



UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
YUNIBESITHI YA PRETORIA

# Gender-based violence in South Africa: Towards legal reform

by

BEATRICE NOMBULELO BOKWA

STUDENT NUMBER: 14030901

Submitted in accordance with the requirements for the degree Magister Legum in Procedural Law in the Faculty of Law at the University of Pretoria

2021

## Synopsis

Gender-based violence has always been prevalent in South African society, but in the past five years it has received a lot more attention because of the extent of media coverage surrounding it. We now, fortunately, know about all the mothers, sisters, and friends who, are suffering behind closed doors or who are being killed brutally. This knowledge has caused an uproar which caught the attention of the Presidency. In his address to the nation, President Cyril Ramaphosa discussed gender-based violence and the changes that are to take place to curb its rise<sup>1</sup>. This inspired the direction of this dissertation.

This dissertation discusses the police's role in a gender-based violence case from the moment a complaint is received till the end of the process. The police play an important role because their approach to the victim determines the tone of the rest of the investigation. If a victim trusts a police officer, they are more likely to provide helpful information. If the community trusts the police, they are more likely to leave such matters in the department's hands. The dissertation also discusses the purpose of bail and whether that purpose would allow a court refusing an accused bail simply because the accused committed a gender-based violent crime. It also looks at the new amendments to the law and how they contribute towards the curb the rise of gender-based violence as compared to the initial functioning legislation. The dissertation ends by discussing other countries' approaches to gender-based violence in fulfilment of their duty to protect against it. The aim of this discussion is to enlighten the reader on other possible approaches.

---

<sup>1</sup> See the president's address in the introduction and background.

## Table of Contents

<b>Chapter 1: Introduction and background .....</b>	<b>4</b>
<b>Chapter 2: The role of the police .....</b>	<b>7</b>
2.1 Interaction between a police officer and a victim .....	7
2.2 Victim’s reluctance to report a crime .....	7
2.3 Police official’s gender-based violence training .....	8
2.4 The need for professional assistance.....	10
2.5 Policies implemented to make it easier for victims to report a case.....	10
<b>Chapter 3: Bail.....</b>	<b>14</b>
3.1 The definition and purpose of bail.....	14
3.2 Amendments made to bail by the new legislation .....	16
3.3 Discussion of the above-mentioned amendments .....	21
3.4 Bail with regard to serious offences prior to the amendments.....	22
3.5 Determining exceptional circumstances.....	24
<b>Chapter 4: Different countries approach to gender based violence .....</b>	<b>27</b>
4.1 Earlier attempts at curbing the rise of gender-based violence .....	27
4.2 The State’s obligation of due diligence .....	28
4.3 The above-mentioned International Human Rights translating onto National Law-making .....	30
<b>Chapter 5: Conclusion .....</b>	<b>33</b>
<b>Bibliography .....</b>	<b>36</b>
Academic dissertations and research papers.....	36
Articles and abstracts from electronic databases .....	36
Books .....	36
Case law.....	36
Government or official publications.....	36
Internet sources .....	36
Journal Articles .....	38
Legislation .....	38
Reports .....	39

## Chapter 1: Introduction and background

Gender-based violence has a few definitions depending on your source. For this paper it is accepted to be a form of violence that targets a person based on her/his gender and vulnerability. It includes one of, or a combination of sexual, physical, and emotional violence or deprivation with or without the intention to cause harm.<sup>2</sup>

In the year 2019 South Africa was faced with a few high-profile cases whereby women were violently violated by men. One such example is, the death of the late Tshegofatso Pule. The body of the 28-year-old was found hanging from a tree with multiple stab wounds. This despicable crime was committed by her boyfriend to hide his affair and his unborn baby from his wife.<sup>3</sup> Another high-profile example was the death of the late Naledi Phangindawo who was hacked with an axe while attending a cultural function. She succumbed to her injuries on arrival at hospital. She left behind three children, aged two, four and six.<sup>4</sup> The suspect, reportedly was the father of two of Naledi's children.<sup>5</sup> Deaths like these caused an uproar in South Africa with multiple protests taking a stand against such violence.<sup>6</sup>

Unfortunately, this situation was exacerbated by the Covid-19 pandemic. Different lockdown restrictions were implemented some of which confined people to their homes. As a result of South Africans being confined to their homes, it meant that victims had no choice but to be exposed to their abusers even more. Covid-19 restrictions furthermore

---

<sup>2</sup> Andersson N, Cockcroft A, and Shea B (2008) *Gender-based violence and HIV: Relevance for HIV prevention in hyperendemic countries of southern Africa*. Journal AIDS.

<sup>3</sup> Tshegofatso Pule: Alleged mastermind's trial to begin in High Court on 28 May. 17 May 2021 <https://www.news24.com/news24/southafrica/news/tshegofatso-pule-alleged-masterminds-trial-to-begin-in-high-court-on-28-may-20210517> (accessed 28 December 2021).

<sup>4</sup> The way she died is unimaginable: Family, friends on the killing of Naledi Phangindawo. 9 June 2020. <https://www.timeslive.co.za/news/south-africa/2020-06-09-the-way-she-died-is-unimaginable-family-friends-onkilling-of-young-mother/> (accessed 2 July 2021).

<sup>5</sup> Naledi Phangindawo murder: Accused abandons bail. 17 June 2020. <https://www.news24.com/news24/southafrica/news/naledi-phangindawo-murder-accused-abandons-bail20200617> (accessed 2 July 2021).

<sup>6</sup> Thousands of Protests in South Africa over rising violence against women. 7 September 2019. <https://www.theguardian.com/world/2019/sep/05/thousands-protest-in-south-africa-over-rising-violenceagainst-women> (accessed 1 July 2021).

lead to job losses which increased the exposure of victims to their abusers because now they are faced with the abuser and the abuser's frustration throughout the day. As a result the Minister of Police, Bheki Cele announced in April 2020 that over 2000 cases of Gender-based violence had been reported to the South African Police Services in the first week of lockdown.<sup>7</sup>

In December of 2020 President Ramaphosa in his address to the nation confirmed that South Africa was facing two pandemics, "Covid-19" and "Gender-Based Violence".<sup>8</sup> He noted that the nation was in mourning and in pain and that the country has been deeply traumatised by acts of extreme violence perpetrated by men against women and children. He furthermore said that the acts of violence made us doubt the very foundation of our democratic society, our commitment to human rights and human dignity, to equality, to peace and to justice. He also made a call for us, to come together as a nation to confront our problems directly. He held that women had every right to expect that they be free from harassment and violence and that the government has heard the calls of the women of the country for action and for justice. He also expressed and resolved to end all forms of violence and abuse perpetrated by men against women."<sup>9</sup>

The President proposed that crimes against women and children should receive harsher sentences and that the state should oppose bail for perpetrators of these crimes. He also expressed the need for an increase in rehabilitation programs to avoid recidivism. Finally, he indicated that the challenges faced in police stations such as backlogs of cases and delays in investigations would be addressed, as this would give citizens the comfort of

---

<sup>7</sup> Cele urges SA to report abuse as GBV calls top 2,230. 3 April 2020.

<<https://www.enca.com/news/policeminister-encourages-sa-report-abuse>> (accessed 30 April 2021).

<sup>8</sup> SA faces two pandemics – Covid 19 and GBV : Ramaphosa. 31 December 2020.

<<https://www.sabcnews.com/sabcnews/sa-faces-two-pandemics-covid-19-and-gbv-ramaphosa/>> (accessed 1 July 2021).

<sup>9</sup> President Cyril Ramaphosa: Address to the nation on public and gender-based violence. 5 September 2019.

<<https://www.gov.za/speeches/president-cyril-ramaphosa-address-nation-public-and-gender-based-violence-5-sep2019-0000#>> (accessed 5 May 2021).

knowing that criminal cases are being attended to and hence no need for citizens to take measures into their own hands.<sup>10</sup>

In Chapter 2 the role of the police in combatting gender-based violence is discussed. It is the victim's first interaction with the criminal justice system and an important part of the process.

In Chapter 3 to the question of bail is discussed. It has been suggested that there be amendments to bail that would afford the victim more protection. This chapter considers the new amendments by determining the purpose of bail and emphasizing the way in which bail is granted and the effect these amendments will have.

In Chapter 4, the dissertation views the different approaches used by other countries to tackle the topic of gender based violence.

Chapter 5 concludes this dissertation by reflecting on the suggestions raised and their probability of success.

---

<sup>10</sup> Ibid.

## Chapter 2: The role of the police

### 2.1 Interaction between a police officer and a victim

The criminal justice process starts with the police. The police either witnesses a crime, or a crime is reported to them. The crime can either be reported at a police station or the crime can be reported by contacting the police at 10111. A case docket is opened and a witness statement is taken. The case is registered with the SAPS Crime Administration System and a CAS number is sent to the witness/complainant via SMS. Thereafter, the case is assigned to a detective who is in charge of the case moving forward. The crime is investigated and the docket is completed. Then the detective will present the docket to the relevant court for prosecution.<sup>11</sup>

### 2.2 Victim's reluctance to report a crime

There are several South Africans who choose to report crimes committed against them but there are some who choose not to, because of the disheartening treatment some witnesses have received from police officials. Some officers lack sympathy, and others make the victim feel as if it was their fault or simply stereotype them. This type of secondary victimization that victims go through can discourage victims from coming forward in the future as they may perceive the system to be failing them.<sup>12</sup>

In addition to this, there have been reported cases of police officials being accused of gender-based violence-related offences.<sup>13</sup> This makes victims lose faith in the criminal justice system. Although not all police officials take part in such offences, the fact that some of them have been accused creates a wrong impression about the police which makes some victims doubt the sincerity of all police because one can never be clear who is guilty of such a crime or who knew of a brother in blue committing such a crime. Stations where police officers have been accused of GBV crimes as identified by Minister

---

<sup>11</sup> South African Police Service, Reporting a crime < [https://www.saps.gov.za/services/report\\_crime.php](https://www.saps.gov.za/services/report_crime.php) > (accessed 9 March 2021).

<sup>12</sup> Merlyn Barkhuizen (2015) Police reaction to the male victim of domestic violence in South Africa: case study analysis, *Police Practice and Research*, 16:4, 291-302

<sup>13</sup> IOL Reporter. 139 SAPS members have had GBV cases opened against them. 20 October 2020. <<https://www.iol.co.za/news/south-africa/139-saps-members-have-had-gbv-cases-opened-against-them-d9882d1c-5853-426f-a434-e8544bb8ae2d>> (accessed 18 March 2021).

Cele are, Umlazi and Ntuzama police stations in KwaZulu-Natal, Bloemspruit in the Free State, Mitchells Plain and Gugulethu in Western Cape. The accused police officials were accused of crimes such as assault with intent to cause grievous bodily harm, statutory rape, rape, murder, domestic violence, attempted murder, and pointing of a firearm.<sup>14</sup>

Another reason why victims might choose not to testify is because they might have been directly intimidated not to testify.<sup>15</sup> It is important that victims feel encouraged to report crimes committed against them. The victim is more likely to report a crime when she/he feels safe. This would mean that firstly, the police officials who are appointed to protect the public from crime should not be committing any crime. Secondly, the department should prioritize keeping witnesses/victims safe because they are under the threat of being intimidated by the accused. This can be done through re-organising and investing more money into the witness protection programmes. This boost of money will make it easier to appoint more officials to physically protect these victims and the ability to move them to other provinces with new identities with the assistance of the department of Home Affairs. Lastly, by avoiding secondary victimization. Funds can be saved and redistributed to this cause by speeding up caseloads. That way a trial will not go on forever leading to witness protection programmes paying more on rent or hotel bail<sup>16</sup> Secondary victimization will be avoided if the police officials have the proper training in dealing with victims as discussed below.

### **2.3 Police official's gender-based violence training**

It is imperative to appoint suitably trained police officials for the proper monitoring of all gender-based violence-related crime. This type of training includes; personal conduct for 21 sessions, investigative interviewing is 8 sessions, statement taking would be 16 sessions and victim empowerment is limited to 4 sessions.<sup>17</sup> All South African Police Service officials complete the Basic Police Development Learning Programme. Phase

---

<sup>14</sup> Ibid.

<sup>15</sup> Anthony Minnaar (2002). Witness Protection Programs – some lessons from the South African experience. *Acta Criminologica* 15(3) at 128.

<sup>16</sup> Ibid at 128.

<sup>17</sup> South African Police Service. Back to Basics: Briefing of the Portfolio Committee on Police SAPS Basic Training Learning Programme. 2016.



one is at the academy and lasts 10 months. During this time the focus is on acquiring the necessary skills and knowledge and the application thereof. Phase two lasts 12 months and is at the workplace. The third and final phase lasts 2 months and consists of integrated assessments at the academy.<sup>18</sup> The purpose of the training is to prevent crime in line with the police service's constitutional objectives which are to prevent, combat and investigate crime in pursuit of maintaining public order and protecting South Africa's residents and their property.<sup>19</sup> In the first 2-5 months at the academy, police officials are trained to investigate, interview, and take statements.<sup>20</sup> When interviewing vulnerable and intimidated witnesses the South African Police Service should apply four phases: namely, establishing a rapport, seeking free narrative recall, asking questions, and closure. The interviewer should be aware that to gather accurate information, they have to be sensitive to the witnesses' communicative needs and also her/his own impact on the interview. Establishing a rapport will help the interviewer become more familiar with the witnesses' preferred method of communication which will make the witness as comfortable as possible.<sup>21</sup> These phases are most commonly used in the UK but would be of advantage to our very own SAPS too.

Counselling and internal support should furthermore be provided at every station, especially to newly trained recruits to ensure emotional readiness as they will be better able to deal with such crimes and the emotional toll it takes on a person. Interacting and establishing partnerships with the community also helps police officials understand and respond to the different cultural groups in the community.<sup>22</sup> As it is important to invest in the safety of our community it is equally important to invest in our police officials for the sake of a better performance of their duties.

---

<sup>18</sup> South African Police Services, Basic Police Development Learning Programme.

[https://www.saps.gov.za/careers/basic\\_police\\_program.php](https://www.saps.gov.za/careers/basic_police_program.php) (Accessed 21 March 2021).

<sup>19</sup> Section 205(3) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>20</sup> South African Police Service.(2016). Back to Basics: Briefing of the Portfolio Committee on Police SAPS Basic Training Learning Programme.

<sup>21</sup> Ministry of Justice. (2011). Achieving best evidence in criminal proceedings guidance on interviewing victims and witnesses, and guidance on using special measures (1st ed.). London: Ministry of Justice.

<sup>22</sup> Gupte, J.; Shahrokh, T. and Wheeler, J. (2014). Tackling Urban Violence in Mumbai and Cape Town through Citizen Engagement and Community Action, IDS Policy Briefing 71 at 2.

#### **2.4 The need for professional assistance**

The South African Police Service should know that certain investigations could be beyond their capabilities and require the assistance of professionals such as social workers, psychologists, or religious leaders if need be. Psychologists can for example contribute to an investigation by drawing on their clinical or professional experience to make judgments about the offenders' profile. This will for example inform the detective to be observant of certain personality traits.<sup>23</sup> A professionally assisted investigating team can also better identify witnesses who require therapeutic support, especially before giving evidence in criminal proceedings. No one can deny the witness of this type of therapy, but it should be communicated with all parties involved that therapeutic assistance is utilised. However there is a fear that the evidence would be tainted and that the prosecution would be lost if a victim is granted pre-trial therapy therefore special attention should be given not to coach the witness in terms of the evidence they are providing to the detectives or evidence they will provide in proceedings.<sup>24</sup> In addition to this the court should avoid stigmatising victims who have been to pre-trial therapy as having been coached.

#### **2.5 Policies implemented to make it easier for victims to report a case**

During 2011 the Minister of Police reiterated that victims should not be humiliated or exposed to secondary victimization but should rather be encouraged to open a case. Police stations should have victim-friendly rooms to make it easier to conduct a proper interview.<sup>25</sup> This statement was followed by the launch of the “Reducing Barriers to Reporting of Sexual Offences and Domestic Violence” policy with the intention of making it easier for victims to report crimes committed against them. This policy has a six-point plan,<sup>26</sup>

---

<sup>23</sup> Youngs, D (ed) (2005) *Behavioural Analysis of Crime: Studies in David Canter's Investigative Psychology*, The British Journal of Criminology, Volume 55, Issue 1 at 203–205.

<sup>24</sup> Department of Justice. (2011). Achieving best evidence in criminal proceedings guidance on interviewing victims and witnesses, and guidance on using special measures at 119. 3<sup>rd</sup> Edition.

<sup>25</sup> Sulaiman Philip. SAPS steps to help victims of gender-based violence.

<<https://www.vukuzenzele.gov.za/saps-steps-help-victims-gender-based-violence>> (24 March 2021).

<sup>26</sup> Ibid.

1. Victims should be treated with respect and dignity and interviewed by a trained police officer in a victim sensitive and compassionate manner.
2. Victims should be assisted in a victim-friendly room where they will have privacy and be provided with victim support services.
3. Victims will be taken to a medical examination by a healthcare professional to obtain medical evidence and complete a medical report, including seeing to the health of the victim.
4. The investigation should be conducted by the Family Violence, Sexual Offences, or Child Protection Unit by a detective with the relevant training.
5. Victims and their families should be referred to victim support services that are available in the police station for legal, psychological, or medical assistance.
6. Victims should receive regular feedback on the progress of their case.

All police stations must further have a domestic violence task team and ensure that each shift has at least one or two officers on duty who are able to manage issues relating to domestic violence. The Station Commissioner has the responsibility to make sure that all SAPS members are competent and that they take domestic violence seriously. The task team will be responsible to make sure all queries are effectively responded to and resolved, and to maintain a database of shelters and other services which would be helpful to victims, update incident reports and train new members at police stations so that they too can assist gender-based victims in need of assistance.<sup>27</sup> This task team should also be heavily involved in the community. This can be done by building partnerships with shelters and services in the area, hosting regular meetings to discuss common issues and challenges in servicing victims of domestic violence, and victim empowerment.<sup>28</sup>

In 2018 the Deputy Minister of police, Minister Mathale, assured the public that victims will receive priority and that criminals will get the punishment they deserve. This will be

---

<sup>27</sup> K Stone and C Lopes (2018) Policing responses to domestic violence: exploring reactions by the police to women in need of shelter at 24.

<sup>28</sup> Ibid.

achieved by reviewing the parole system with regards to certain categories of people who have committed gender-based violence and serious crimes. This was in fact achieved in the Criminal and Related Matters Amendment Bill which prioritises the victim, complainant, or relative of the deceased by giving them the right, to make representations to the National Commissioner of Correctional Services when the accused is considered for parole, day parole or under correctional supervision and to attend relevant meetings of the parole board.<sup>29</sup> The Police Services have also introduced the use of technology to promptly respond and assist the victims, particularly those in possession of protection orders.<sup>30</sup>

It would be easier for victims to report offences and to get involved if they believed in the effectiveness of the justice system. This can be done through educating our communities on the criminal justice system so that they understand how it works and what it takes for the police to arrest, investigate, and for the prosecution to build a case.

There are several initiatives by the police to curb the rise of gender-based violence. But we as the community have to hold them accountable by filing complaints when officials act out of line, or are simply incompetent when dealing with victims or witnesses or the investigation in general. For a victim to hold a police officer accountable they would have to be able to detect incompetency. To detect incompetency, the victim would need to know what competency should look like. This can only be done through education. The community should know their rights. Many individuals do not know their rights and as a result, walk away after being mistreated, thinking it is normal. There are a few ways that the community can be more informed, firstly through the media. People are more likely to know about their rights if their rights are discussed on radio and TV. The percentage of the community that does not have access to these media platforms can be informed through print media such as posters and flyers that should be distributed all over communities, in malls, stores, clinics, and police stations. This type of community

---

<sup>29</sup> (2020) Criminal and Related Matters Amendment Bill (Government Gazette No. 43595 of 7 August 2020) at 29.

<sup>30</sup> Ibid at 4.

involvement will help curb the rise of gender-based violence in communities through better police work.

## Chapter 3: Bail

### 3.1 The definition and purpose of bail

Bail has been defined under South African law as a contract in terms of which an accused who is being held in custody is offered liberty upon his payment of, or his furnishing of a guarantee to pay, a fixed sum of money and upon his undertaking to comply with the conditions related to his release.<sup>31</sup> When an accused is granted bail, he undertakes to appear in court, or at the place to which the proceedings are adjourned, on the date and time appointed. Should the accused not appear, or fail to abide by the conditions set, the bail may be cancelled, her/his bail money forfeited, and she/he be rearrested.

In his address to the nation President Ramaphosa stated that the state should oppose bail and parole for perpetrators of rape and murder against women and children.<sup>32</sup> He then went on to urge parliament to process legislative amendments without delay.<sup>33</sup> As a result the National Council of Provinces (NCOP) has passed three bills which came into effect on the 5<sup>th</sup> of August 2021, namely, the Criminal and Related Matters Amendment Bill, Domestic Violence Amendment Bill and the Criminal Law (Sexual Offences and Related Matters) Amendment Bill. These bills are created to transform how government departments, police department and the courts deal with cases of violence against the vulnerable and women.<sup>34</sup>

The Criminal Law Amendment Bill aims to expand the scope of the National Register of Sexual Offenders to include all sexual offences not just those committed against children and disabled persons. It also expands the list of persons who are to be protected to

---

<sup>31</sup> Du Toit (2018) ch9 p1.

<sup>32</sup> President Cyril Ramaphosa: Address to the nation on public and gender-based violence. 5 September 2019.<<https://www.gov.za/speeches/president-cyril-ramaphosa-address-nation-public-and-gender-based-violence-5-sep2019-0000#>> (accessed 25 September 2021).

<sup>33</sup> Address by President Cyril Ramaphosa on South Africa's response to the coronavirus pandemic. 17 June 2020.<<http://www.dirco.gov.za/docs/speeches/2020/cram0617.pdf>> (accessed 25 September 2021)

<sup>34</sup> NCOP approves GBV bills.?? 2 September 2020 <<https://www.sanews.gov.za/south-africa/ncop-approves-gbv-bills>> (accessed 26 October 2021)

include all vulnerable persons this now includes victims of domestic violence. A new offence, namely that of sexual intimidation is introduced in this bill.<sup>35</sup>

The Domestic Violence Amendment Bill refers to how acts of domestic violence will be responded to by certain functionaries, persons and government departments going forward and regulates the obtaining of protection orders in response to acts of domestic violence.<sup>36</sup> Protection order applications can now be submitted 24 hours in a day and it is possible to have a protection order hearing without the presence of the accused.<sup>37</sup> The point of this is to reduce the intimidation victims face when they attempt to protect themselves through this avenue.

Lastly the Criminal and Related Matters Amendment Bill amends the Magistrate Act to allow the appointment of intermediaries when giving evidence in proceedings other than criminal proceedings. This Bill also amends the Criminal Procedure Act to further regulate the granting and cancellation of bail and include the right of a complainant in a domestic -related offence to participate in parole proceedings.<sup>38</sup>

The Criminal Procedure Act has been amended to prohibit against the publication of information which reveals the identity of an accused who is under the age of 18, a witness who is under the age of 18 and a person against whom an offence was allegedly committed whom is under the age of 18. This however can be overturned by a presiding judge or judicial officer who believes that the publication thereof would be in his opinion just, equitable and in the interest of any particular person.<sup>39</sup> A police official may publish this type of information in the event that substantial injustice would occur and no other means are available.<sup>40</sup> For example, if the accused escaped from lawful custody or any

---

<sup>35</sup> (2020) The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill 2020 (Government Gazette No 43595 of August 2020) at 15.

<sup>36</sup> South Africa (2021) Domestic Violence Amendment Bill at 33.

<sup>37</sup> Ramaphosa signs into law 3 anti-gbv bills, bringing more protection to victims. 31 January 2022.<  
<https://ewn.co.za/2022/01/31/ramaphosa-signs-into-law-3-anti-gbv-bills-bringing-more-protection-to-victims>>(accessed on 17 March 2022).

<sup>38</sup> (2020) Criminal and Related Matters Amendment Bill (Government Gazette No. 43595 of 7 August 2020) at 21

<sup>39</sup> (2021) The Criminal Procedure Amendment Bill. B12B 2021 at clause 1(a) at 2.

<sup>40</sup> Ibid at clause 1(b) at 2.

other form of detention and if the accused was released on bail or warning and failed to appear or remain in proceedings. Other possibilities that could lead to publication of information include, if the South African Police Services are unable to locate the whereabouts of an accused, they may release information if they do not specify age or the persons involvement in an offence.<sup>41</sup>

These amendments came about after the *Centre for Child Law and Others v Media 24 Limited and Others* decided that there is a gap in the protection afforded to child victims. It noted that the protection does not continue even after the alleged victim, witness and accused does not continue to apply even after they turn 18. Therefore the court gave the Parliament an opportunity to rectify this gap within 24 months.<sup>42</sup>

### **3.2 Amendments made to bail by the new legislation**

The most relevant bill to this chapter is the Criminal and Related Matters Amendment Bill because this Bill discusses the topic of bail multiple times. Firstly, In clause 2 of this Bill an amendment is made to section 59 of the Criminal Procedure Act. It states that an accused who is in custody for any offence other than an offence referred to in Part 2 and Part 3 of Schedule 2, an offence against a person in a domestic relationship as defined in the Domestic Violence Act<sup>43</sup> and offence referred to in section 18(1)(a) of the Protection from Harassment Act<sup>44</sup> may before their first appearance in a lower court be released on bail as per the discretion of the police officer charged with the case and upon payment of a sum of money determined by such a police officer.<sup>45</sup> This means that the privilege of being released on police bail is not granted to gender offenders that would fall within Part 2 & 3 of Schedule 2, Domestic Violence offences and violators of provision 10 (1) & (2) of the Protection from Harassment Act.

---

<sup>41</sup> Supra fn 40 clause 1(b), (c) and (d) at 2-3.

<sup>42</sup> *Centre for Child Law and Others v Media 24 Limited and Others* 2019 ZACC 46.

<sup>43</sup> Section 1 of the Domestic Violence Act 116 of 1998.

<sup>44</sup> Section 18(1)(a) of the Protection from Harassment Act 17 of 2011

<sup>45</sup> Clause 2 of Supra fn 40 at 5.



The Director of Public Prosecutions has the power to authorise bail as stated in clause 3 of this Bill. This amends section 59A of the Criminal Procedure Act, It states that the Director of Public Prosecutions may in respect of offences listed in Schedule 7 and after consulting with the police officer who is assigned the investigation authorise the release of an accused on bail. Therefore the accused will be released from custody upon the payment of the sum of money stipulated for their bail. This aims to exclude offences such as those against a person in a domestic relationship and as per section 1 of the Domestic Violence Act, section 17 (1)(a) of the Domestic Violence Act and section 18 (1)(a) of the Protection from Harassment Act and any law that contravenes the order issued by a court with intent to protect a victim whom the offence in question was committed.<sup>46</sup> In addition to police officials, an interested party may also make an application to the court to publish the information of an accused, a witness or a person whom an offence was allegedly committed against before or after the age of 18. The court may grant this application should it find that the interest of the administration of justice permit it.<sup>47</sup>

Clause 4 of the Bill amends the Court's approach to bail, in terms of the protection of the victim of the offence itself. For example, the person which the offence in question was allegedly committed against or family of the victim (if the victim is deceased) should be considered before an accused is granted bail in addition to a pre-trial service report regarding the desirability of releasing the accused on bail, if one is available .<sup>48</sup> If there is a likelihood that an accused if released on bail will endanger the safety of the public, victim of alleged offence committed or any other person or will commit a schedule 1 offence then this applicant will not be granted bail. To help establish if this likelihood exists the court may consider;<sup>49</sup>

---

<sup>46</sup> Supra fn 40 Clause 1 (b) of Supra 4 at 6.

<sup>47</sup> Supra fn 40 Clause 1(3B) at 3.

<sup>48</sup> Clause 4 (b)(b) of Supra fn 40 at 6.

<sup>49</sup> Clause 4 (d)(5) of Supra fn 40 at 7.

1. The degree of violence in the charge.
2. Any threat of violence which an accused may have made to the victim of the alleged offence or any other person or any resentment harboured by the accused against the victim or any other person.
3. Any resentment the accused is alleged to harbour against the victim of the alleged offence.
4. Any disposition of violence by the accused as is evident from their past conduct.
5. Any disposition of the accused to commit, an offence found in section 1 of the Domestic violence Act, Schedule 1 offence, offence listed in section 17(1)(a) of the Domestic Violence Act and section 18(1)(a) of the Protection from Harassment Act then lastly any law that criminalises a contravention of any order which was issued by a court to protect a victim of an alleged crime.
6. The frequency of that particular offence.
7. Any evidence that the accused has previously committed the following offences : Schedule 1 offence, section 1 of the Domestic violence Act, offence listed in section 17(1)(a) of the Domestic Violence Act and section 18(1)(a) of the Protection from Harassment Act then lastly any law that criminalises a contravention of any order which was issued by a court to protect a victim of an alleged crime.
8. Any other factor which the court would deem important to consider.

In addition to the things that a court should consider before permitting the release of an accused on bail is the interest of justice as stated in section 9 of the Criminal Procedure Act, but these interest of justice have been amended to include the safety of any person against whom the offence in question has allegedly been committed.<sup>50</sup> The above mentioned amendments have a focus towards the victim. It is clear that every consideration centres around the victim and “any other person” as stated in the bill. The reference to “any other person” could however be problematic because it could literally mean anyone.

---

<sup>50</sup> Clause 4 (e) of Supra fn 40 at 7.

But said bail can be cancelled through section 68 of the Criminal Procedure Act that has also been amended by the Criminal and Related matters Amendment Bill to add that an accused would be defeating the ends of justice should he contravene a condition placed upon him at his bail such as Section 7 of the Domestic Violence Act and Section 10(1) and (2) of the Protection from Harassment Act 2011 or any order in terms of any other law. This is an extra measure to protect persons against whom the alleged offence took place.<sup>51</sup>

Bail can also be cancelled should the accused pose a threat to the victim of the alleged crime or any other person. In which case any magistrate may with the application of a peace officer and the submission of a written statement on oath by such officer who has reason to believe that the accused poses such a risk, issue a warrant of arrest if it is not practical to obtain a warrant of arrest through section 1 of the Criminal procedure Act.<sup>52</sup>

The final addition to the cancelation of bail amendments is if the accused has contravened the provisions of an order or failed to disclose that such an order exists. More specifically the following type of orders;<sup>53</sup>

- a) A section 7 of the Domestic Violence Act<sup>54</sup> imposed order or;
- b) A section 10(1) and (2) of the Protection from Harassment Act<sup>55</sup> imposed order or;
- c) Any order in terms of any other law which is imposed with the intention of protecting the victim of an alleged crime and lastly
- d) That he or she was at the time of the crime a sentenced offender whom is placed under correctional supervision, day parole , parole or medical parole as stipulated by section 73 of the Correctional Services Act.<sup>56</sup>

---

<sup>51</sup> Section 5 of Supra fn 40 at 9.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Section 7 of the Domestic violence Act 116 of 1998.

<sup>55</sup> Section 10(1) & (2) of the Protection from Harassment Act 17 of 2011.

<sup>56</sup> Section 73 of the correctional Service Act 111 of 1998.

These amendments fill up gaps in the current legislation. It is commendable that the legislators did not follow the express instruction from the President to completely deny alleged offenders of gender-based violence bail solely based on the nature of the offence as suggested in his address to the nation.<sup>57</sup> Because such a denial would be considered unconstitutional.

Section 35 (1)(f) of the Constitution specifically states that, everyone who is arrested for allegedly committing an offence may be released from detention if the interests of justice permit, subject to reasonable conditions.<sup>28</sup> This means that the idea that people who have been arrested for allegedly committing a gender-based violence act such as assault, rape, or murder should not be granted bail is unconstitutional. Everyone should be given the right to present whether the interests of justice permit or whether there is exceptional circumstances in the case that would permit a release as per the regulating legislation. It does not matter what crime was committed; there can never be a blanket statement that simply excludes the option of bail.

Apart from being unconstitutional the suggestion to draft or amend legislation to completely refuse gender-based violence offenders bail cannot be reasonably and justifiably limited through section 36 of the Constitution.<sup>58</sup> Because although the purpose for the restriction would be commendable and is closely related to the limitation, there are less restrictive means to achieve this purpose. These less restrictive means are found in the current legislation and the newly effective amendments that make it difficult for a gender based violence offender to be granted bail due to the nature of it being a serious offence.

The current functioning legislation that makes it difficult for a gender based violence offender to obtain bail in any case therefore the new amendments do not necessarily make a large difference in that regard. They do however tackle loop holes found in the current legislation, such as replacing the term “people who are mentally disabled” to

---

<sup>57</sup> Supra fn 34.

<sup>58</sup> Section 36 of the Constitution of the Republic of South Africa 1996.

“persons with a mental disability” and using more gender neutral vocabulary and the use of “they”. These changes ensure inclusivity and equality which would make the current legislation protect and serve a larger group unlimited group. In addition to this, the bills are more so cantered around the feelings of the victim and making sure that the victim is considered in the making of big decisions such as offering parole.

These changes do not solve the issues that the old legislation was dealing with, for example the new amendments may reach a broader crowd and might be more inclusive of victims but the biggest problem that existed before was the lack of application. We had laws that made it difficult for a gender-based violence offender as will be discussed in more detail below, but these laws were never truly applied, hence the rise in gender based violence. These new amendments create new laws but do not deal with the application problem. Application truly starts at the very moment police officials deal with an accused person, following all the necessary protocols is very important to make sure that the offender faces his day in court. No dockets or evidence should be lost within this process which will almost always guarantee a swift entrance into the court phase. Once we enter this phase then it is the judicial officer’s responsibility to apply the law as is. This does not mean that the judicial officer should remove their discretion, if anything the law encourages discretion and consideration of facts as they are in front of you but do so as previous case law has done. This will create a sense of uniformity and equality amongst accused persons which will decrease the application problem making it easier for an accused to all receive the same wrath from the law instead of some getting of lucky.

### **3.3 Discussion of the above-mentioned amendments**

These amendments have been made in good spirits with the intention to curb the rise of gender based violence. However the law is not perfect and even the new amendments contain gaps. For example the constant use of the term “other person” or “any interested party” is a dangerous route to take the law in because it opens the possibilities of literally anyone which can further delay the process causing the victim more harm than good. The consideration of all these different interested parties requires multiple investigations and will cause an administrative nightmare for the South African Police Services whom

at the moment are swamped as is. Therefore it is important to note that the application of this will not be easy.

The consideration of all these people also has the potential of causing an unfair bail trial for the accused. An accused has the right to a fair trial according to section 35 (3) of the Constitution of the Republic of South Africa. This right includes the right to have the trial commence and conclude without unreasonable delay.<sup>59</sup> Although “any interested party’s” insight could be helpful to the trial at large, it is important to specify whom these interested parties could be to be able to limit unnecessary or repetitive information.

After reflecting on the new amendments , it may be pointed out that some of the old legislation was fighting the same cause of protecting victims of alleged offences. The legislation that we had prior to these amendments safe guards against any possible concerns around this topic. These safe guards are evident in the way functionaries deal with serious offences. The discussion below will also show means of curbing the rise of gender based violence through limiting bail because of the nature of it being a serious offence.

### **3.4 Bail with regard to serious offences prior to the amendments**

When considering bail, it is clear that a judicial officer should make a finding whether the interests of justice permit the release of bail,<sup>60</sup> but a judicial officer should also consider the purpose of bail which is for the accused to provide some surety that he will appear in court when required to and will abide by the conditions set. Bail should never be used as an opportunity to punish an accused because at the time the accused is still innocent and has not been found guilty. The presumption of innocence is important, especially because the Constitutional court has stated that the infringing of this presumption would have to be clear, convincing, and compelling.<sup>61</sup> The judicial officer would therefore consider the importance of this presumption of innocence and know that the bail hearing is not the

---

<sup>59</sup> Section 35 (3)(d) of the Constitution of the Republic of South Africa Act 104 of 1996.

<sup>60</sup> *Procurer General Vrystaat v Ramakhosi* 1996 (4) All SA 207 (O).

<sup>61</sup> Justice Y Mokgoro. (2001). *The application of the Bill of Rights to the Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing* at 7.

time to determine the accused's innocence therefore remove the stigma of the crime they are being accused of and focus on the purpose of bail.

Serious offences are offences such as rape, compelled rape and murder. However the National Assembly has passed gender-based violence bills in September 2021 as mentioned above. One of these bills, the Criminal and Related Matters Amendment Bill has expanded the scope of offences by including an offence against a person in a domestic relationship<sup>62</sup>.

Section 60(11) of the Criminal Procedure Act has the effect of turning the tables and shifting the onus of proof on the accused to convince a court on a balance of probabilities that such exceptional circumstances exist. Note that initially, the court would have to find reasons in terms of the interest of justice to release an accused on bail but if the charge is a serious offence found in schedule 5 the accused will have to adduce evidence which satisfies the court that the interest of justice permit his or her release.<sup>63</sup> If it is a schedule 6 offence then it's the accused's duty to find exceptional circumstances in the interests of justice which would permit release.<sup>64</sup> In the instance that an offence falls within the definition of gender-based violence but is not verbatim found in schedule 5 or 6 then section 60 (1) (a) would apply and the accused will only be released on bail if the interest of justice permit.<sup>65</sup>

As stated above, "exceptional circumstances" would have to be presented if the accused is accused of a schedule 6 offence which begs the question what are exceptional circumstances. According to the Concise Oxford Dictionary 1990, "exceptional" means unusual and not typical. In the *S v Petersen* case<sup>66</sup> the full bench concluded that exceptional circumstances would be something that is unusual, peculiar or extraordinary.

---

<sup>62</sup> South Africa (2020) The Criminal and Related Matters Amendment Bill. Government Gazette No. 43595 of 7 August 2020 at 23.

<sup>63</sup> Section 60 (11)(a) of the Criminal Procedure Act 51 of 1977.

<sup>64</sup> Section 60 (11)(b) of the Criminal Procedure Act 51 of 1977.

<sup>65</sup> Section 60 (1)(a) of the Criminal Procedure Act 51 of 1977.

<sup>66</sup> *S v Petersen* 2008 (2) SACR 355 ( C ) at para 55.

Therefore the court would have to exercise a value judgement with regards to the relevant facts in front of the court at the time with reference to the applicable criteria at the time. These circumstances would be the type that would not be found in a normal bail application but is rather specific to the accused.<sup>67</sup> For a court to determine whether circumstances are exceptional it would have to consider all the relevant circumstances.<sup>68</sup>

### **3.5 Determining exceptional circumstances**

There is no specific list that a court can refer to determine exceptional circumstances. The only thing a court can do is consider all relevant circumstances, refer to previous cases and eliminate "ordinary circumstances". Luckily "ordinary circumstances" that would lead to the refusal of bail have been codified in section 60 (4) of the Criminal Procedure Act of 1977, it reads as follows.

"The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- a) Where there is the likelihood that the accused if he or she were released on bail, will endanger the safety of the public or any particular person, or will commit a Schedule 1 offence: or
- b) Where there is the likelihood that the accused if he or she were released on bail will attempt to evade his or her trial; or
- c) Where there is the likelihood that the accused if he or she were released on bail will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- d) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system.
- e) Wherein exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security; or [sic]"<sup>69</sup>

---

<sup>67</sup> S v H 1999 (1) SACR 72 (W) at 77E.

<sup>68</sup> Herbay v S 1999 (2) All SA 216 (W).

<sup>69</sup> Supra fn5.



There is no fixed list of exceptional circumstances that an accused can use but we can refer to previous cases for guidance. In the *Jonas v S* case, the appeal was granted and held that the case was to be reheard by the magistrate and to be decided whether bail would be granted or not. In this case, the court held that exceptional circumstances could not be listed by law but that a terminal illness, an alibi, or a claim of innocence could be enough of an exceptional circumstance because it would be out of the ordinary to incarcerate an innocent person.<sup>70</sup>

The *Herbay v S* case is an example of circumstances the accused offered as a reason to be granted bail, but they were all rejected, and the court found that "the grounds ruminated as constituting exceptional circumstances do not contain exceptional circumstances even when taken together".<sup>71</sup> The circumstances considered include but are not limited to that the accused will lose his job if he is not present at work and as a result, the accused and his wife will not be able to pay for their house or their debts or the maintenance for the child. The investigating officer on the case had no problem with the accused being granted bail because the case rests solely on allegations made by the complainant and that the accused should be regarded as innocent until proven guilty.<sup>72</sup>

The court rejected these as exceptional circumstances because it felt that the loss of a job and not being able to pay one's bills is an ordinary circumstance to be expected. The court also found that there was more evidence provided than just the complainant's allegation and that the investigating officer did not provide any evidence to substantiate his opinion. The court also held that every accused is presumed innocent until found guilty therefore this has nothing to do with the granting of bail.<sup>73</sup> It is however important to note that not all courts will come to the same conclusion because circumstances that may be considered as "ordinary" in one case may be considered "exceptional" in another.<sup>74</sup> Courts should however try maintaining a uniform approach to circumstances without

---

<sup>70</sup> *Jonas v S* 1999 1 All SA 578 (SE).

<sup>71</sup> *Herbay supra* fn69.

<sup>72</sup> *Herbay supra* fn69.

<sup>73</sup> *Herbay supra* fn69.

<sup>74</sup> *S v Dlamini* 1999 (7) BCLR 771 (CC) par 76.

losing their discretion. This is done by relying on previous case law but applying the law as per the set of facts in front of the court. It would not be fair for two accused in two different cases to present the same circumstances yet receive two different outcomes.

Schedule 5 and 6 shifts the onus of proving exceptional circumstances or that the interest of justice permits their release on bail. This is a difficult position to put the accused in, an almost impossible position because for it to be in the interest of justice to grant them bail would mean that it should be in the public's interest as well. The public is expressly included in the consideration of bail through section 60 (4) (a) and section 60 (4)(e) of the Criminal Procedure Act 51 of 1977.

Public peace and security are endangered by the release of accused person who is charged with offences that cause public outrage. Keeping these types of individuals detained has a positive effect on the community as it will instil confidence in the criminal justice system. The interests that would permit the release of an accused heavily depend on public interest. The three new bills as mentioned above seem to move towards focusing on the victim and considering the victims and “anyone else” in the facilitation of their protection and the granting of bail.<sup>75</sup> Therefore the public’s interest could find footing in the term “anyone else”. For a victim to have to cross over the hurdle of the public’s interest is difficult and almost impossible therefore making it difficult but not impossible to be granted bail.

Withholding bail is an easy way to keep persons accused of gender-based violence in prison. The obvious reason would be to curb the rise of gender-based violence and to protect the victims from their abusers. But it would be unconstitutional. The Constitution gives an accused the right to a bail hearing where the bail will be determined based on the discussion above so there is no way we can have legislation that takes away this right. Hence there are now three new bills that make it difficult for an accuser to obtain bail but not impossible.

---

<sup>75</sup> Clause 4 (b)(b) of Supra fn 40 at 6.

## Chapter 4: Different countries approach to gender based violence

Gender based violence is a global pandemic that affects plenty of women world-wide. This is especially made clear to us in the news we listen to and read. Therefore it only makes sense for this dissertation to broaden its discussion by looking at how the rest of the world views and handles gender based violence. The elimination of this type of violence is a priority for everyone, including the international community. There has been several attempts in establishing the right of women to live free of violence. Progression will come from legal norms that in return change social norms surrounding violence. Implementing laws is one of the ways in which government can attempt to affect these norms. Studies have found that each year that a country implements legislation associated with reducing domestic violence then it actually reduces by two percent.<sup>76</sup>

### **4.1 Earlier attempts at curbing the rise of gender-based violence**

Studies have shown that the Democratic Republic of Congo has the highest reported rates of intimate partner violence. These high rates are also seen in the Cameroon, Sierra Leone and Uganda as compared to the low rates found in Singapore and Switzerland.<sup>77</sup> To reduce and control this, laws date back as far as 1976 where the International Covenant on Civil and Political Rights prohibited discrimination on the basis of sex. This was followed by a prohibition of inhuman or degrading treatment. In 1992 the term discrimination was defined in order to make the above prohibition broad enough to include; physical, mental, sexual treatments and coercion and deprivations of liberty. This law paved the way for many more laws, protocols and conventions to be introduced with the hope of reducing gender-based violence. The Protocol to the African Charter on Human and People's Rights was the first of many protocols, it prohibited against gender based violence as part of the women's rights to life and dignity. Violence against women was also defined as all acts perpetrated against women.<sup>78</sup> The Committee of Ministries of the Council of Europe adopted a regional convention known as the "Istanbul

---

<sup>76</sup> Klugman, J. (2017). Gender Based Violence and the law. Georgetown University at 2.

<sup>77</sup> Supra fn77 at 5.

<sup>78</sup> Supra fn 77 at 9.

Convention” that held that violence against women is labelled as a human rights violation and a form of discrimination, to combat this it creates duties for the State. The State is thus called to prevent, investigate, punish and provide access to services such as legal, financial, psychological aids, hotlines and sexual trauma services.<sup>79</sup>

Although International declarations and resolutions do not have as much of a binding force as treaties would, they still contribute towards the development and reform of legal norms and jurisprudence.<sup>80</sup> For example, The United Nations Conference on Human Rights in Vienna paved the way for the integration of women rights into human rights norm whereas prior to this, intimate partner violence was regarded as being beyond their scope.<sup>81</sup> This was followed by UN Declaration on Elimination of Violence against Women which defined violence as any act of gender-based violence that leads to physical, sexual or psychological harm or suffering to women. This includes intimidation such as threats of these acts and deprivation of liberty whether it takes place in private or public.<sup>82</sup> Another noticeable effect coming from the UN’s Declaration on Elimination of Violence against Women is that for the first time marital rape was recognised as violence against women. As stated above, these declarations do not have the same binding as law would have but they influence law makers in a positive manner. For example, this declaration was followed by law makers adopting the above-mentioned definitions.<sup>83</sup>

#### **4.2 The State’s obligation of due diligence**

At the Rome Conference which established the International Criminal Court, States agreed upon explicit provisions in statute such as sexual and gender based crimes that would be included as war crimes relating to both international and non-international armed conflict.<sup>84</sup> Therefore such crimes will be legally prosecuted but it is not as simple as that, prosecutions and investigations face challenges such as a lack of time and costs to complete these prosecutions. This should never stop a government from trying to

---

<sup>79</sup> Supra fn77 at 10.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Supra fn 77 at 11.

<sup>84</sup> Ibid at 13.

prosecute or coming up with measures that will make the whole justice procedure easier. A government that is not able to fulfil its duty to protect women from violence and enforce laws that prevent said violence in addition punish offenders of such violence will be seen as a government that has breached its due diligence duties and complicit in the human rights abuse.

Therefore States have come up measures to prevent such violence and punish it's offenders to avoid being held accountable. But those who breach the due diligence standard will meet their consequences, an example of this is seen in *Aydin v Turkey*<sup>85</sup>. In this European Court of Human Rights the State did not act with due diligence and therefore failed to seek witnesses to the rape and torture of the applicant. This is thus categorised as a human rights violation. *The Bevaqua and S v. Bulgaria*,<sup>86</sup> European Case, the court ruled that States that a party to the Convention have a responsibility to ensure that all victims of gender based violence are able to institute proceedings and those proceedings can be initiated by public prosecutors. The prosecutors involved should furthermore regard violence against women as an aggravating and decisive factor in deciding whether to prosecute in the public interest. This case also stated that parties should use protection orders measures to protect victims and should always ensure that children involved are protected. Lastly, it held that the authorities failure to uphold this due diligence by imposing sanctions on law enforcement is equivalent to a refusal to provide immediate assistance which the applicant needs at the time.

The *Opuz v Turkey* case<sup>87</sup> is an example of where the state failed to comply with the due diligence standards. In this case, the applicant and her mother endured physical violence and threats thereof for years from Nahide's husband whom eventually killed the mother. Prior to the murder, the mother and daughter had complained multiple times to the law enforcement authorities to no avail. The case acknowledged that this law enforcement breached the rule of customary international law which creates an obligation on the State

---

<sup>85</sup> *Aydin v. Turkey*, No. 57/1996/676/866, Eur. Ct. H.R. Judgment, 109 (Sep. 25, 1997).

<sup>86</sup> *Bevacqua v. Bulgaria*, No. 71127/01, Eur. Ct. H.R. Judgment (Jun. 12, 2008).

<sup>87</sup> *Opuz v. Turkey*, No. 33401/02, Eur. Ct. H.R. Judgment (Jun. 9, 2009).

to prevent and respond to acts of violence against women with due diligence. As a result Turkey is seen to have violated Article 24 of the European Convention. This due diligence requirement on an international level requires States to enforce protective measures for women such as restraining orders and responding effectively to request for help from law enforcement. This was adopted in domestic law is Cosa Rican in 2007 which criminalizes violence against women.<sup>88</sup>

**4.3 The above-mentioned International Human Rights translating onto National Law-making**  
Domestic violence legislation varies in terms of the different topics within it. For example physical violence, emotional violence and sexual violence. Physical violence has been legislated by 124 countries, emotional violence by 122 countries and sexual violence by 95 countries around the world.<sup>89</sup> However the sanctions and remedies across these countries vary.

All these legislations are welcomed by most because in true form they have good intentions. However, there are some feminists that have negative criticism. For example, some feel that the law as an institution would be of little value in transforming a victim's life. Linda Mills held that law should only be involved in these cases if, the case is life threatening because anything before that would require people who are equipped to deal with such whereas she believes that the law does not have the necessary skills to deal with such topics at the moment. She added on that the narrative that is constantly being created of the battered women as the face of gender based violence should be abandoned because there are several other forms of abuse such as deprivation of liberty, emotional abuse and economic abuse. A woman who suffers from these other forms of abuse will not have the confidence to come forward because they will feel as if their abuse is trivial compared to physical violence.<sup>90</sup> Another critic is that legal intervention leads to second victimization, this is as a result of the expected delays and the nature of the judicial process. Although these critics may be sound there is no way we cannot have

---

<sup>88</sup> Supra fn77 at 15.

<sup>89</sup> Ibid at 23.

<sup>90</sup> Supra fn77 at 25.

legislation surrounding gender based violence. Because as stated above, it is created with good intentions.

Therefore many countries have continued to legislate and prosecute all forms of gender based violence. Which leads us to the different views on sentencing. Some countries such as Victoria, Australia prefer to send offenders to a behaviour change programme because they are of the belief that holding perpetrators to account does not require incarceration. But rather an attempt to change one's attitude and behaviour is of utmost importance. However this approach has not worked well for victims in the area as research has shown that the extent to which these interventions have the ability to keep victims safe is unknown especially because there are no follow ups after the programme is completed.

Apart from an approach that focuses on behaviour as discussed above, other countries such as Latin America have chosen to adopt a conciliation-based approach which means that when intimate partner violence takes place, the partners will be encouraged to meditate and arbitrate the matter personally. Countries such as Chile, Mexico, Argentina, Bolivia and Peru have implemented this approach. Argentina's federal law requires the judge to first summon the parties involved to mediation, educational or therapeutic programmes within 48 hours of hearing the matter.<sup>91</sup> Mexico argues that this conciliation-oriented approach's purpose is to preserve the family and to protect women against violent partners.<sup>92</sup>

These different approaches and attempts all have one thing in common, which is to curb the rise of Gender Based Violence and for States to fulfil their obligation to protect victims.

---

<sup>91</sup> Supra fn77 at 26.

<sup>92</sup> Supra fn77 at 26.





## Chapter 5: Conclusion

The legal approach to gender-based violence in South Africa is seen in the legislation that frowns upon it, in the sentencing that aims to create a deterrence from it, and in the police's role. This topic was inspired by the rise of gender-based violence and the chapters are based on the President of the Republic of South Africa's response to the violence in which he urged lawmakers to draft legislation that will amend bail.

The chapter on the police's role is important to include because the case starts with them. They take the victim's statement and open a case. Therefore, the police's training in dealing with victims, witnesses, and gender-based violence cases is very important. But in some cases, an offender would never go through the above-mentioned channels because they are never reported in the first place. This is either because the victim is no longer able to speak for themselves or those who can choose not to. Some victims do not report an offence against them because they blame themselves for their victimization, they are afraid of the offender, they do not recognize the crime, or they choose to protect the offender because of the relationship they have with them.

Problems regarding violence can also be addressed through recognizing the need for the police and the community to effectively work together. As discussed earlier, if the community had faith in the police, it would make it easier them to report crimes and work with the police. To motivate community involvement, it would be important for the community to understand that transformative change is possible.<sup>93</sup> This will also encourage the community to trust the police and their efforts instead of taking matters into their own hands which in itself can lead to more criminal acts.

The community should also be made aware of witness protection programs and the option of a restraining order. Trust in the justice system will be achieved through action. For example, seeing gender-based violence cases being followed through in the media. When one victim sees another victim receive justice, naturally it creates an expectation

---

<sup>93</sup> Supra fn 23.

that you will receive justice too. The police's presence in communities will create trust in the justice system because you will be seeing them patrol, interact and host meetings in the community which can be a platform to share grievances and be heard.

The police should also invest in a better administration system, keeping track of all convicted offenders in a database and include their residences to make sure that they are not too close to children-based areas which include schools, children parks, and after-cares. This will make it easier for police officials or parole officers to make sure that the released offenders continue to be rehabilitated.

As discussed in the paper, the President had suggested that law makers make laws that would refuse gender based violence accused persons bail. But that would be unconstitutional to deny persons bail just because of the crime they have committed. The Constitution of the Republic of South Africa grants persons bail should the interest of justice allow therefore if the offender is a risk to the community or the victim should they be released on bail then the interest would not permit bail as per the judge's discretion. The judge's discretion is another reason why we cannot simply deny a person bail based on the crime committed because it removes their discretion and undermines the separation of powers.

Therefore bills have been introduced to make it difficult for such accused persons to receive bail but not to make it completely impossible. These new bills are centred around the victim. They protect victims of gender based violence and prioritises them in major decisions such as parole and bail. The bill has went as far as considering people who aren't necessarily the victim but have an interest in the matter. However this is not to say that the laws before these bills were incompetent. They were functional but the new bills have since being in affect filled in noticeable gaps in the previous legislation. The dissertation goes on to discuss how bail was handled prior to these new amendments being in effect with regards to serious offences.

The Dissertation ends by discussing the history and development of legislation, declarations and alternative options in terms of gender based violence both internationally and nationally. These attempts all exist because it is the State's duty to protect victims. This part of the dissertation is important because it shows us how different countries deal with gender based violence and how they justify such options. It makes it possible for the reader to compare the South African approach with a significant number of countries from the rest of the world.

## Bibliography

### Academic dissertations and research papers

- Merlyn Barkhuizen (2015) Police reaction to the male victim of domestic violence in South Africa: case study analysis, *Police Practice and Research*, 16:4, 291-302.

### Articles and abstracts from electronic databases

- Anthony Minnaar (2002). Witness Protection Programs – some lessons from the South African experience. *Acta Criminologica* 15(3) at 128.

### Books

- Du Toit. (2018). *Commentary on the Criminal Procedure Act*. Juta.
- Klugman. (2017). *Gender Based Violence and the law*. Georgetown University.

### Case law

- *Aydin v. Turkey*, No. 57/1996/676/866, Eur. Ct. H.R. Judgment, ¶ 109 (Sep. 25, 1997).
- *Bevacqua v. Bulgaria*, No. 71127/01, Eur. Ct. H.R. Judgment (Jun. 12, 2008).
- *Centre for Child Law and Others v Media 24 Limited and Others* 2019 ZACC.
- *Herbay v S* 1999 (2) All SA 216 (W).
- *Jonas v S* 1999 1 All SA 578 (SE).
- *Opuz v. Turkey*, No. 33401/02, Eur. Ct. H.R. Judgment (Jun. 9, 2009).
- *Procurer General Vrystaat v Ramakhosi* 1996 (4) All SA 207 (O).
- *S v Petersen* 2008 (2) SACR 355 ( C ).
- *S v H* 1999 (1) SACR 72 (W) at 77E.
- *S v Dlamini* 1999 (7) BCLR 771 (CC).

### Government or official publications

- Capt. K Mashamaite and Capt. V Mukhathi. *South African Police Services Magazine* (August 2020).
- South Africa (2020) *The Criminal and Related Matters Amendment Bill*. Government Gazette No. 43595 of 7 August 2020.

### Internet sources

- Address by President Cyril Ramaphosa on South Africa's response to the coronavirus pandemic. 17 June 2020.  
<<http://www.dirco.gov.za/docs/speeches/2020/cram0617.pdf>> (accessed 25 September 2021)

- Cele urges SA to report abuse as GBV calls top 2,230. 3 April 2020. <<https://www.enca.com/news/police-minister-encourages-sa-report-abuse>> (accessed 30 April 2021).
- IOL Reporter. 139 SAPS members have had GBV cases opened against them. 20 October 2020 <<https://www.iol.co.za/news/south-africa/139-saps-members-have-had-gbv-cases-opened-against-them-d9882d1c-5853-426f-a434-e8544bb8ae2d>> (accessed 18 March 2021).
- Naledi Phangindawo murder: Accused abandons bail. 17 June 2020. <https://www.news24.com/news24/southafrica/news/naledi-phangindawo-murder-accused-abandons-bail20200617> (accessed 2 July 2021).
- NCOP approves GBV bills. 2 September 2020 <<https://www.sanews.gov.za/south-africa/ncop-approves-gbv-bills>>. (accessed 26 October 2021)
- The way she died is unimaginable': Family, friends on the killing of Naledi Phangindawo. 9 June 2020. <<https://www.timeslive.co.za/news/south-africa/2020-06-09-the-way-she-died-is-unimaginable-family-friends-on-killing-of-young-mother/>> (accessed 2 July 2021)
- President Cyril Ramaphosa: Address to the nation on public and gender-based violence. 5 September 2019. <<https://www.gov.za/speeches/president-cyril-ramaphosa-address-nation-public-and-gender-based-violence-5-sep-2019-0000#>> (accessed 5 May 2021).
- Ramaphosa signs into law 3 anti-gbv bills, bringing more protection to victims. 31 January 2022. <<https://ewn.co.za/2022/01/31/ramaphosa-signs-into-law-3-anti-gbv-bills-bringing-more-protection-to-victims>>(accessed on 17 March 2022).
- SA faces two pandemics – Covid 19 and GBV : Ramaphosa. 31 December 2020. <<https://www.sabcnews.com/sabcnews/sa-faces-two-pandemics-covid-19-and-gbvramaphosa/>> (accessed 1 July 2021)
- South African Police Services, Basic Police Development Learning Programme. [https://www.saps.gov.za/careers/basic\\_police\\_program.php](https://www.saps.gov.za/careers/basic_police_program.php) (accessed 21 March 2021).
- South African Police Service, Reporting a crime. <[https://www.saps.gov.za/services/report\\_crime.php](https://www.saps.gov.za/services/report_crime.php)> (accessed 9 March 2021).
- Sulaiman Philip. SAPS steps to help victims of gender-based violence. <<https://www.vukuzenzele.gov.za/saps-steps-help-victims-gender-based-violence>> <24> (accessed 24 March 2021)

The way she died is unimaginable: Family, friends on the killing of Naledi Phangindawo. 9 June 2020. <https://www.timeslive.co.za/news/south-africa/2020-06-09-the-way-she-died-is-unimaginable-family-friends-onkilling-of-young-mother/> (accessed 2 July 2021).

- Thousands of Protests in South Africa over rising violence against women. 7 September 2019. <https://www.theguardian.com/world/2019/sep/05/thousands-protest-in-southafrica-over-rising-violence-against-women> >(accessed 1 July 2021).
- Tshegofatso Pule: Alleged mastermind's trial to begin in High Court on 28 May. 17 May 2021 <https://www.news24.com/news24/southafrica/news/tshegofatso-pule-alleged-masterminds-trial-to-begin-in-high-court-on-28-may-20210517> (accessed 28 December 2021).
- Uyinene Mrwetyana's body was found hidden in Post Office safe overnight, says State. 7 November 2019. <https://www.news24.com/news24/southafrica/news/uyinenemrwetyanas-body-was-hidden-in-post-office-safe-overnight-says-state-20191107> > (accessed 2 July 2021).

### Journal Articles

- Andersson N, Cockcroft A, and Shea B (2008) Gender-based violence and HIV: Relevance for HIV prevention in hyperendemic countries of southern Africa. *Journal AIDS*.
- Youngs, D (ed) (2005) Behavioural Analysis of Crime: Studies in David Canter's Investigative Psychology, *The British Journal of Criminology*, Volume 55, Issue 1 at 203–205.

### Legislation

- Correctional Services Act 111 of 1998.
- Criminal Law Amendment Act 105 of 1977.
- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- Criminal Procedure Act 51 of 1977.
- Domestic Violence Act 116 of 1998.
- Domestic Violence Amendment Bill 2020.
- The Interim Constitution Act 200 of 1993.
- The Constitution of the Republic of South Africa Act 108 of 1996.
- The Criminal and Related Matters Amendment Bill. Government Gazette No. 43595 of 2020.
- The Protection from Harassment Act 17 of 2011

- South Africa (2020) The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill 2020 (Government Gazette No 43595 of August 2020).
- South Africa (2021) The Criminal Procedure Amendment Bill. B12B 2021.

### Reports

- Council of Europe, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, May 11, 2011.
- Department of Justice. (2012). Achieving best evidence in criminal proceedings guidance on interviewing victims and witnesses, and guidance on using special measures and the provision of pre-trial therapy.
- Gupte, J. Shahrokh, T. and Wheeler, J. (2014). Tackling Urban Violence in Mumbai and Cape Town through Citizen Engagement and Community Action, IDS Policy Briefing.
- Ministry of Justice. (2011). Achieving best evidence in criminal proceedings guidance on interviewing victims and witnesses, and guidance on using special measures (1st ed.). London: Ministry of Justice.
- South African Police Service. (2016). Back to Basics: Briefing of the Portfolio Committee on Police SAPS Basic Training Learning Programme.