South Africa.³⁷⁰

Although the matter of *S v Obi*³⁷¹ commenced in 2015, the accused was only convicted and sentenced in 2019. He was sentenced for 23 counts of trafficking of persons (ranging from sexual grooming of children, kidnapping, and keeping of brothel) and was sentenced to life imprisonment on each of the three counts of trafficking in persons.³⁷²

In 2019, Judge Natvarlil Ranchod (Gauteng High Court in Pretoria) sentenced human trafficking kingpin, Ediozi Odi, to 6 life sentences and an additional 129 years imprisonment for keeping three young girls hostage to work as sex slaves.³⁷³

The number of prosecutions for the crime of traffic of persons reported is generally deficient; however, it should not be regarded as an indication that trafficking is under control or non-existent in South Africa.³⁷⁴ According to the Walk Free Foundation, in 2016 alone about 248 700 persons were reported to be living in conditions of slavery in South Africa, the majority being women and children.³⁷⁵ South Africa reports about 11 cases of trafficking of person per year; however, the reported number is not a true reflection or reality of trafficking in the Republic.³⁷⁶

The low number of cases reported and investigated on trafficking of persons in the Republic indicates that the majority of offenders continue with their activities of trafficking without any hindrances.³⁷⁷

³⁶⁵ Jeffery “Address by the Deputy Minister of Justice and Constitutional Development” (14 April 2015).

³⁶⁶ (2015) 3 All SA 201 (WCC) (hereafter the *Jezile* case).

³⁶⁷ *Jezile* para 60.

³⁶⁸ *S v Mabuza and Others* (174/01) [2007] ZASCA 110; [2007] SCA 110 (RSA) (20 September 2007)

³⁶⁹ Jeffery “Address by the Deputy Minister of Justice and Constitutional Development” (14 April 2015).

³⁷⁰ As above.

³⁷¹ (CC40/2018) (2019) ZAGPPHC 1045 (hereafter the *Obi* case).

³⁷² *Obi* para 3-14.

³⁷³ Z Venter “Human trafficking 'kingpin' to rot in jail” (18 September 2019) <https://www.iol.co.za/news/south-africa/human-trafficking-kingpin-to-rot-in-jail-33191689> (accessed 12 August 2021).

³⁷⁴ N Mollema and SS Terblanche “The effectiveness of sentencing as a measure to combat human trafficking” (2017) 2 *South African journal of Criminal Justice* 221.

³⁷⁵ Walk Free Foundation “Global slavery index. Modern slavery: a hidden, every day problem” (2018) <https://www.globalslaveryindex.org/> (accessed 12 August 2021).

³⁷⁶ Mollema and Terblanche (2017) 2 *South African journal of Criminal Justice* 221.

³⁷⁷ As above.

In conclusion, South Africa has adopted very comprehensive anti-traffic legislation. However, this is not sufficient to combat trafficking.³⁷⁸ Trafficking is a socially complex problem and it is essential to address the root cause of trafficking to create and combine a concrete possible solution to combat trafficking.³⁷⁹ Socio-economic issues such as lack of education and awareness, immigration and control, overpopulation, poverty, unemployment, and corruption are major contributing factors to trafficking.³⁸⁰

Addressing the socio-economic issues, combating violence against women, involving the government and civil societies, and ensuring the effective implementation of the Act constitutes a possible multidisciplinary approach to combat trafficking.³⁸¹

It is imperative to acknowledge that each incident of human trafficking is different and each victim has different needs; therefore, a “one size fits all” approach to assist these victims is insufficient.³⁸² Therefore, the law alone cannot combat trafficking without the assistance of civil societies such as religious organisations, individual groups, professionals, government agencies, and non-government agencies, including all persons and individuals that assist victims of trafficking to safe shelter.³⁸³

2.4 Conclusion

In this chapter, I explore the legal framework that governs the protection of women in South Africa, in so far as their access to justice rights are concerned. The access that I advocate for is the ability for women to access justice, where women’s voices can be heard, where they can exercise their rights, and challenge discrimination and hold accountable those persons (including decision-makers) who violate their human rights.³⁸⁴ The justice I advocate for is the protection, fairness, equality, justness, balance, and safe spaces for women.³⁸⁵

³⁷⁸ Patricia (23 March 2016) *De Rebus* 23.

³⁷⁹ Patricia (23 March 2016) *De Rebus* 23.

³⁸⁰ As above.

³⁸¹ As above.

³⁸² Kempen (2019) 112(7) *Servamus* 67.

³⁸³ As above.

³⁸⁴ UN and the Rule of Law “Access to Justice” (unknown) <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (accessed 06 June 2020). See also UNODC “Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems” (2013) https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf (accessed 06 June 2020).

³⁸⁵ IDLO “Justice for Women High-level Group Report” 36 and 45-48.

Overall, I advocate for an inclusive environment where women can feel safe and protected free and with adequate access to justice, whenever their human rights are violated.³⁸⁶ This chapter briefly discusses the importance of access to justice particularly concerning the plight of women in South Africa. I conclude that social change is required to achieve the equal protection of women in South Africa.

Therefore I identify the solutions to the existing problem regarding the lack of access to justice for women in South Africa. Prior to the Constitutional dispensation, women were excluded from many opportunities such as the right to own land, right to divorce, right to political participation, *etcetera*.

Consequently, many women were left uneducated, unaware of their rights, and continued to endure the segregating rules imposed on them by the apartheid administration. Analysing the importance of women's access to justice provides a better understanding of women's specific needs to better assist women to access justice.

To obtain a better understanding of women's needs it is necessary to clarify and identify those specific needs to be able to understand the importance of those rights to assist and achieve social justice. We cannot move forward when women are behind, and the rest of society is moving forward.

Regarding the South African legal framework discussed above, the Constitution provides the overall authority on how society should behave and how the challenges experienced in the country should be handled. However, even with the clear provisions as stipulated under section 34 of the Constitution, access to justice for women is a farfetched wish that still needs to come true.

The Domestic Violence Act aims to prevent abuse against women; however, the reality remains that domestic violence incidents against women have increased rampantly, especially now during the Covid-19 pandemic as movement and travel is limited and women are confined to their houses. Abusers take advantage of this situation. Women, more than ever, need protection to be able to access justice. The Domestic Violence Act aims to prevent any further domestic abuses against women and punish anyone who is found guilty of contravening the provisions of the Act. However, the Domestic Violence Act is insufficient to protect women from abuse and promote their access to justice.

³⁸⁶ IDLO "Justice for Women High-level Group Report" 2.

The Equality Act has brought many good changes for women; however, in the twentieth-century women were not supposed to fight for inclusiveness as inclusiveness in workplaces, society, churches, households, and many more were supposed to automatically take place. Even after the enactment of the Equality Act, women still face discrimination, harassment, and hate speech.

A woman is judged every day on the way she dresses, speaks, works, her marital status, employment, body structure, and even culture and religion. In the home environment a woman is expected to be a mother, wife, dressmaker, cook, cleaner, teacher, and respectful to her husband even when facing abuse. A woman is not expected to report a case of domestic violence or discrimination incidents at work or even harassment or rape. It is often alleged to be her fault for wearing a short skirt or dressed inappropriately for work. In addition, during the cross-examination process, these victims often relive the abuse. Women, as victims of abuse, receive no protection and are often threatened (with violence or even death) and coerced to withdraw their cases. Reproductive health issues as well as marriage and divorce challenges also hamper women's access to justice. For example, it is often regarded as a shame or disappointment for a woman to file for divorce or decide not to have children.

The Harassment Act provides for two remedies (protection order and the arrest of the perpetrator by SAPS). The Harassment Act remains ineffective as harassment against women persists despite protection orders. In most instances, the women who seek protection orders are those that leave with their partners. Often these women find that they have no place to go once the protection order is granted, and they often return to the company of the perpetrator and the abuse continues.

Women need protection for them to access justice. The data on the effectiveness of the Harassment Act remains limited as it cannot be established with certainty how many women are really protected from harm via protection orders. It is not also clear how many women remain the victims of abuse despite protection orders. Although the Harassment Act aims to do good, its implementation remains a challenge.

The Trafficking Act is another Act that does not seem to make a sufficient impact on the plight of the women in South African. Trafficking is a socially complex problem; therefore, it is essential to address the root cause of trafficking to create and combine a concrete possible solution to combat trafficking. The number of trafficking cases reported remains underreported despite the

prevalence of this crime. Women and girls disappear in South Africa daily due to the trafficking of persons. The perpetrators are well known to the SAPS and in the societies; however, trafficking continues without interception or arrest. Women and children are trafficked in front of the silently observing communities.

Women are often blackmailed and coerced to join trafficking. Trafficking is a vicious circle that must be addressed as a matter of urgency. The SAPS may be involved in the crimes or community members may be accomplices to the crime. How can a victim of trafficking obtain justice if their own communities are involved in the crimes and cannot protect them?

Therefore, I conclude that access to justice is a fundamental principle of the rule of law. In the absence of access to justice, people are unable to make their voices heard, exercise their rights, challenge discrimination, or hold decision-makers accountable.³⁸⁷

Despite our progressive regulatory framework and its efforts in post-constitutional democracy in South Africa since 1994, little attention is paid to the incorporation of social support mechanisms to support and promote black women's access to justice rights.

Chapter 3 reviews the regional legal instruments and their role to ensure that women's access to justice rights are fully accessible.

³⁸⁷ S Dauer and M Gomez "Violence against women and economic, social and cultural rights in Africa" (2006) 7(2) *Human Rights Review* 49-58.

CHAPTER THREE: AN EXAMINATION OF THE REGIONAL INSTRUMENTS THAT ENSURE WOMEN'S RIGHT TO ACCESS JUSTICE

3.1 Introduction

This chapter analyses the African regional legal instruments on women's access to justice rights. First, the supremacy of the Constitution is explored, followed by a discussion of the regional instruments.

The analysis includes, among others, a consideration of the ACHPR, African Charter on the Rights and Welfare of the Child, 1990 (ACRWC), and the Maputo Protocol. The modern legal foundation for the right of access to justice can be found in international treaties such as the European Convention on Human Rights, 1950 (article 6) and the International Convention Covenant on Civil and Political Rights (article 14). The codification of access to justice signifies that the right to access courts is a fundamental right much like freedom of speech and freedom of religion.

Eventually, the discourse provides a discussion on the effectiveness of these legal instruments to protect and ensure women's access to justice rights in the region. This provides an idea of whether the regional instruments are sufficient to promote and advance women's access to justice rights in the African continent.

3.2 The Constitution of the Republic of South Africa, 1996

Section 2 states that the Constitution is the supreme law of the country and requires that every law or conduct must be consistent therewith. Additionally, section 39 requires that,

when interpreting the Bill of Rights, a court, tribunal or forum—
must promote the values that underlie, and open and democratic society based on human dignity, equality, and freedom;
must consider international law; and
may consider foreign law. [...].³⁸⁸

³⁸⁸ Sec 39(1) of the Constitution (own emphasis added).

Accordingly, section 39(1) enjoins courts to consider both foreign and public international law, making the consideration thereof mandatory. Notably, the wording in paragraphs (b) and (c) implies that a different approach is employed when assessing international and foreign law. Regarding international law, the court *must* consider it, whereas the court *may* consider foreign law. Rautenbach correctly submits that even though there is a clear difference between the two auxiliary verbs “may” and “must”, both are linked with the verb “consider”, which includes a variety of connotations such as to “think carefully about (something)”, to regard something as having a specified quality, or take something into account when making a judgment.³⁸⁹

It is evident in its international consideration, the court must go through (i.e. “must consider”) this process, whilst in the case of foreign law, there is no such mandatory obligation.³⁹⁰ In assessing both the international and foreign law, Chaskalson J states that,

In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.³⁹¹

Accordingly, when assessing women’s access to justice and security, South African courts must consider the African regional laws.

3.3 African regional and international instruments

This part explores the African regional system mechanisms to promote and ensure women’s access to justice in the region.

3.3.1 The African Charter

First and foremost, article 1 of the African Charter imposes an obligation on its member state to recognise the rights, duties, and freedom enshrined in the Charter and undertake to adopt legislative or other measures to give effect thereto.

³⁸⁹ C Rautenbach “The South African Constitutional Court’s use of foreign precedent in matters of religion: without fear or favour” (2015) *PELJ* 1547-1548.

³⁹⁰ See also *S v Makwanyane* 1995 (3) SA 391 (CC) (hereafter the *Makwanyane* case) para 37.

³⁹¹ *Makwanyane* para 39.

Notably, the African Charter protects all the rights alluded to in the above discussion. Notably, article 18 states that,

- (3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the *woman* and the *child* as stipulated in international declarations and conventions.
- (4) The *aged and the disabled* shall also have the right to special measures of protection in keeping with their physical or moral needs.

Sub-articles (3) and (4) specifically refer to women, children, and disabled persons. Accordingly, the African Charter appears to recognise the importance of protecting the most vulnerable groups in society. Hence, each member state must provide measures that seek to realise the rights entrenched in the Charter.³⁹²

Moreover, article 6 also states that “every individual shall have the right to liberty and to the security of his person”. It is at this backdrop that South Africa must take more advanced legislative steps to achieve access to justice for women.

3.3.2 The Maputo Protocol

The Maputo Protocol calls upon all member states to take all necessary measures to eliminate every form of discrimination against women and to ensure the protection of women’s rights as stipulated in international declarations and conventions. Article 8 deals with access to justice and equal protection before the law. It provides:

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- (a) effective access by women to judicial and legal services, including legal aid;
- (b) support to local, national, regional, and continental initiatives directed at providing women access to legal services, including legal aid;
- (c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- (e) that women are represented equally in the judiciary and law enforcement organs;

³⁹² Art 2 of the African Charter.

- (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

Each member state shall also adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities.³⁹³ It is evident that more measures must be taken to ensure that women, children, and disabled persons receive access to justice as recognised by national and international communities. This is rightly so because these persons qualify as vulnerable groups worldwide.

3.3.2 *The CEDAW*

The CEDAW seeks social and economic inclusion of all both men and women in society. Article 2 states that,

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

³⁹³ Art 13 of the Maputo Protocol.

It can be argued that access to justice not only includes “access to competent court”, but also includes fair and equal access to social and economic opportunities for everyone. Therefore, every government must take all necessary measures to fulfil these obligations.

3.4 Discussion

Both the African Charter and the Maputo Protocol heavily stress the principle of equality before the law and non-discrimination.³⁹⁴ The Maputo Protocol further imposes a responsibility on member states to ensure effective access to justice for women. The effective access to justice for women would, amongst others, include judicial access to legal services, including legal aid.³⁹⁵

South Africa is a signatory to the African Charter and is committed to realise access to justice for all, including women. South Africa’s commitment to ensure access to justice for all can be seen in enacted legislation such as the Legal Aid South Africa Act,³⁹⁶ which is enacted as a statutory body to ensure and to provide legal aid services that are accessible to everyone.³⁹⁷

Currently, the majority of the Universities in South Africa have established legal aid clinics to assist the relevant communities in which they are situated.³⁹⁸ Furthermore, other institutions that have been established under the Legal Aid Act to ensure access to justice are community-based advice offices, NGOs like the Legal Resources Centre (LRC), Lawyers for Human Rights, and the Centre for Child (law based in the faculty of law, University of Pretoria).³⁹⁹

Furthermore, the Organisation of the African Commission on Human and Peoples’ Rights (established under article 30 of the African Charter) tasks member states, including South Africa, to protect and to safeguard peoples’ rights and ensure that human rights in Africa are protected.⁴⁰⁰ The Organisation of the African Commission on Human and Peoples’ Rights is a measure to safeguard and ensure that countries are held accountable for human rights violations.⁴⁰¹ South Africa must give effect to the provisions of the Bill of Rights in the Constitution, regional and

³⁹⁴ E Durojaye, G Mirugi-Mukundi and O Adeniyi “Legal empowerment as a tool for engendering access to justice in South Africa” (2020) 20 *International Journal of Discrimination and the Law* 224-244.

³⁹⁵ Durojaye, Mirugi-Mukundi and Adeniyi (2020) 20 *International Journal of Discrimination and the Law* 228-229.

³⁹⁶ 39 of 2014 (hereafter Legal Aid Act).

³⁹⁷ Sec 9 of the Constitution.

³⁹⁸ Legal Aid South Africa “Country Report, Legal Aid South Africa” (April 2017) http://www.internationallegalaidgroup.org/images/miscdocs/SA_Country_report_-April_2017.pdf (accessed 26 October 2021).

³⁹⁹ As above.

⁴⁰⁰ Art 30 of the African Charter.

⁴⁰¹ As above.

international instruments, institutions like the SAHRC were established.⁴⁰² Further institutions established to ensure access to justice include the Public Protector, and the Commission for Gender Equality (CGE), *etcetera*.⁴⁰³

To give effect to the provisions on the African Charter regarding the protection and promotion of access to justice for women, article 1 of the Protocol to the ACHPR establishes the African Court to complement the work of the African Commission.⁴⁰⁴ The jurisdiction of the African Court extends to all cases and disputes that have been submitted to it, including the interpretation and application of the African Charter.⁴⁰⁵ The jurisdiction of the African Court also extends to the interpretation of the relevant human rights instruments ratified by that particular state concerned.⁴⁰⁶

The African Commission, state parties, and African intergovernmental organisations are entitled to submit cases to the African Court.⁴⁰⁷ When a state party has an interest in a certain case it can request the African Court to join the proceedings.⁴⁰⁸ Other relevant non-governmental organisations can also join the proceedings under the observer status.⁴⁰⁹ Most importantly, individuals can institute cases directly to the African Court under article 34(6),⁴¹⁰ which requires for the declaration to be made by state parties, therefore, accepting the competency of the African Court.⁴¹¹

The commitment of state parties in accepting the competency of the African Court is an indication that state parties agree to uphold the rule of law and to be held accountable for any human rights violations as stipulated in the African Charter, therefore, ensuring access to justice for women.⁴¹²

⁴⁰² Human Rights Commission Act 54 of 1995.

⁴⁰³ C Murray “The Human Rights Commission et al: what is the role of South Africa's Chapter 9 Institutions?” (2006) 9(2) *PELJ* 1-26.

⁴⁰⁴ Art 1 of the Protocol to the ACHPR.

⁴⁰⁵ Art 3 of the Protocol to the ACHPR.

⁴⁰⁶ As above.

⁴⁰⁷ Art 5 of the Protocol to the ACHPR.

⁴⁰⁸ Art 5(2) of the Protocol to the ACHPR.

⁴⁰⁹ Art 5(3) of the Protocol to the ACHPR.

⁴¹⁰ Art 34(6) of the Protocol to the ACHPR requires the states to make a declaration at the time of the ratification of the protocol or any time after accepting the competency of the African Court to receive petitions in accordance with art 5(3) of the Protocol.

⁴¹¹ Art 5(3) of the Protocol to the ACHPR.

⁴¹² As above.

In *APDF v IHRDA*,⁴¹³ the judgment is remarkable due to the fact the Court found a violation of the Maputo Protocol for the first time.⁴¹⁴ The 2011 Malian Family Code allowed girls to be married at the age of sixteen and at times the minimum age could be lowered to fifteen and consent from the girl being married is not a requirement for the marriage to be valid.⁴¹⁵

The African Court held that the provisions under the 2011 Malian Family Code violate the Maputo Protocol and should therefore not be followed.⁴¹⁶ Similarly, in *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*⁴¹⁷ the complaints were all women who participated in the Egyptian Movement for Change.⁴¹⁸ The women were assaulted, intimidated, and sexually harassed by the National Democratic Support (supporters of the previous Former President of Egypt, Hosni Mubarak) under the watchful eye of the Egypt Riot Police.⁴¹⁹

The women approached the domestic authorities for redress, which proved to be fruitless, and then decided to seek redress from the African Court.⁴²⁰ The African Court held that Egypt failed to perform its positive duty to prevent and investigate violations of human rights against women as stipulated in the African Charter.⁴²¹ Therefore, Egypt was ordered to pay compensation

⁴¹³ Banens “African Court issues”. In *APDF v IHRDA*, an application was submitted to the African Court against the Republic of Mali for promulgating the 2011 Malian Family Code, which violated several international human rights instruments of which Mali was a signatory. The Applicant relied on several provisions of the Maputo Protocol, such as art 6(b), which stipulates 18 years as the minimum age for marriage; arts 1(3), 2 and 21 of the ACRWC; arts 16(a)-(b) of CEDAW, which address the rights to consent to marriage, as well as several provisions of the ACHPR.

⁴¹⁴ Banens “African Court issues”. See also *ACRWC v IHRDA* para 135: the Court unanimously concluded that the State violated the several international human right provisions and ordered the State to amend the impute laws and to harmonise its laws confined with international instruments and to take appropriate measures to remedy and end the violations committed.

⁴¹⁵ Banens “African Court issues”. See also *ACRW v IHRDA* para 117: in the instant case were the Applicant asserts that the 2011 Malian Family Code allowed girls age 16-17 years to be married with only the father’s consent even though the mother opposes to the marriage as a fathers decision supersede any other, thus making the early marriage of girls easier. The Applicant further compared the requirement of the 2011 Malian Family Code to the 1962 Malian Family Code where permission from both parents for the conclusion of a valid marriage was a requirement, which made it difficult for young girls to be married at such a tender age even though the age requirement was 15-17 it placed a more stringent protection for the girls.

⁴¹⁶ Banens “African Court issues”. See art 2(2) of the Maputo Protocol; arts 1(3) and 21 of the ACRWC; and art 5(a) of CEDAW.

⁴¹⁷ ACHPR, 323/06, 10th Extra-ordinary Session, December 2011.

⁴¹⁸ Open Society Justice Initiative “Decisions of the African Commission on Human and Peoples' Rights, 2010-2014” (September 2015) <https://www.justiceinitiative.org/uploads/9a38bc11-1fdd-44b4-96e9-46b9f6263b99/case-diges-ts-achpr-20151014.pdf> (accessed 27 October 2021).

⁴¹⁹ Open Society Justice Initiative “Decisions of the African Commission on Human and Peoples' Rights, 2010-2014” 16-17.

⁴²⁰ As above.

⁴²¹ As above.

to the victims and urged to investigate the alleged human rights violations and hold perpetrators accountable.⁴²²

The two cases discussed above demonstrate the commitment and the effectiveness of the African Court in holding state parties accountable for failing to protect women against human rights violations. However, there are challenges to the complete effectiveness of the African Court.

The success of these commitments is however limited as state parties are governed by their own national legislation and can only approach the African Court for redress when the national laws have been exhausted.⁴²³ Also, another factor that affects the effectiveness of the Court is the time frame (restriction) required to approach the African Court and the time frame of the African Court's adjudication process, for example, *APDF v IHRDA*. Sadly, however, women find it difficult to access justice as in the *APDF v IHRDA* case that took four years to access justice.⁴²⁴ During that time, until the end of the case, human rights violations against the women of Mali continued.

Another challenge of the Court is to ensure that states adhere to the judgments made by the African Court, for example, *Law Society of Zimbabwe v Zimbabwe*.⁴²⁵ Although the matter dealt with the acquisition of property, it is relevant to indicate the weakness of the African Court to hold states parties accountable and the consequences for failing to adhere to the African Court's decision.⁴²⁶ In conclusion, the African Charter has provisions in place to protect women; however, South Africa must take robust steps to effectively enforce and implement those legislative provisions.

In addition to the African Charter, South Africa is committed to regional instruments to ensure access to justice for women. Notably, South Africa also reaffirmed its faith in the fundamental human rights to uphold the dignity of all people.⁴²⁷ Through its affirmation and commitment to its international obligation to further ensure access to justice for women in South Africa, international instruments such as the CEDAW, Universal Declaration, ICCPR, and the ICESCR, other international human rights instruments, and other UN conventions on the rights of

⁴²² As above.

⁴²³ Art 56(5) of the African Charter.

⁴²⁴ Banens "African Court issues".

⁴²⁵ *Law Society of Zimbabwe v Zimbabwe*, ACHPR, 321/06, 13th Extra-ordinary Session, February 2013.

⁴²⁶ As above. See art 5 of the Protocol which empowers the African Court to institute action against State Parties which failed to comply with the decision of the African Court.

⁴²⁷ Art 2 of CEDAW.

women were adopted.⁴²⁸ Therefore access to justice for women is not limited to include only “access to competent court”, but also include fair and equal access to social and economic opportunities for women as stipulated in the instruments mentioned above.⁴²⁹ It is therefore imperative that the government takes all necessary measures to fulfil its obligations and ensure that access to justice for women in South Africa is effectively enforced and successfully implemented.

Finally, the provisions discussed above of the African regional instruments are properly crafted. The intention of the drafters is clear and the intended outcomes are clearly stipulated; however, in many African countries, the laws are ignored, simply not correctly applied or the unavailability of resources contributes to ineffective implementation. The biggest challenge or the main obstacle that hinders women to seek redress in the African Court is the requirements of exhausting local remedies before approaching the African Court.⁴³⁰

The challenge with this requirement is that many women already find it difficult to seek redress using local remedies, or the local remedies are not women-friendly and create a barrier to justice. The other challenge of the African Court is the time limit in which the case or matter must be brought to the attention of the African Court and the time frame of the African Court’s adjudication process.⁴³¹ This requirement limits women to report their cases and places them under unnecessary pressure because once the period has passed it will become very difficult to seek redress. The time it takes to adjudicate over a matter is too long, while the matter is being investigated and adjudicated women continue to face violations.

In South Africa, the legislation on the rights of women is clearly stipulated; however, ensuring the effective implementation of the laws to protect women remains a big challenge.

3.4 Conclusion

The regional legal instruments discussed above contain provisions that either directly or indirectly recognise that access to justice is a human rights issue. South Africa is committed through its legal instruments to ensure that access to justice for all, including women, is realised. The commitment

⁴²⁸ UN Committee on Economic, Social, and Cultural Rights (Committee on ESCR).

⁴²⁹ Art 2 of CEDAW.

⁴³⁰ Art 56(6) of the African Charter.

⁴³¹ As above.

is evident from the Constitution — as a supreme law — which requires that international and regional instruments be observed and complied with as discussed above.

This indicates South Africa's commitment to providing access to justice for all, including vulnerable women and children. The state must put in place effective mechanisms to ensure that this commitment is indeed fulfilled. To respond to this obligation, South Africa has enacted various pieces of legislation to ensure access to justice. Despite these various pieces of legislation, it is concluded that South African women still experience serious violations of their human rights in various forms.

I, therefore, submit that more robust steps must be taken in terms of the social support mechanism to curb the spread of women's rights violations. If no robust steps are taken and the government continues to fail to effectively implement the current laws women will continue to experience difficulties to access justice.

The lack of access to remedies provided by the existing law leads to an increase in vulnerability, exploitation, and the violation of women's rights. Vulnerability and poverty effectively hinder women's access to justice and their ability to use the justice system and its remedies. Therefore, when women cannot access justice, the vicious circle of vulnerability, exclusion, and poverty continues, which impairs or blocks women from enjoying their rights. Chapter 4 examines these challenges.

CHAPTER FOUR: THE SOCIAL, CULTURAL CHALLENGES AND PROSPECTS TO THE REALISATION OF ACCESS TO JUSTICE FOR WOMEN IN SOUTH AFRICA

4.1 Introduction

In this chapter I examine the challenges that hinder black women from access to justice in South Africa. First, this chapter identifies the social challenges, as these are problems that are experienced by people in their communities, engaging in normal behaviours with one another.

Under the social challenges, four challenges are examined, namely (1) intimate partner violence; (2) discrimination against women at work; (3) exclusion of women from decision making; and (4) education and empowerment.

By identifying the social obstacles that hinder women from access to justice, actions can be taken to eliminate the obstacles and make it possible for women to access justice. High rates of unemployment, immersing poverty and low growth, increase in inequality, and disruption of economic activities due to pandemics (such as Covid-19) are all major economic factors that affect women's access to justice.

Therefore, an examination of the economic challenges faced by women in their access to justice in South Africa follows. Although many economic challenges hinder women to access justice as mentioned above, this chapter only examines two challenges, namely (1) economic violence and (2) limited financial resources as these are arguably the most crucial barriers to access to justice for women. The two economic challenges are explained further under the heading of economic challenges below.

Different people from different cultural groups follow different cultural practices and customs when dealing with the challenges or problems facing their communities or societies. The chapter briefly explores those cultural challenges faced by women when assessing justice.

Lastly, the following cultural challenges are explored: (1) Discriminatory family laws; (2); Discriminatory property regimes; and (3) Plural legal systems. Identifying and understanding these cultural challenges makes it easier to formulate amicable solutions to the problems affecting communities in accessing justice.

At the conclusion of this chapter it is evident that the identified barriers do limit women's prospects to the realisation of access to justice for women in South Africa. The extent to which these barriers limit women from access to justice is also shortly discussed in the conclusion.

4.2 Social challenges

There is a link between inequality and access to justice — especially considering vulnerable groups such as women and children.⁴³² The link between discrimination and inequality leads to the inability of women to seek redress against human rights violations.⁴³³ Consequently, a lack of access to justice leads to an increase in poverty and inequality.⁴³⁴ Women's access to justice is the root for tackling poverty, inequality, vulnerability, exclusions, and unemployment, *etcetera*.⁴³⁵

Social challenges are problems that are experienced by people in specific communities due to specific behaviours which negatively affect their communities.⁴³⁶ Women face numerous social challenges in accessing justice and they differ from community to community; however, only a few of the social challenges are examined in this dissertation such as legal empowerment, property rights, limitation of resources, levels of poverty, and intimate partner violence.⁴³⁷ Furthermore, limited access to basic social amenities (such as healthcare, sanitation, and shelter), discrimination at the workplace, and exclusion of women from decision-making contribute to these challenges.⁴³⁸

4.2.1 Intimate partner violence

According to the WHO, in 2018, about one-billion women lacked legal protection against violence from their partners.⁴³⁹ The 2020 SAPS Crime Statistics indicate that one in five women in South Africa has experienced physical violence from a partner.⁴⁴⁰ Despite the existing legislation to

⁴³² Durojaye, Mirugi-Mukundi and Adeniyi (2020) 20 *International Journal of Discrimination and the Law* 229.

⁴³³ As above.

⁴³⁴ As above.

⁴³⁵ As above.

⁴³⁶ IDLO "Justice for Women High-level Group Report" 5-6.

⁴³⁷ IDLO "Justice for Women High-level Group Report" 6.

⁴³⁸ As above.

⁴³⁹ WHO "Global and regional estimates of violence against women. Situation report" (20 October 2013) <https://www.who.int/publications/i/item/9789241564625> (accessed 25 November 2021).

⁴⁴⁰ Sunday Times Reporters "'He tried to pull my teeth out with pliers': Women on how they escaped abuse" (29 November 2020) *Sunday Times News* <https://www.timeslive.co.za/sunday-times/news/2020-11-29-he-tried-to-pull-my-teeth-out-with-pliers-women-on-how-they-escaped-abuse/> (accessed 29 December 2020). See further UN Women "Global Database on Violence Against Women" <https://evaw-global-database.unwomen.org/pt/countries/africa/south-africa> (accessed 29 December 2020).

protect women and the government's efforts, abuse continues.⁴⁴¹ The lack of protection orders and effective implementation by the police and prosecution is a great challenge.⁴⁴²

Our courts are adversarial by nature, i.e. it does not create a conducive environment for victims of intimate partner violence.⁴⁴³ As mentioned, GBV victims are often subjected to secondary trauma when seeking redress due to the requirements set by the criminal justice system and other statutory laws, which in most cases are not gender-sensitive or victim-centred.⁴⁴⁴

The increasing number of protection orders that are confirmed (although not final) is good; however, it is more difficult to interpret the increase in breaches.⁴⁴⁵ The low number of final protection orders is often attributed to the woman's failure to return to court; the police's frustration with domestic violence is often attributed to women withdrawing charges against their abusive partners.⁴⁴⁶

Our courts do not always accommodate women seeking to obtain final protection orders. In 16% of cases, applicants have to go to court three or four times to establish the outcome of their applications for interim protection orders.⁴⁴⁷ If they don't returned to court to indicate that the abuse had become worse their interim protection orders are cancelled and their orders are not made final.⁴⁴⁸

Apart from the courts, many women are reluctant to open cases due to the fear that their partners may be arrested and taken into custody.⁴⁴⁹ An arrest may render the woman in financial difficulty especially if the perpetrator is the breadwinner.⁴⁵⁰ Accordingly, it is a problem to obtain justice (which would be served after conviction) and at the same time bear the financial burden that is created.⁴⁵¹ Consequently, the perpetrator walks free and justice is denied for the woman.⁴⁵²

⁴⁴¹ IDLO "Justice for Women High-level Group Report" 8.

⁴⁴² As above.

⁴⁴³ CE Jordan "Intimate Partner Violence and the Justice System: An Examination of the Interface" (2004) 19 *Journal of Interpersonal Violence* 1412-1434.

⁴⁴⁴ Durojaye, Mirugi-Mukundi and Adeniyi (2020) 20 *International Journal of Discrimination and the Law* 230.

⁴⁴⁵ Jordan (2004) 19 *Journal of Interpersonal Violence* 1412-1434.

⁴⁴⁶ As above.

⁴⁴⁷ As above.

⁴⁴⁸ As above.

⁴⁴⁹ As above.

⁴⁵⁰ As above.

⁴⁵¹ As above.

⁴⁵² As above.

Furthermore, the lack of support by family and friends after the abuse affects the victim's decision to report the incident, which leads to the victim withdrawing the case.⁴⁵³ The slow pace of the investigation and prosecution affects the victims who ultimately lose hope in the entire legal system, leaving them feeling hopeless and drained.⁴⁵⁴

According to Fischer and Rose, about 27% of perpetrators arrested end up assaulting and threatening their victims.⁴⁵⁵ The victims are either physically threatened (even with death) to withdraw the matter or withdraw the protection order against the perpetrators.⁴⁵⁶

Bachman states that 1 out of 10 women in South Africa do not report their cases to the police due to fear of being killed by their perpetrators.⁴⁵⁷ As a consequence, violations against women continue and access to justice is denied.⁴⁵⁸ The violations of women's rights, the list continues as each woman has their own individual challenges they face in abusive relationships. It thus becomes impossible to pinpoint one specific challenge as women are still denied their overall fundamental rights.

4.2.2 Discrimination against women at work

According to the World Bank statistics, about 2.7-billion women are legally restricted from occupying the same job as their male counterparts. The Middle East and North Africa are the regions with the most uneven employment regarding women. In South Africa, about 1-million women are employed in the domestic workers' sector.⁴⁵⁹ 16% of these women were either physically or verbally abused by their employers.⁴⁶⁰ According to the 2019 "Report on Pay and Working Conditions for Domestic Work in South Africa" (compiled by Sweep South) after interviewing about 1 300 domestic workers,⁴⁶¹ 27% said they live in shacks, 79% are the main breadwinners, and 50% support people financially.⁴⁶²

⁴⁵³ As above.

⁴⁵⁴ As above.

⁴⁵⁵ As above.

⁴⁵⁶ As above.

⁴⁵⁷ As above.

⁴⁵⁸ As above.

⁴⁵⁹ J de Villiers "16% of South Africa's domestic workers are abused at work, according to a shocking new" (19 May 2019) *Business Insider SA* <https://www.businessinsider.co.za/16-of-south-african-domestic-workers-report-being-abused-at-work-sweep-south-report-said-2019-5> (accessed 29 December 2020).

⁴⁶⁰ As above.

⁴⁶¹ As above.

⁴⁶² As above.

South Africa has a long history of gender discrimination which is evident in our unequal society where women have delegated traditional roles.⁴⁶³ In workplaces, women are paid less than their male counterparts even if they occupy the same position.⁴⁶⁴ In South Africa, about 28% of women are paid less than their male counterparts according to the Global World Report for 2018/9.⁴⁶⁵

The Constitution guarantees the right to equality for all persons, including women; however, many women are denied their fundamental right to equal access to pay.⁴⁶⁶ In addition, the marginalisation of women in the workplace undervalues their contribution at work and perpetuates the narrative of the already existing masculinity, and contributes to women's subordination.⁴⁶⁷

4.2.3 Exclusion of women from decision-making

Illiteracy amongst women is one of the biggest obstacles and contributes to a lack of understanding or comprehending important documents.⁴⁶⁸ This causes many pitfalls and hampers the creation of a better society.⁴⁶⁹ This is why the decision-making processes are one-sided and jeopardise social changes and coordinated strategic activities.⁴⁷⁰ Being excluded from decision-making may weaken women's power as they are the backbone of any community or society.⁴⁷¹ It is evident that when women's exclusions prevail it impairs deliberation and reasoning, which violates human rights.⁴⁷²

4.2.4 Education and empowerment

Education is the key to any organisational success and without education, an understanding of rights cannot be established.⁴⁷³ Through education, it is believed that the general public adopts a

⁴⁶³ As above.

⁴⁶⁴ As above.

⁴⁶⁵ T Wonci "South Africa has a long history of gender discrimination" (29 April 2019) *IOL* <https://www.iol.co.za/business-report/opinion/south-africa-has-a-long-history-of-gender-discrimination-22170778> (accessed 29 December 2020) (hereafter Wonci "South Africa has a long history of gender discrimination").

⁴⁶⁶ As above.

⁴⁶⁷ As above.

⁴⁶⁸ IDLO "Justice for Women High-level Group Report" 13-17.

⁴⁶⁹ As above.

⁴⁷⁰ As above.

⁴⁷¹ As above.

⁴⁷² As above.

⁴⁷³ As above.

broader vision of roles as part of nation-building.⁴⁷⁴ Therefore, it is clear that for women to form part of nation-building they must be empowered through adult education and self-development.⁴⁷⁵

The education and empowerment of women — especially in rural areas — can only materialise through, *inter alia*, radio, road shows, the establishment of adult education institutions in the region, *etcetera*.⁴⁷⁶

The idea of social justice for all women can only be achieved through social justice education to empower women to contribute to the common discourse in their societies.⁴⁷⁷ With education, women will be able to develop and understand their human rights, which in turn equip them with the necessary knowledge and tools to realise their access to justice rights.⁴⁷⁸

4.3 Economic challenges

Economic challenges refer to the unavailability of resources that restricts people from accessing their desired needs. An economically impoverished nation leads to societies and communities that are deprived of their basic human rights and social injustices continue to prevail.⁴⁷⁹ The greater the poverty, the more people are deprived of accessing their basic human rights, leading to fewer people enjoying fair and equal rights to basic needs.⁴⁸⁰ Although many economic challenges affect women's access to justice, this part of the dissertation only examines two of the most crucial barriers to access to justice, namely (1) economic violence; and (2) limited resources.

4.3.1 Economic violence

Economic violence refers to the abuser's complete control over the victim's money and other economic resources or activities.⁴⁸¹ Economic violence toward women occurs when a male abuser maintains control of the family finances.⁴⁸² The man decides, without regard to the woman, how

⁴⁷⁴ As above.

⁴⁷⁵ As above.

⁴⁷⁶ As above.

⁴⁷⁷ As above.

⁴⁷⁸ As above.

⁴⁷⁹ RN Ozoemena "Gender Justice and Economic Inclusion in South Africa" (2018) 9 *Journal of International Women's studies* 13-28.

⁴⁸⁰ L Lamm "The relationship between social justice and economic justice" (26 March 2018) <https://borgenproject.org/social-justice-and-economic-justice/> (accessed 21 October 2021).

⁴⁸¹ Durojaye, Mirugi-Mukundi and Adeniyi (2020) 20 *International Journal of Discrimination and the Law* 231-234.

⁴⁸² As above.

the money is to be spent or saved, thereby reducing women to completely dependent on the male abuser for money to meet their personal needs.⁴⁸³

It may involve subjecting a woman to a strict allowance or forcing her to beg for money. Women work longer hours than men but earn less.⁴⁸⁴ This includes both household chores (which are unpaid) and paid employment in the labour market.⁴⁸⁵ Despite progress in women's economic activity attained by women after South Africa's independence, many women still suffer economic forms of abuse, including limited access to funds and credit; lack of control over access to health care, employment, education, and agricultural resources; exclusion from financial decision making; receiving unequal remuneration for work equal in value to men's work; and discriminatory traditional laws on inheritance, property rights, and use of communal land.⁴⁸⁶

4.3.2 Limited financial resources

The unavailability of basic resources such as shelter, adequate water supply, toilet services, and justice for women makes it difficult for women to access justice.⁴⁸⁷ The lack of resources and the insufficient funding of the justice system in South Africa is also one of the contributing economic barriers to women's access to justice.⁴⁸⁸ The impact is most evident in the rural and remote areas as many police stations and courts are situated very far from the communities.⁴⁸⁹

The distance creates a barrier to accessing the courts and police stations, especially in intimate partner relationships, and this leads to many cases being underreported.⁴⁹⁰

Other basic services such as clinics, schools, and access to clean water are also out of reach as most of these services are situated in urban and suburban areas.⁴⁹¹ The financial resources required to travel from rural areas and townships to access those basic services create another added burden to women's access to justice.⁴⁹² As a consequence of the lack of resources and empowerment, women face far-reaching consequences when seeking redress.⁴⁹³

⁴⁸³ As above.

⁴⁸⁴ As above.

⁴⁸⁵ As above.

⁴⁸⁶ As above.

⁴⁸⁷ Durojaye, Mirugi-Mukundi and Adeniyi (2020) 20 *International Journal of Discrimination and the Law* 231-232.

⁴⁸⁸ As above.

⁴⁸⁹ As above.

⁴⁹⁰ As above.

⁴⁹¹ As above.

⁴⁹² As above.

⁴⁹³ As above.

It is therefore concluded that different women experience different challenges when accessing justice and the government must develop different mechanisms to address the plight of women seeking redress.⁴⁹⁴

4.4 Cultural challenges

In the African context, harmful traditional practices include the practice of female genital mutilation, sacrificing and ritual killing of children,⁴⁹⁵ corporal punishment, the acceptance of domestic violence towards women, forced and/or early marriages, polygamy, and the denial of women's inheritance rights.⁴⁹⁶ Many customary laws discriminate against women in the areas of inheritance, marriage, succession, and divorce.⁴⁹⁷ Identifying these areas of discrimination is the key to a deeper understanding of why women in South Africa do not fully enjoy their access to justice rights.⁴⁹⁸

Many African countries (Mali, Sudan, South Sudan, and Ethiopia) have only made limited efforts to address discriminatory cultural practices and stereotypes against women.⁴⁹⁹ Various African societies, especially in rural areas, believe that they are primarily responsible for their position of disadvantage.⁵⁰⁰ In South Africa, customs and cultural practices form part of the communities and it is necessary to closely analyse these customary practices especially when practiced to the detriment of women.⁵⁰¹

Customary law in South Africa is defined in terms of section 1 of the Recognition of Customary Act⁵⁰² as “the customs and usages traditionally observed among the indigenous African peoples of South Africa, which forms part of the culture of those peoples”.⁵⁰³

⁴⁹⁴ As above.

⁴⁹⁵ As above.

⁴⁹⁶ E Moore and C Himonga “Living Customary Law and Families in South Africa” (2018) *South African Child Gauge* 61-68.

⁴⁹⁷ Moore and Himonga (2018) *South African Child Gauge* 61-63

⁴⁹⁸ As above.

⁴⁹⁹ As above.

⁵⁰⁰ As above.

⁵⁰¹ As above.

⁵⁰² Recognition of Customary Marriages Act 120 of 1998

⁵⁰³ As above.

4.4.1 Discriminatory family laws

There are many discriminatory family practices in various countries and several of them are codified either by law or religion.⁵⁰⁴ In many countries, the codification of these discriminatory family laws (either by law or religion) hampers women in their quest for access to justice.⁵⁰⁵ The situation is evident in instances of divorce where a woman is often regarded as a troublemaker or disrespectful to the family.⁵⁰⁶ In many instances, the laws and the practices surrounding divorce are discriminatory or biased to women and women only have limited, or no, options and often remain in the relationship to avoid being labelled as outcasts.⁵⁰⁷ It is therefore imperative to address the discriminatory laws and norms as it is a central key to achieving access to justice for women.⁵⁰⁸

4.4.2 Discriminatory property regimes

Women's disadvantage in terms of property and access to and control of land is well documented in South Africa.⁵⁰⁹ The difficulty experienced by women — more especially impoverished women — to access and control land contributes to poverty.⁵¹⁰ Poverty contributes greatly to women's lack of access to justice. Property rights in terms of customary law render it difficult for women to obtain land rights in certain instances where their right of occupation depends on the relationship with their husband or male relatives.⁵¹¹ In addition, the formal registration of land can be a challenge and very costly.

For as long as the delay to acknowledge the fundamental property rights (as guaranteed in the Constitution to all persons, which include women)⁵¹² persists, the violation of women's human rights and dignity will continue.

⁵⁰⁴ As above.

⁵⁰⁵ As above.

⁵⁰⁶ As above.

⁵⁰⁷ As above.

⁵⁰⁸ As above.

⁵⁰⁹ See *Gumede (born Shange) v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

⁵¹⁰ Jordan (2004) 19 *Journal of Interpersonal Violence* 7.

⁵¹¹ As above.

⁵¹² As above. See also sec 25 of the Constitution, which guarantees everyone the right to property.

4.4.3 *Plural legal systems: statutory law and customary law challenges?*

Plural legal systems refer to two or more legal systems that coexist in the same social field.⁵¹³ In the South African context, statutory law and customary law coexist; however, the coexistence of this plural legal system is guided and confined within the constitutional provisions.⁵¹⁴ Many human rights problems experienced by women in South Africa are resolved outside the norms of a formal justice system.⁵¹⁵ Customary law plays a significant role in shaping our Constitution regarding sources of long-standing practices.⁵¹⁶ Customary laws just like statutory laws contribute significantly to the implications experienced by women in their quest for access to justice.⁵¹⁷ In many rural areas, women are expected to fulfil certain gender roles regarding decision-making, chores, and expectations.⁵¹⁸

The patriarchal power of men dominates most rural areas as, in most instances, men have the final say without considering women's opinions and decisions.⁵¹⁹ This power dynamic contributes to the distortion caused by customary law and strengthens the role of traditional male leaders and reinforces that male head of household as the only true person in law, and the sole holder of family property and civic status.⁵²⁰ In most communities, the power dynamics extinguish the rights of wives to the security of tenure and use of land — women became legally invisible.⁵²¹

It is admitted that extensive discrimination against women continues to exist and that such discrimination violates the principle of equality and respect for human dignity. In the past the consent of women (in terms of customary law marriages) was not important.

Under tradition and custom, women regarded men as superior to them.⁵²² This created a gap between the sexes for centuries and men took advantage of women.⁵²³ Women and their children were disowned by the heir of inheritance of their deceased father (even in legally binding

⁵¹³ RA Ige “Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village” (2015) (35) *Journal of Law, Policy and Globalization* 59-66.

⁵¹⁴ Sec 39 of Constitution.

⁵¹⁵ IDLO “Justice for Women High-level Group Report” 7; see also J Ubink (eds) *Customary Justice: Perspectives on Legal Empowerment* (2011) 7.

⁵¹⁶ IDLO “Justice for Women High-level Group Report” 7.

⁵¹⁷ As above.

⁵¹⁸ IDLO “Justice for Women High-level Group Report” 7, see also Ozoemena (2018) 9 *Journal of International Women's studies* 13-28

⁵¹⁹ IDLO “Justice for Women High-level Group Report” 7.

⁵²⁰ As above.

⁵²¹ As above.

⁵²² As above.

⁵²³ As above.

or recognised marriages).⁵²⁴ This deprived women of their rights because decisions were made on their behalf; therefore, as a nation, we should promote democracy and strengthen the rule of law.⁵²⁵

The prevalence of illiteracy in South Africa remains a significant obstacle to achieving the elimination of discrimination.⁵²⁶ It is most unfortunate that the South African socio-economic structure has made it nearly impossible for the vast majority of women in rural areas to access education.⁵²⁷

The case of *Gumede*⁵²⁸ accurately demonstrates the persistent patriarchal society in which women live. The challenges women experience, especially in the rural areas, during and after the termination of customary marriages are dire. The *Gumede* case concerned a claim of unfair gender discrimination concerning women who were married under customary law as codified in the KwaZulu Act on the Code of Zulu Law 16 of 1985 (KwaZulu Act).⁵²⁹

According to section 20 of the KwaZulu Act and section 22 of the Natal Code,⁵³⁰ the family head is the owner of the family property and has full control of all the family property, a position that disadvantaged Mrs Gumede.⁵³¹ The position disadvantaged Mrs Gumede because according to the customary law, her husband owned basically all assets, and therefore Mrs Gumede was bound to lose everything including a home.⁵³²

During her divorce from Mr Gumede, Mrs Gumede had to persuade the Divorce Court that it was just and equitable for her to be awarded a part in the matrimonial property upon her divorce. The matter eventually landed in the Constitutional Court and the customary and the statutory laws were discussed in detail. This dissertation does not indulge in these details. In the end, the Constitutional Court confirmed the judgment of the High Court, which declared section 7(2) of the Recognition of Customary Marriages Act 120 of 1998, sections 20 and 22 of the Natal Code, and section 20 of the KwaZulu Act unconstitutional as it excluded women (such as Mrs Gumede) from enjoying access to the family property, which is inconsistent with the Constitution and therefore invalid.

⁵²⁴ As above.

⁵²⁵ As above.

⁵²⁶ As above.

⁵²⁷ As above.

⁵²⁸ *Gumede (born Shange) v President of the Republic of South Africa* 2009 (3) SA 152 (CC) (hereafter the *Gumede* case).

⁵²⁹ *Gumede* para 3.

⁵³⁰ Natal Code of Zulu Law published in Proclamation R151 of 1987, GG No. 10966.

⁵³¹ *Gumede* paras 3-5.

⁵³² As above.

The *Gumede* case indicates exactly how statutory and customary law significantly contribute to the difficulties experienced by women when accessing justice. Evidently, certain statutory and customary laws have made it difficult for women to access justice. Therefore, a continuous amendment and abolishment of discriminatory laws against women must continue.

4.5 Conclusion

Justice for women is at the core of women's basic human rights and is clearly stipulated in our Constitution. Eliminating the barriers that limit women to the full enjoyment of their human rights, justice, and dignity is critical to achieving access to justice for black women in South Africa. This chapter identifies the different challenges that prevent women from access to justice. It evaluates the social challenges and problems that are experienced by people in the communities engaging in normal behaviours with one another. Under the social challenges, intimate partner violence is explored, which highlights the importance of women's legal protection against violence from their partners.

According to SAPS crime statistics (2020), one out of five women in South Africa has experienced violence from their partners. The barrier in reducing intimate partner violence is the unavailability of resources — especially in rural areas. Victims must be accommodated and feel safe after they report their cases. The other barrier relates to the incompetence and lack of adequate knowledge by the SAPS when handling these cases. This renders it difficult for victims to report these cases. Another barrier pertains to the unwillingness of victims to report cases or be present at the final issuing of the restraining order due to fear of intimidation. As a result of these barriers, women stay in abusive relationships, cases remain under-reported and the abuse continues.

Discrimination against women in the workplace is one of the challenges women face. In South Africa, about 28% of women are paid less than their male counterparts according to the Global World Report for 2018/9.⁵³³

Women are unable to participate and contribute constructively to conversations in their homes or communities due to a lack of education and legal understanding. In rural areas, women are generally not present when important discussions take place pertaining to their home or

⁵³³ Wonci “South Africa has a long history of gender discrimination”.

community. The discussions and the decision-making are left to the head of the household even if the matter requires input from both partners.

The empowerment of women is rooted in knowledge about their rights. The lack of knowledge and insufficient education or ability for women to understand documents is one of many challenges facing women. Only when there is sufficient community education and women empowerment followed by adult literacy programs and awareness, will women truly be free to access justice.

The discriminatory family laws are also one of the barriers to women's access to justice. The codification of these discriminatory family laws remains and contributes greatly to the obstacle for women to obtain justice in many countries. The situation is evident in instances of divorce where a woman would be seen as a troublemaker or disrespectful to the family when seeking a decree of divorce.

The purpose of depriving women of any financial independence is to ensure that women do not have a financial voice in the household or society. As a consequence of financial deprivation, a woman becomes completely dependent on the (abuser) for money to meet her personal needs. At times, the woman is the one that makes more money but has no say as to how her own money is to be spent.

By denying women economic independence, the need to make their own informed decisions is a human rights violation of women's rights to freedom of participation and choice. The lack and unavailability of basic resources such as clinics, police stations, courts, water, and shelters, closer to women are also some of the contributing factors that negatively affect women when seeking redress.

The lack of understanding and the lack of financial empowerment creates a financial dependency syndrome in women, as without money one is unable to access the most basic needs. As a consequence, and to ensure that women are not deprived of their basic needs, most women would rather continue to remain in abusive relationships for survival.

Customary law covers aspects that govern the personal and family lives of their community such as maintenance of children, consequences of marriages, and divorce. It also covers the rights of inheritance, administration of estates, land tenure, and duties of traditional leaders, and any other aspect relating to the regulation and maintenance of its traditional community.

In South Africa, different communities practice different customs and traditions. Many are not documented as the customs evolve as the society changes. Some of these practices, however, still disadvantage women. Discriminatory family laws make women feel like it is their fault for seeking a decree of divorce, or it is an embarrassment to the family to divorce. Women often remain in abusive relationships simply because of family laws.

The discriminatory property regime is another aspect examined above. Property rights in terms of customary law make it difficult for women to obtain land rights in certain instances where their right of occupation is and was dependent on the relationship with the husband or male relatives. Also contributing to the challenge is the process of the formal registration of land which can be costly for most women due to the unavailability of financial resources.

As long as we do not acknowledge the fundamental rights to property that are guaranteed in the constitution to all persons, which includes women, women will continue to be disadvantaged.

Therefore, women in our societies experience many challenges when seeking redress. Women require extra protection against human rights violations. It is high time that the government intensifies the fight for women's protection through practical means and not just on paper.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5.1 Conclusion

History shows that where there are immense human rights injustices, people eventually tend to rise against the existing social order and demand a more socially just society. Human rights violations remain a significant force for challenging inequalities and exclusions in societies. The situation is evident as South Africa's independence was focused on structural inequalities such as social class and advocated for the redistribution of resources for all.

If the lack of access to human rights for women persist it may pile up and could result in civil war or political unrest. The state must intensify its strategies for women as they remain victims of many injustices. Even though the South African law on the rights of women is firm, it is only on paper. The redistribution of wealth and the control of resources to transform social power in favour of women remains but a dream for many women. In other words, the government fails to sufficiently implement and meet its own targets to ensure that women are protected.

South African women's movements must play an important role in the development of societies in which they operate as this will enable them to engage within a wider political struggle for human rights. Radical changes are necessitated in societies to highlight injustices and confront wrongdoers.

Effectiveness is a priority to grow and strengthen women to work towards a common objective and ensure unity and solidarity. To successfully achieve this, emphasis must be placed on individuals and the expansion of the education system through adult education to address the inequalities of the past.

Furthermore, women must be provided with basic education focussing on participation and decision-making that are responsive to their local communities. This will produce cooperation that is collective in resisting a system that tolerates human rights violations.

Finally, the state has the primary responsibility to ensure that women are safe and laws to protect women are fully enforced and correctly implemented. The current situation, however, demonstrates otherwise as human rights violations against women occur daily. The daily reports of women's rights violations in the country seem to suggest that the government is failing to live up to its constitutional obligations to protect women. Therefore, to succeed in changing the current dynamics, the government must first acknowledge that it has failed to protect black women in

South Africa. Additionally, the government must acknowledge that the current strategies in place for women's protection have failed and the violation of women's rights continues.

Thereafter, the government must develop a turnaround strategy that involves a social support mechanism to ensure the successful implementation of the laws to protect women. A social support mechanism, amongst others, would mean that the state must invest sufficient resources, capital, manpower, and training to empower women to access justice.

As mentioned above, one of the most crucial causes contributing to the suffering of women in South Africa is poverty, lack of awareness of rights, unequal distribution of wealth, unemployment, and lack of adequate resources.

It is the responsibility of the government, community leaders, non-governmental organisations, schools, police officers, and religious leaders, to work together to achieve a safe South Africa for all women.

5.2 Recommendation

Most of the challenges that have surfaced in this dissertation relate to, amongst others, the issue of lack of knowledge and awareness of the rights of women. Therefore, to achieve women's access to justice, social support mechanisms are needed. The social support mechanism includes education programs, an increase of capacity, resources and or financial empowerment, and continuous law reform. Each is discussed in detail.

5.2.1 Education program

The SAPS and other law enforcement agencies have courses or programs to assist the community as well as its members in the training on human rights.⁵³⁴ In addition hereto, the basic training of the police and special courses provided by the SAPS and other departments must include the continuous integration of mandatory human rights modules. The basic human rights courses, specifically on women and children, may further equip the SAPS with a better understanding and practical approach to matters of human rights abuses against women and children. Human rights courses such as the Advanced Human Rights Course: Police Oversight and Vulnerable Groups

⁵³⁴ SAPS "Media Statement from Eastern Cape Media Centre Corporate Communication" (May 2018) <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=15710> (accessed 26 December 2020).

offered by the Centre for Human Rights, University of Pretoria, must be conducted regularly to equip SAPS officials with more skills and knowledge of police oversight on human rights.⁵³⁵

The prosecution must be mandatory for GBV crimes even if the victim withdraws the case. The Criminal Procedure Act does not prevent a victim of GBV to withdraw the case.⁵³⁶ Consequently, if the case is withdrawn the perpetrators get away with the crime. The prosecution and investigation must be able to continue even if the victim has withdrawn the case provided that the prosecution has enough evidence to proceed with the matter.

Additional information on access to justice must be published on social media platforms to improve access to justice — especially when published in indigenous languages. Regular public sensitisation and mindfulness programmes must take place to cut across the gender peak and improve women’s human rights awareness. Strategies for gender equivalency, knowledge, and profitable commission can also assist women to access justice.

Training women about their rights concerning property and heritage, and advocacy and training with police, and other government departments is crucial to realise women’s access to justice rights. Continued advocacy with policy-makers, the media, and community leaders must aim to change discriminative laws and customary practices that negatively impact women’s human rights.

Schools must include in their curricula education on financial independence, business management, human rights, and legal empowerment to create awareness of human rights. Similarly, as rightfully stated by Kok and Botha, the intensification of candidate attorneys in private firms with payment from the government will increase awareness and intensive delivery of legal services to the poor.⁵³⁷

5.2.2 Increase of capacity, resources, and/or financial support

Collaboration between the formal and informal justice systems and the justice and security sectors must be intensified. Well-capacitated systems must be developed with ultramodern budgets, vehicles, and logistics to ensure effective and quick responses to GBV cases. Programmes to

⁵³⁵ See Centre for Human Rights (CHR) University of Pretoria “Advanced Human Rights Course: Police Oversight and Vulnerable Groups” <https://www.chr.up.ac.za/courses-presented/policing-and-vulnerability-in-africa> (accessed 26 November 2021).

⁵³⁶ Secs 6, 7 and 50 of the Criminal Procedure Act 51 of 1977.

⁵³⁷ Botha and Kok (2019) *AHRLJ* 318-336, see Vawda YA “access to justice: from legal representation to promotion of equality and social justice – addressing the legal isolation of the poor” University of KwaZulu-Natal 241-244.

ensure that the traditional and formal justice systems are completely harmonised must be intensified to develop broader awareness and options for women to seek redress.

It is the government's responsibility to ensure the intended impact of the law is realised; it is essential to combat failures in the perpetration of laws that should otherwise guarantee equal rights for women. To perfect women's access to justice, they must enjoy legal aid. Legal aid may enable women to enter the justice system with sufficient support, knowledge, and understanding of the court processes. Investing in women service providers and specialised courts, including mobile domestic violence, family, and equality courts will demonstrate the government's commitment to ensure access to justice for women.

Making customary law subject to indigenous equivalency guarantees and enables women to challenge discriminative aspects of these laws. Women can share in defining and delivering justice in plural legal surroundings with the support of the government and the cooperation of women's organisations. At the same time, human rights commissions should be gender-sensitive and facilitate and encourage women's participation to ensure their protection, and monitor the attainment of their rights.

Women's voices are often silenced. Some women do not proactively seek redress due to fear of losing the little rights that they are afforded (either by the state or their partners). Therefore, more and more women's movements must advocate for women's rights, and the state must heed these calls.

5.2.3 Continuous law reform

Additional strategies include the gender analysis of current laws, gender auditing of new laws, and gender training for staff members to monitor the successes, setbacks, and improvements regarding the realisation of women's access to justice rights. The introduction of gender perspectives in the education and training of those who administer and apply the law will help to improve the understanding of women's needs in societies.

The establishment of an independent legal aid scheme for the most vulnerable must be achieved as discussed above. However, more resources and funding must be invested to allow for adequate service delivery and the expansion of access points (legal aid institutions) to ensure women's access to justice. Strengthening the work of Chapter 9 Institutions may ensure that moral rights are observed and executed during court processes.

Finally, as mentioned throughout this dissertation, women's access to justice rights is complex. Access to justice is experienced differently by women, as mentioned above. The rights of women must be realised according to their specific needs and a "one size fits all" blanket approach must be avoided. A blanket approach is not sufficient as it does not address the specific needs of specific women in their quest for redress. Women in poor and vulnerable areas are most affected and disadvantaged in terms of the right to access justice. The solution will therefore never be born from a "one size fits all approach". Rather a collective effort from all affected stakeholders as discussed above must be adopted and implemented for a successful access to justice for women.

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6.10 *Papers presented*

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