

# **Restorative Justice as a Response to Intimate Partner Violence: A Pathway to Survivor - Centred Justice and Social Repair**

by

Nomzamo Mji

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Supervisor : Dr Sanele Sibanda

## Declaration of Originality

Nomzamo Mji

**Student number:** 21822507

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## Abstract

Intimate partner violence ('IPV') is the most common form of gender-based violence experienced by women in South Africa and worldwide. Despite efforts to improve the criminal justice response, the existing remedies have been accepted as largely ineffective in addressing IPV. IPV survivors are some of the most misunderstood victims seeking redress from the legal system. Many IPV survivors do not seek the punishment of their partner and require other forms of redress to address the personal and societal harm caused by IPV. Carceral approaches do not serve the justice needs of many marginalised survivors.

Recognizing the impact of race, gender, and class on survivors' experiences and justice options, this research applies an intersectional feminist lens to explore the efficacy of restorative justice as an alternative response to IPV. Through qualitative analysis, the study investigates whether restorative justice can better meet the needs of marginalized IPV survivors who prefer non-carceral responses.

Findings suggest that restorative approaches not only empower survivors by amplifying their voices but also foster accountability among offenders and facilitate community engagement in the process. Ultimately, this research advocates for a paradigm shift in the movement to end violence, prioritizing restorative justice as a means to centre survivor needs, interrupt cycles of violence and promote social repair.

Keywords: intimate partner violence, domestic violence, restorative justice, community accountability, social repair.

## Dedication

Firstly, the countless survivors. This is really for you. It's a love letter. I wrote this paper in plain English because I hope that if you ever read my paper, you could find resonance beyond alienating academic jargon. This paper is a humble offering. We can do better to support you and hear what you need. I will keep listening.

Secondly, the safety net that catches the survivors: family, NGOs, community activists, the care economy that works tirelessly to love and heal and fight for better.

Along this journey, I bore witness to the most recent holocaust. I dedicate this to the indomitable spirit of resistance in Gaza. I often wondered the point of writing in the midst of three concurrent genocides (Sudan, Congo, Palestine). But then I would see Palestinians graduating from their tents and it would embolden me to take the next step. Free Palestine.

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Pralini: Thank you for the countless pomodorros ('pomms'). My pomm chomm, a virtual study buddy and so much more. Thank you for reminding me that every tiny step counts and that I must love myself through this. We did it! I will forever treasure this time we walked each other home.

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From the other realm: I come from a long line of pathfinders & trailblazers. Mkhulu, Makhulu, Grandpa and Grandma. Ndiyabulela Chisana, Twana, Nkomose noGabisa. Thank you for all the blessings and protection you have showered on my life. I remain in awe of the strides you made when all the systems were against you. Camagu.

'The Sis': my thesis. My most annoying sibling. It took on a life of its own. Stubborn and unwieldy, kinda like me. Like any sibling – it touched me on my studio several times but ultimately we grew up together. I'm grateful for the wonky, worthy journey.

Lecturers : Prof Modiri, Dr Dladla, Prof Dyani - Mhango – your courses invigorated me and emboldened me to think outside the box. Thank you for creating such a vibrant legal department.

## Epigraph

“Our collective work in creating a new approach to violence intervention is just beginning and, at the same time, follows trajectories that go as far back as violence, itself. Currently, many of us have refined our critique of the prevailing intervention model and must now challenge ourselves to take the risks necessary to shift our assumptions and defy our dogmas so that we can realize new possibilities. I believe that the answer lies deep within our own selves and our communities. If we learn to trust and build upon this wisdom, we will be able to create models that harness the creativity and reparative energy of those most motivated for change.”

M Kim ‘Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenge’  
in James Pcatek (ed) Restorative Justice and Violence against Women (2010) 193

## Terminology

**Intimate partner violent (IPV):** is commonly referred to as domestic violence. I choose the term IPV to distinguish this type of violence from the broad range of harms covered by the term domestic violence in the Domestic Violence Act.

**Gender – based violence (GBV):** is the umbrella term used to capture violence that occurs as a result of the unequal power relationships and the normative role expectations associated with each gender in a specific society.

**Harmer:** The term harmer will be used instead of perpetrator or offender. This is a choice to distinguish the restorative approach from a criminal justice approach. The term perpetrator or offender will be used in the context of the criminal justice system or where authors referred to have used this term.

**Survivor:** I have chosen this term instead of victim to capture the resilience of women who navigate personal and structural violence daily. The term captures a sense of hopefulness and agency which is consonant with restorative justice.

**Woman:** includes not only cisgender women, but also trans women and femme/feminine-identifying genderqueer and non-binary persons.

**Violence Against Women:** any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. It refers to violence directed at a woman because she is a woman and that affects her disproportionately.

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# 1 Introduction

## 1.1 Background and Context

Intimate partner violence ('IPV') is the most common form of gender-based violence ('GBV') experienced by women in South Africa and worldwide.<sup>1</sup> IPV includes physical, sexual, economic, psychological and emotional abuse and controlling behaviours by an intimate partner.<sup>2</sup> It affects the physical, emotional and mental health of many South African women daily. Although the lack of data is often cited as a challenge in research on this topic, it is generally accepted that the rates of IPV are notably high and that women are more likely to be victims.<sup>3</sup> More than 40% of men disclose having been physically violent to a partner and 40–50% of women have also reported experiencing such violence.<sup>4</sup> Additionally, nearly one in five women reported having experienced sexual IPV.<sup>5</sup>

The consequences of IPV are far reaching and profound – it is a substantial cause of morbidity and mortality.<sup>6</sup> Meyersfeld identifies domestic violence as one of the most serious causes of sickness, poverty, homelessness and disability for women around the world.<sup>7</sup> Even after leaving an abusive relationship, many survivors continue to suffer from

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<sup>1</sup> B Meyersfeld *Domestic violence and international law* (2010) 122.

<sup>2</sup> World Health Organisation 'Understanding and Addressing Violence against Women: Intimate Partner Violence' (2012) < [https://apps.who.int/iris/bitstream/handle/10665/77432/WHO\\_RHR\\_12.36\\_eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf) > (accessed 13 May 2022).

<sup>3</sup> N Sibanda-Moyo, E Khonje *et al*, 'Violence against women in South Africa: A country in crisis 2017' (2017) <<https://www.csvr.org.za/violence-against-women-in-sa>>18 (accessed 8 August 2023).

<sup>4</sup> M Seedat, A Van Niekerk *et al*, 'Violence and injuries in South Africa: prioritising an agenda for prevention' (2009) 374(9694) *The Lancet* 1011 1013.

<sup>5</sup> N Sibanda-Moyo, E Khonje *et al*, above n 3, 10.

<sup>6</sup> C Gordon, 'Intimate partner violence is everyone's problem, but how should we approach it in a clinical setting?' (2016) 106(10) *South African Medical Journal* 962.

<sup>7</sup> B Meyersfeld, above n 1, 1.

depression, trauma and anxiety. IPV also affects the children who grow up in a violent home.<sup>8</sup> They are more likely to be in an adult abusive relationship. The impact is gendered: girls who grow up in an abusive home are more likely to suffer abuse and boys in violent homes are more likely to become abusers.<sup>9</sup> It is essential for responses to interrupt cycles of violence.

A considerable amount of energy has been invested in legal and institutional reform to extend protection to IPV survivors and improve the effectiveness of the criminal justice system. The Domestic Violence Act ('the DVA') is a robust piece of legislation that extends protection to a broad range of domestic relationships and harms.<sup>10</sup> It operates within a legislative scheme that includes international obligations on state parties to take positive steps to protect women from state and personal violence. The legal framework includes the Convention on the Elimination of Discrimination against Women ('CEDAW') and the African Charter on Human and People's rights whose protocols contain provisions that articulate the right of women to be free from public and private violence and impose obligations on member states to take steps to protect that right.<sup>11</sup>

Despite these measures, when harm occurs in intimate relationships, many abused women are reluctant to engage legal remedies.<sup>12</sup> While they may want the abuse to end,

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<sup>8</sup> UN Committee on the Elimination of Discrimination Against Women Report 'Inquiry concerning South Africa conducted under article 8 of the Optional Protocol to the Convention' 2021 ('CEDAW Report') <<https://digitallibrary.un.org/record/3951406?ln=fr&v=pdf>> Clause 28 - 29 (accessed 8 February 2022).

<sup>9</sup> R Jewkes, M Flood *et al*, 'From work with men and boys to changes of social norms and reduction of inequities in gender relations: a conceptual shift in prevention of violence against women and girls' (2015) 385 *The Lancet* 1580 1581.

<sup>10</sup> Act 116 of 1998.

<sup>11</sup> Convention on the Elimination of Discrimination Against Women read with the UN Declaration on Elimination of Violence against Women and CEDAW's General Recommendation 19. Protocol to the African Charter on the Rights of Women in Africa, Article 4.

<sup>12</sup> J Fedler, 'Lawyering Domestic Violence through the Prevention of Family Violence Act 1993 - An Evaluation after a Year in Operation' (1995) 112 *South African Law Journal* 231 232.

they may not want their abuser to be imprisoned.<sup>13</sup> Black women bear a disproportionate burden of the high poverty and unemployment levels in South Africa.<sup>14</sup> When deciding whether to pursue legal action, they have to weigh up the potential loss of food, housing and partner maintenance.<sup>15</sup> Non-reporting is a deliberate strategy pursued by some women who see IPV as a private matter and are distrustful of authorities. They don't want to bring shame to themselves or family and don't want to be cast as typical victim or aggressor. Considering this context, survivors may be better served by interventions that don't rely on a criminal justice response.<sup>16</sup> This study proceeds from the premise that a significant number of survivors' needs for justice are not met by the criminal justice system necessitating the exploration of alternative justice pathways.<sup>17</sup> The remedies currently available have been accepted as largely ineffective in addressing the ongoing challenge of IPV.<sup>18</sup>

## 1.2 Shortcomings of the Criminal Justice System

Globally, the criminal justice system is notorious for failing to meet the needs of IPV survivors.<sup>19</sup> The literature is replete with examples of the shortcomings of the criminal

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<sup>13</sup> B Hudson, 'Restorative Justice and Gendered Violence: Diversion or Effective Justice' (2002) 42 *British Journal of Criminology* 616 622; K Moul, 'Providing a sense of justice: Informal mechanisms for dealing with domestic violence' (2005) 12 *South African Crime Quarterly* 17 21.

<sup>14</sup> Stats\_SA, 'Crimes against women in South Africa, an analysis of the phenomenon of GBV and femicide' (2021) 6 <[https://www.parliament.gov.za/storage/app/media/1\\_Stock/Events\\_Institutional/2020/womens\\_charter\\_2020/docs/30-07-2020/A\\_Statistical\\_Overview\\_R\\_Maluleke.pdf](https://www.parliament.gov.za/storage/app/media/1_Stock/Events_Institutional/2020/womens_charter_2020/docs/30-07-2020/A_Statistical_Overview_R_Maluleke.pdf) > (accessed 1 July 2023).

<sup>15</sup> D Smythe and L Artz, 'Bridges and barriers: a five year retrospective on the Domestic Violence Act' (2005) 1 *Acta Juridica* 200 206.

<sup>16</sup> H Mogstad, D Dryding *et al*, 'Policing the private: Social barriers to the effective policing of domestic violence' (2016) 56 *South African Crime Quarterly* 5 13.

<sup>17</sup> K Moul, above n 13, 21.

<sup>18</sup> The Presidency 'Declaration of the Presidential Summit against Gender Based Violence and Femicide.' (2018) < <https://www.thepresidency.gov.za/content/declaration-presidential-summit-against-gender-based-violence-and-femicide> > (accessed 10 February 2022). Also see the Preamble to the amended DVA that came into effect on 14 April 2023.

<sup>19</sup> B Meyersfeld, above n 1, 1.

justice system, many of which can be grouped into ‘secondary victimization,’ meaning that many survivors who report abuse are exposed to treatment that exacerbates the harm that they have suffered.

Despite their duties to assist IPV survivors, the police are consistently identified as a problematic link in the chain.<sup>20</sup> The South African police force is generally reluctant to get involved in cases of IPV. Some police officers do not consider the matters as sufficiently serious and view them as family squabbles.<sup>21</sup> Survivor voices are muted through trivialising and dismissal of their harm. Smythe and Artz describe a process of ‘scripting’ where survivor stories are flattened with court officials relying on stereotypes.<sup>22</sup> The long, unfriendly processes and the failure to secure adequate protection make many abused women feel disillusioned after interacting with the criminal justice system.<sup>23</sup>

Incidents of IPV are notoriously underreported.<sup>24</sup> Some reasons relate to perceptions about the treatment that will be experienced at the hands of authorities. As Hall notes, when considering seeking help, a survivor considers how she will be treated.<sup>25</sup> In South Africa, some survivors do not report incidents because they do not trust the police to provide meaningful assistance. This distrust is even greater in townships and marginalised communities. This distrust is not unfounded. Survivors from poor communities seen as ‘undeserving’ (such as farm communities) are profiled by police officers. These communities face the racist and classist myth that ‘violence is a way of

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<sup>20</sup> Section 2 of the DVA imposes duties on police officers to provide the assistance required to a complainant including connecting the complainant with medical treatment or a shelter.

<sup>21</sup> D Smythe and P Parenzee 'Acting Against Domestic Violence' in Bill Dixon and Elrena Van der Spuy (eds) *Justice gained? : crime and crime control in South Africa's transition* (2004) 149.

<sup>22</sup> D Smythe and L Artz, above n 15, 209.

<sup>23</sup> J Fedler, above n 12, 236.

<sup>24</sup> SA Government, 'National Strategic Plan on Gender - Based Violence and Femicide' (2020) ('GBVF National Strategic Plan') 32.

<sup>25</sup> RJ Hall, 'Feminist strategies to end violence against women' (2015) *The Oxford Handbook of Transnational Feminist Movements* 394 401.

life' for their members and they diminish the trauma of survivors.<sup>26</sup> These women also feel alienated from the formal justice system.<sup>27</sup> The risk of ill – treatment by state officials is even higher for LGBTQIA+ persons. The intersection of racial, gender and sexuality discrimination converge to create a particular experience of hardship. Mailula and Mokgoroane emphasize that the risk of secondary victimisation, the violence of heterosexist framings of IPV and the potential of being outed creates a secondary closet for lesbian black women in violent relationships.<sup>28</sup> These examples seek to illustrate that the availability of remedies is shaped by the intersection of gender, race class and sexuality.

### 1.3 New Paradigm of Responses

While some lawyers and activists work tirelessly to reform the dysfunction of the criminal justice system, this study is situated in an emergent paradigm of responses. These responses are aimed at countering some of the shortcomings of the criminal justice system and creating new pathways to justice for IPV survivors. Importantly, these responses are aimed at restoration and repair of the harm that arises from IPV. This harm is understood to affect an interconnected web of relationships. The restoration efforts are forward looking and aim to prevent the harm from reoccurring. This is achieved by taking account of the underlying causes that lead to IPV. A focus on harmer and community accountability extends the reparatory aspects of justice beyond individuals and tends to the social implications of harm. This is how social repair is understood.

In the last 20 years there has been growing feminist interest in non–carceral and restorative approaches to IPV. Coker discusses increasing attention given to a

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<sup>26</sup> D Smythe and P Parenzee, above n 21, 150.

<sup>27</sup> As above, 155.

<sup>28</sup> L Mailula and L Mokgoroane, 'The bloody rainbow: the Creation of the Second Closet – lesbian Blackwomxn, Intimate Partner Violence and Third Parties' Responses' (2020) (1) *Acta Juridica* 267 277.

‘reimagined movement to end gender violence.’<sup>29</sup> The term reimagination applies to the shift driven by black, queer and gender non-conforming individuals towards anti-carceral and anti-racist approaches to addressing harm.<sup>30</sup> These approaches acknowledge the social and economic conditions that give rise to violence and center the lived experience of marginalized women. RJ fits into this paradigm. It invites us to reimagine how we can address interpersonal harm. RJ is touted as a survivor - centred process because it positions the needs of survivors as a starting point in the pursuit of justice. The needs of the harmed party shape the restorative conversation.<sup>31</sup>

#### 1.4 Survivor Needs

As Fedler explains, abused women might be the most misunderstood victims seeking redress from the legal system. They both fear and love their abusers. While they may want the abuse to end, they may not want to end the relationship with the abuser.<sup>32</sup> Many survivors do not seek the punishment of their partner and require other forms of redress. In 2021 when reviewing the question of whether to criminalise domestic violence the South African Law Reform Commission found that the consequences of criminal sanctions ‘bear no relation’ to the future needs of victims. They identified the future needs as employment, housing and food – a means to survive.<sup>33</sup> These complexities expose the insufficiency of uniform approaches and challenge policy and lawmakers to provide relief that is responsive to the lived realities of IPV survivors.

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<sup>29</sup> D Coker, 'Restorative Approaches to Intimate Partner Violence and Sexual Harm' (2020) 36 *Ohio State Journal on Dispute Resolution* 591 598.

<sup>30</sup> S LaVarco, 'Reimagining the Violence against Women Act from a Transformative Justice Perspective: Decarceration and Financial Reparations for Criminalized Survivors of Sexual and Gender-Based Violence Notes' (2023) 98 *New York University Law Review* 912 915- 916.

<sup>31</sup> L Goodmark, 'Restorative Justice as Feminist Practice Special Issue: Exploring Possibilities: A Restorative Approach to Institutional Climate and Culture in Families, Education, Workplaces and Professions' (2018) 1 *International Journal of Restorative Justice* 372 375.

<sup>32</sup> J Fedler, above n 12, 232; B Hudson, above n 13 622; K Moulton, above n 13, 21.

<sup>33</sup> SALR Commission, 'Domestic Violence: The Criminal Law Response' (2021) 32.

This study centres the needs of IPV survivors in forging a pathway to a survivor-centred IPV response. In this exploration, I drew on the work of authors who have prioritised the voices and lived experience of survivors. Minaker conducted research to centre the needs of women in examining the efficacy of the criminal justice system. She identified seven central needs that provide key insights into the needs a survivor - centred response should aim to fulfil. I will use the needs as a reference point in evaluating the extent to which RJ can meet survivor needs.

Although there are increasing calls for ‘tough on crime’ approaches to IPV, this research shows that harsher penalisation is not always consistent with survivor needs. The extent to which RJ actually meets survivor needs has received some scrutiny in SA, USA, Canada, Australia, New Zealand and the EU.<sup>34</sup> Across these contexts the most commonly recognised benefits for survivors are: voice, empowered participation, validation, offender responsibility, the creation of a communicative and flexible environment as well as relationship repair (if this is a goal).<sup>35</sup> This study will evaluate how these benefits can fulfil the needs of survivors who prefer to pursue a non – carceral approach.

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<sup>34</sup> E Sasson and C Allen, 'Restorative Approaches to Address Intimate Partner Violence: A New York City Blueprint' (2020) <[https://www.nyc.gov/assets/ocdv/downloads/pdf/Guide\\_RJBlueprint\\_pageview\\_10142020.pdf](https://www.nyc.gov/assets/ocdv/downloads/pdf/Guide_RJBlueprint_pageview_10142020.pdf)> (USA); J Stubbs, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice' (2007) 7 *Criminology & Criminal Justice* 169 (Australia) ; L Drost, B Haller *et al*, 'Restorative justice in cases of domestic violence : Best practice examples between increasing mutual understanding and awareness of specific protection needs' (2015) <[https://www.euforumrj.org/sites/default/files/2019-12/7388\\_restorative\\_justice\\_in\\_cases\\_of\\_domestic\\_violence.pdf](https://www.euforumrj.org/sites/default/files/2019-12/7388_restorative_justice_in_cases_of_domestic_violence.pdf)>53 (EU); A Cameron, 'Stopping the violence: Canadian feminist debates on restorative justice and intimate violence' (2006) 10(1) *Theoretical Criminology* 49 (Canada).

<sup>35</sup> K Daly and J Stubbs, 'Feminist engagement with restorative justice' (2006) 10(1) *Theoretical Criminology* 503 512.

## 1.5 Understanding Restorative Justice in the Context of IPV

There is no single definition of Restorative Justice. It has been applied in a range of contexts with different theoretical underpinnings and aims. Some of the range in meanings also depends on the context in which restorative justice has been applied. In this paper 'restorative justice is seen as an alternate modality of justice which de-emphasizes punishment in favour of the reparation of harms within a context of community support and accountability for both the person harmed and the wrongdoer.'<sup>36</sup> Accountability entails taking responsibility for harm caused and seeking to make amends. This is a departure from the universalising logic of criminal justice through which the state imposes punishment to express disapproval and deter future crime.<sup>37</sup> Wrongdoing is remedied by repair not by punishment. Through the process of repair, justice is served. By shifting the focus from punishment to accountability, RJ involves a conceptual shift to conventional understandings of justice because punishment as a deterrent is a cornerstone of most criminal justice systems.<sup>38</sup>

Feminist critics of restorative justice for IPV are concerned that restorative justice places too much emphasis on apology and forgiveness which can severely compromise the safety of the abused.<sup>39</sup> In certain abusive situations, apology is a common tactic of coercion.<sup>40</sup> It is important to emphasize that a restorative process does not require nor

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<sup>36</sup> S Ehret 'Justice for Women Who Experience Intimate Partner Violence: Reflections on restorative justice ideals and making social meaning' Doctorate of Philosophy in Criminology thesis, University of Ottawa, 2016 2.

<sup>37</sup> As above, 57.

<sup>38</sup> A Spies, 'Substantive Equality, Restorative Justice and the Sentencing of Rape Offenders' (2016) 29 *South African Journal of Criminal Justice* 273 275.

<sup>39</sup> K Daly and J Stubbs, above n 35, 513.

<sup>40</sup> C Quince Hopkins, MP Koss *et al*, 'Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities Responding: Two New Solutions' (2004) 23 *Saint Louis University Public Law Review* 289 303.

necessarily entail forgiveness. While restorative processes provide a context in which forgiveness may happen, it is neither a primary focus nor principle of restorative justice.<sup>41</sup> What is more central to RJ is a principle of mutual accountability and interconnectedness which informs how we repair societal harm. Zehr speaks of a web of relationships that connects all people.<sup>42</sup> Pranis refers to a principle of community responsibility.<sup>43</sup>

Many scholars have recognized the conceptual connections between RJ and African notions of justice.<sup>44</sup> In a restorative justice framework the view of crime is predicated not so much on transgressions against the state, but on a violation of relationships on an individual and communal level.<sup>45</sup> Underpinning the African concept of justice is *ubuntu*, a relational worldview, which expresses our interconnectedness and our common humanity. Justice involves restoring social harmony amongst a web of relationships that are critical for the survival of the whole community.<sup>46</sup> Ramose explains that an ubuntu conception of law, is 'a search for justice as the restoration of equilibrium.'<sup>47</sup>

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<sup>41</sup> H Zehr and A Gohar *The little book of restorative justice: Revised and updated* (2015) 6. A Skelton and M Batley, 'Restorative Justice: A Contemporary South African Review' (2008) 21(3) *Acta Criminologica* 37-38. K Daly and J Stubbs, above n 35, 513.

<sup>42</sup> H Zehr and A Gohar above n 41, 17- 18.

<sup>43</sup> K Pranis 'Restorative Values and Confronting Family Violence' in Heather Strang and John Braithwaite (eds) *Restorative justice and Family Violence* (2002) 27.

<sup>44</sup> PBB Murhula and AD Tolla, 'The Effectiveness of Restorative Justice Practices on Victims of Crime: Evidence from South Africa' (2021) 10(1) *International Journal for Crime, Justice and Social Democracy* 101. See also A Skelton, 'Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa' (2007) 2007 *Acta Juridica* 228-230 and scholars at fn 6 who say that restorative justice is an African way of doing justice.

<sup>45</sup> M Randall, 'Restorative Justice and Gendered Violence; From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law Restorative Justice' (2013) 36 *The Dalhousie Law Journal* 461-476.

<sup>46</sup> R Murambadoro, C Wielenga *et al*, 'Beyond restorative justice : understanding justice from an African perspective' (2020) 9(1) *Ubuntu : Journal of Conflict and Social Transformation* 43-48-50.

<sup>47</sup> MB Ramose, 'An African perspective on justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy* 14 <<https://them.polylog.org/3/frm-en.htm>> 3.

The interconnected web of relationships is apparent when one considers the context of IPV in SA. In SA, IPV takes place in a context of high levels of structural and interpersonal violence. All types of interpersonal violence are very common and interrelated.<sup>48</sup> Men who commit violence against women and girls are more likely to commit violence against other men. Men who have been victims of childhood violence are more likely to perpetrate IPV.<sup>49</sup> This background highlights the necessity of IPV responses which recognise that harmers need to be rehabilitated to interrupt cycles of violence.

## 1.6 Context of Violence

### 1.6.1 Theories of IPV

There are many perspectives that have been adopted in theorising on the prevalence and causes of IPV. The Centre for the Study of Violence and Reconciliation ('CSV') explains that an adequate explanation recognises: i) the inherited violence of colonisation and apartheid; ii) the role of patriarchy (evident in gender norms, hegemonic masculinity and economic and social inequality) and iii) contemporary social ills such as substance abuse.<sup>50</sup> Most comprehensive theories of IPV in SA recognise that it is enabled by a dynamic interplay of these factors at the individual, relational, community and societal level. This is elaborated upon below.

### 1.6.2 Continuum of Violence

IPV is seen as part of a continuum of violence for South African women. On one end, IPV is largely normalised as an everyday experience and at the other end of the spectrum is

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<sup>48</sup> R Jewkes, J Levin *et al*, 'Risk factors for domestic violence: findings from a South African cross-sectional study' (2002) 55(9) *Social science & medicine* 1603 1604.

<sup>49</sup> R Jewkes, M Flood *et al*, above n 9, 1581.

<sup>50</sup> N Sibanda-Moyo, E Khonje *et al*, above n 3, 13.

intimate femicide.<sup>51</sup> Abused South African women face a high risk of being killed by their intimate partners.<sup>52</sup> RJ is not appropriate for all abusive relationships. Some victims are in situations of intimate terrorism and others are supported by friends and family. It is important to assess the circumstances of particular couples and the dynamics of abuse.<sup>53</sup> The primary need of most survivors is safety and RJ should not be applied in situations where it may expose the survivor to further harm.

### 1.6.3 Structural Violence

Centuries of race – based dispossession and displacement created a political economy that predisposed poor black South Africans to be uniquely vulnerable to many different forms of violence. In the 2020 study ‘Lived Realities and Responses to SGBV’ the CSVr researched the prevalence and impact of Sexual and Gender Based violence in seven Johannesburg townships and one in the North West.<sup>54</sup> Five of these areas had been identified as SGBV hotspots in 2020. The experience in these hotspots is an example of the systemic disadvantage marginalised survivors experience. Survivors of IPV are nested in a structural web of violence described in the report as a schema or ‘catalogue of violence.’<sup>55</sup> The schema of violence includes economic violence, slow violence,

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<sup>51</sup> TJ Van Niekerk and FA Boonzaier, 'An Intersectional Analysis of Responses to Intimate Partner Violence in two marginalised South African communities' (2019) 10(1) *International Journal of Child, Youth and Family Studies* 26 37. This was the experience of women interviewed in Hanover Park and Vlottenberg.

<sup>52</sup> The Third National Femicide Study by the South African Medical Research Council (SAMRC) reveals that the number of intimate partner femicides (defined as the murder of women by an intimate partner (i.e. a current or ex-husband/boyfriend, same sex partner or a rejected would be lover) is still 3 murders a day. This remains unchanged since 2009. SAMRC, 'Decrease in Femicide in South Africa: Three National Studies Across 18 Years' (2022) <https://reports/research-brief-decrease-femicide-south-africa-three-national-studies-across-18-years> (accessed 10 April 2023).

<sup>53</sup> L Drost, B Haller *et al*, above n 34, 9.

<sup>54</sup> Orange Farm, Alexandra, Diepsloot, eKangala, Mamelodi, Marikana, Mayfair.

<sup>55</sup> CSVr, 'Lived Realities and SGBV Responses : A Synthesis Report on Eight Communities' (2022) <<https://www.csvr.org.za/wp-content/uploads/2023/02/CSVr-Lived-realities-and-SGBV-Responses-Synthesis-Report.pdf>> (accessed 7 November 2023) 12. Most recently, Beth Ritchie conceptualised the Violence Matrix to explain ‘the tangled web of structural disadvantages, institutionalized racism, gender

structural violence, domestic violence, IPV, trauma, difference, substance abuse, spatial violence and stigma. In synthesising the experience across all eight communities, the CSVr researchers concluded that the root causes and drivers of sexual and gender-based violence ('SGBV') are socioeconomic inequalities which were seen to increase vulnerability to incidents of SGBV.<sup>56</sup> This vulnerability also coexisted with the resistance to reporting these incidents in these areas. IPV exists within a matrix of violence that severely undermines access to remedies. In all areas the researchers noted the lack of services and the lack of trust in SAPS.

While structural factors perpetuate IPV and exacerbate hardship, it would be incorrect to buy into the narrative that IPV is a poor, black issue alone.<sup>57</sup> In South Africa perpetrators of VAW range from high-ranking political officials, prominent sportsmen, and university professors to the average man on the street.<sup>58</sup> Race, gender, sexuality and class identity are foregrounded to demonstrate that the convergence of inequalities can exacerbate hardship. This highlights the importance of holistic strategies and calls to mind hooks' wisdom that strategies to counter IPV need to be situated within a broader movement to end all violence. This will be unpacked more fully in the next chapter

## 1.7 Against the Tide ... the need for alternatives

The high prevalence of IPV and the ongoing onslaught on women has led to increasing calls for more punitive responses.<sup>59</sup> In response to the public outcry and in an attempt to quell public fears, the government has implemented harsher punishments for serious

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domination, class exploitation, heteropatriarchy and other forms of oppression that locks the systematic abuse of Black women in place.' B Richie *Arrested justice : black women, violence, and America's prison nation* (2012)

<sup>56</sup> As above, 8.

<sup>57</sup> FA Boonzaier, 'Spectacularising narratives on femicide in South Africa: A decolonial feminist analysis' (2023) 71(1) *Current Sociology* 78 81.

<sup>58</sup> N Sibanda-Moyo, E Khonje *et al*, above n 3,10.

<sup>59</sup> E Cameron, 'The Crisis of Criminal Justice in South Africa' (2020) 137 *South African Law Journal* 32 53.

crimes through a minimum sentencing regime. Cameron J explains that the crisis in the criminal justice system is fueled, in part, by the flawed perception that harsher sentences can address the criminality in South Africa. He notes the failure of minimum sentences, the disproportionate representation of poor, black people in the criminal justice system and suggests that restorative, rehabilitative victim focused approaches might be more useful addressing the crime levels.<sup>60</sup>

Mailula, Surajpal and Britton draw attention to the limitations of carceral approaches in addressing gendered violence in South Africa. They all challenge the approach of carceral feminists who prioritise policing as the primary response to GBV. Britton argues that reactive, carceral approaches are inadequate to address the complexity of violence and inequalities in SA. She identifies the shift of SA policy towards carceral, neoliberal approaches which are inappropriate for the entrenched structural disparities at the root of gendered violence. This focus obscures conversations about structural barriers, economic inequality and the state's failure to deliver economic justice and racial equality.<sup>61</sup> Mailula argues that 'carceral interventions do not address the socio-economic factors that influence gendered crime.'<sup>62</sup> She draws on intersectional, radical critique to highlight the relevance of abolitionist feminist approaches in SA. Mailula advocates for indigenous knowledge systems and consideration of lived experiences in thinking creatively about attaining restorative justice and developing frameworks that rely on community accountability and support the rehabilitation of perpetrators. She highlights the lack of rehabilitation in prisons and advocates for the implementation of restorative justice to address gendered violence more holistically and increase community accountability.<sup>63</sup> Surajpal highlights the importance of acknowledging the social and economic context of perpetrators. She notes that many of them have addiction issues, histories of childhood violence and trauma and low socio – economic status.

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<sup>60</sup> As above, 69-71.

<sup>61</sup> HE Britton *Ending gender-based violence : justice and community in South Africa* (2020) 8 – 10.

<sup>62</sup> L Mailula, 'Carceral abolition as a South African possibility: A feminist perspective on the failure of policing and the criminal justice system in South Africa' (2023) *Agenda* 15.

<sup>63</sup> As above, 9.

Consequently, Surajpal advocates for holistic, rehabilitative approaches incorporating RJ and *ubuntu*. She notes that carceral approaches dominate the societal imagination.<sup>64</sup>

Fear of the high crime rate has led to the minimal uptake of RJ.<sup>65</sup> Although an exploration of restorative approaches for IPV defies the mainstream approaches to responding to IPV, the lives and safety of many South African survivors depend on the availability of effective responses. Increased money on prosecution has not shown significant outcomes in curbing GBV.<sup>66</sup> The extent of documented dissatisfaction and the limitations of carceral approaches establish a preliminary basis to investigate alternatives.

## 1.8 Statement of Problem

Despite a strong legislative and criminal justice framework in South Africa, IPV remains highly prevalent and endemic to South African society.<sup>67</sup> The criminal justice system, which dominates responses to IPV, often fails to meet the diverse justice needs of survivors, leaving survivors without proper support and intensifying their sense of helplessness.<sup>68</sup> This lack of effective options exacerbates survivors' vulnerability, hinders their recovery process and increases their risk of continued violence. Existing remedies are largely perceived as ineffective to the extent that scholars have declared that 'the justice system is especially broken when it comes to tackling GBV.'<sup>69</sup>

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<sup>64</sup> S Surajpal, 'Carceral Feminism is not the Answer' (2020)

<<https://africasacountry.com/2020/09/carceral-feminism-is-not-the-answer>> (accessed 5 March 2023) 3.

<sup>65</sup> PBB Murhula and AD Tolla, above n 98, 101.

<sup>66</sup> D Peacock, 'Moving Beyond a Reliance on Criminal Legal Strategies to Address the Root Causes of Domestic and Sexual Violence' (2022) 28(8) *Violence Against Women* 1890

<sup>67</sup> GBVF National Strategic Plan, above n 24, 24.

<sup>68</sup> S v Baloyi 2000 (2) SA 425 (CC) para 13.

<sup>69</sup> N Falkof, S Phadke *et al* 'Introduction' in Nicky Falkof, Shilpa Phadke and Srila Roy (eds) *Intimacy and injury: In the wake of #MeToo in India and South Africa* (2022) 15. The ineffectiveness of the criminal justice system in meeting survivor needs is further acknowledged in Presidential Summit Declaration against Gender Based Violence and Femicide (2019) and the Preamble to the amended DVA that came into effect on 14 April 2023.

This study will examine how restorative approaches can meet the justice needs of IPV. An intersectional analysis of IPV suggests that RJ is better suited to meet the needs of survivors who prefer non-carceral responses to IPV. Even though restorative justice has been part of the South African legal landscape and policy framework for many years, there has been minimal application of RJ beyond juvenile offences. In her article exploring the possibility of RJ for IPV in South Africa, Hargovan highlighted that there was a window of possibility to research restorative interventions as they were not yet widely available for IPV survivors. She mentioned how important it is to research what women would prefer.<sup>70</sup> To my knowledge, these questions remain unanswered. This paper seeks to revive those conversations, particularly in circumstances where evidence indicates that RJ is an empowering process that can provide meaningful remedies for survivors.

### **1.9 Objectives of the Study**

Historically, the application of RJ to gendered violence has been contested and controversial. Activists and scholars have debated whether restorative approaches are appropriate for issues of sexual and domestic violence. I will contribute to this debate by showing how restorative justice can respond to the needs of IPV survivors who prefer non-carceral approaches.

In rethinking responses to IPV, this research is a response to the call by Randall to move beyond tinkering with law reform and search for creative, victim-centred solutions.<sup>71</sup> By centering the lived experiences and knowledge of women, we can craft survivor-centred justice. This research has the potential to inform policy and practice interventions that better meet the diverse needs of IPV survivors and contribute to reducing the harm and prevalence of IPV.

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<sup>70</sup> H Hargovan, 'Restorative Justice and Domestic Violence: Some exploratory thoughts' (2005) 66 *Agenda* 48 52-55.

<sup>71</sup> M Randall, above n 45, 498.

## 1.10 Research questions

The primary question addressed by this research is: Can restorative justice better serve the needs of IPV survivors who prefer a non–carceral approach? In addressing that question, I explore the following sub -questions:

1.10.1 What is survivor - centred justice for IPV survivors? In other words, what are the justice needs of survivors that are not adequately addressed by the criminal justice system?

1.10.2 How, if at all, does RJ meet the justice needs of survivors?

1.10.3 Can restorative approaches enable social repair?

## 1.11 Theoretical Framework

This research is concerned with exploring the potential of RJ to provide relief that centres the justice needs and goals of IPV survivors as well as how restorative practices can aid in the larger effort to eradicate IPV and lessen its harm. I situate this research in a feminist paradigm to draw on a rich repository of feminist theory and strategies that have contributed to the anti–violence movement. Feminists have been at the forefront of theorizing on IPV and developing legal and grassroots responses to it. I drew on global feminist perspectives as well as highlighting local understanding.

Since violence against women in South Africa cannot be adequately explained by a single factor, it is understood that that violence takes place at the intersections of oppression.<sup>72</sup> Accordingly, I proceed from the premise that the experience of violence and availability of remedies is shaped by the intersection of gender with race, class and sexuality. ‘Intersectional thinking is required to address the many ways through which the complex politics of race and gender shape the experience of justice.’<sup>73</sup> This study adopts an

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<sup>72</sup> N Sibanda-Moyo, E Khonje *et al*, above n 3,7.

<sup>73</sup> J Ptacek *Restorative justice and violence against women* (2009) 282.

intersectional feminist framework in examining how restorative approaches can centre survivors and whether they can enable social repair.

## 2 Evolving Feminist Perspectives on the Responses to IPV

Feminist consciousness raising encouraged women to identify and understand the gendered, structural nature of their individual experiences of male violence. This understanding recast intimate violence from being a personal, family issue to a ‘manifestation of a social issue in which males dominate females through power and violence.’<sup>74</sup>

This chapter will explore evolving feminist perspectives on the suitability of restorative approaches to address IPV. The discussion will show how restorative approaches have gained increasing traction from feminists who adopt an intersectional view of IPV. I will also unpack survivor needs based on the lived experience of IPV survivors whose needs were unfulfilled by the criminal justice system.

In the field of RJ, the most developed area of feminist scholarship is whether or not RJ is appropriate in cases of sexual, partner, and family violence. Mainstream feminist (liberal feminist) consensus has been that RJ is incompatible with the imbalanced power dynamics in abusive situations and is unsafe. Critiques of mediation in divorce cases have been influential in suppressing feminist interest in RJ practices.<sup>75</sup> The concerns about mediation captured in the UN Handbook reflect many of the concerns that have been raised about restorative justice - reprivatization and uneven power dynamics.

Mediation is prohibited in the UN Legislation Handbook for Violence Against Women on the basis that ‘[i]t removes cases from judicial scrutiny, presumes that both parties have equal bargaining power, reflects an assumption that both parties are equally at fault for

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<sup>74</sup> N Levit and RRM Verchick *Feminist legal theory : a primer* (2016) 193.

<sup>75</sup> K Daly and J Stubbs, above n 35, 505.

violence, and reduces offender accountability.<sup>76</sup> In the same vein, the South African Department of Justice has recently issued a circular prohibiting mediation services in cases of domestic violence on the basis that mediation services are not provided for in the DVA and the use of such will ‘hinder the realization of the objects of the Act.’<sup>77</sup> It is important to distinguish restorative justice processes from traditional mediation as they are not the same. While the term mediation is sometimes used to describe the encounter between parties in a restorative process, the process and outcome are distinct.<sup>78</sup> Traditional mediation is aimed at reaching a settlement whereas the outcome of a restorative process is to make a restorative plan based on offender accountability. This is the key difference between the two approaches. In mediation there is generally an assumption that parties are equally at fault and/or share responsibility in resolving the conflict. During a restorative process, there is a stronger focus on repairing harm for which the harmer must accept responsibility. In the context of IPV, it is essential to recognise a power imbalance between the harmed and harmer as well as the distinct reparatory obligations of the harmer.

When reviewing feminist critique of RJ, it is important to pay attention to the process that is used in the context of IPV. Put simply ‘much depends on the process used in carrying out RJ.’<sup>79</sup> It is also important to pay attention to the type of feminism that informs understandings of IPV. As Goodmark notes, the greatest opposition to RJ is often from carceral feminists while RJ is more readily embraced by feminists who adopt an intersectional view of IPV. Carceral feminism prioritizes policing and imprisonment as the primary response to violence against women.<sup>80</sup> The discussion below will show key

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<sup>76</sup> UN Women *Handbook for legislation on violence against women* (2012) 38.

<sup>77</sup> Circular 03 2024, Department of Justice and Constitutional Development ‘Directive to Court Administration to Desist from Utilising Mediation Services in Domestic Violence Cases in the Implementation of the Domestic Violence Act, 1998.

<sup>78</sup> L Presser and E Gaarder, ‘Can Restorative Justice Reduce Battering? Some Preliminary Considerations’ (2000) 27(1) *Social Justice* 175 181- 182. Some of the confusion may also be caused by the term Victim Offender Mediation which includes the word mediation.

<sup>79</sup> K Daly and J Stubbs, above n 35, 513.

<sup>80</sup> L Goodmark, above n 31, 372- 373.

differences in understanding survivor needs and how this influences the acceptance of restorative approaches.

## 2.1 Liberal Framings and Responses to IPV

During the 1970s in the USA the battered women's movement gained prominence and has been highly influential in shaping interventions and responses to IPV globally and in South Africa.<sup>81</sup> This movement was mainly spearheaded by liberal white feminists from the Global North. Liberal feminists identified patriarchy as the root and sometimes sole cause of violence within the family.<sup>82</sup> IPV was largely framed as a symptom of gender inequality. The battered women's movement centred the experiences of privileged white women and prioritised a gender analysis to the exclusion of the impact of racism, heteronormativity and classism. In this way the 'battered women' was constructed as a passive and vulnerable, privileged heterosexual white woman. Queer, low-income, non-white women were excluded from the ideal image of a victim. As much as the battered women's movement challenged inequality it also constructed a battered women persona which made it challenging for women who sought alternatives to prosecution to assert this choice. Those type of views were discounted on the basis of theories of 'learned helplessness' which is said to diminish a survivor's ability to choose prosecution even when it is in her best interest.<sup>83</sup> In many ways, the battered women's movement universalised the experience of abuse.

The predominant focus of the liberal feminist movement has been on securing state intervention to pierce the veil between public and private life where women are

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<sup>81</sup> L Vetten 'Deserving and undeserving women : A case study of South African policy and legislation addressing domestic violence' Masters thesis, 2013 84.

<sup>82</sup> RJ Hall, above n 25, 395.

<sup>83</sup> A Polavarapu, 'Global Carceral Feminism and Domestic Violence: What the West Can Learn from Reconciliation in Uganda' (2019) 42 *Harvard Journal of Law and Gender* 123 136 -137.

unprotected from male violence.<sup>84</sup> Lavarco explains that the early feminist movement in the USA contained an array of tools to address IPV including shelters and economic support for survivors. The movement aimed to politicize the personal and harness state support to extend protection to survivors. Despite an initial expanded approach, carceral approaches became the default during the 1990s driven by a neoliberal, political agenda of ‘carceral feminism.’<sup>85</sup> The effect of carceral feminism is that the ‘state’s duty to protect women mainly translates into carrying out penal prosecution.’<sup>86</sup>

## 2.2 Intersectionality: Resisting Essentialist Framings of IPV and Survivors

From the 80s Black feminists such as hooks questioned the primacy of gender analysis in violence. In 1984 hooks wrote an important rebuke to the dominant framings of IPV as an issue of male dominance in mainstream White feminist perspectives. hooks identified the Western philosophical notion of hierarchal rule and coercive authority as the root cause of all violence. In her reflections on the feminist movement to end violence hooks urged feminist activists to widen the frame beyond male domination and situate violence against women within an overall movement to end violence. She cautioned that failure to do so would lead to simplistic explanations that treat violence against women as distinct from other systems of domination. She noted that racism and classism impacted Black women’s experience of IPV in ways that the mainstream white-dominated feminist movement did not account for. She further rejected the sole focus on male supremacy because it would lend credibility to sexist stereotypes that essentialise men as violent and women as not, men as abusers and women as victims.<sup>87</sup>

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<sup>84</sup> B Clark, 'Cold Comfort - A Commentary on the Prevention of Family Violence Act' (1996) 12 *South African Journal on Human Rights* 587 590.

<sup>85</sup> S LaVarco, above n 30, 921-922.

<sup>86</sup> S Tapia Tapia, 'Feminism and Penal Expansion: The Role of Rights-Based Criminal Law in Post-Neoliberal Ecuador' (2018) 26(3) *Feminist Legal Studies* 285 292.

<sup>87</sup> b hooks 'Feminist Movement to End Violence' in *Feminist theory: from margin to center* (1984) hooks was responding to Susan Schechter’s study of the battered women’s movement that emphasized that violence against women is rooted in male domination.

hooks critique foregrounds two central defining tenets of feminisms that have been broadly categorised as third wave feminism. The first tenet is an articulation of the concept of intersectionality that was later coined by Kimberlé Crenshaw.<sup>88</sup> Intersectionality concretised an approach of recognising that women's experience of violence is not shaped by patriarchy alone but also includes other systems of oppression. It was a response to the dominance of white feminist approaches that discounted the impact of racism and other sources of systemic oppression. Intersectionality is a tool of analysis grounded in Critical Race Theory ('CRT'). It is an expression of the prism principle within CRT which recognises that dimensions of social identity are socially constructed, multi – dimensional and co-constituted.<sup>89</sup> It refers to the ways in which oppressed people experience oppression simultaneously based on their multiple social identities.

Crenshaw's essay 'Mapping the Margins' carefully outlines the limitations of strategies which negate the experience of survivors of colour. In this essay Crenshaw applied an intersectional analysis to the experience of violence against women of colour. She highlighted the limitations of policy which failed to appreciate the experience of black women dealing with the intersection of sexism and racism.<sup>90</sup> In South Africa, there is a risk of ineffectual strategies if the response does not account for the ways in which IPV

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<sup>88</sup>K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) *University of Chicago Legal Forum* . Tamale discusses the historical application of the term prior to being coined in S Tamale *Decolonization and Afro - Feminism* (2020) 60 -76. She explains its early roots in the Global North with African Americans. The earliest articulation of the concept is credited to Sojourner Truth who, in 1851, addressed white women about their preoccupation with gender inequality to the exclusion of racial inequality. In Africa, intersectionality was adopted by African women who raised questions of multiple dominations within liberation movements led by men.

<sup>89</sup> J Turner, 'Race, Gender and Restorative Justice: Ten Gifts of a Critical Race Feminist Approach Symposium Issue: Restorative Justice' (2019) 23 *Richmond Public Interest Law Review* 267 272.

<sup>90</sup> K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1990) 43 *Stanford Law Review* 1241.

intersects with various types of violence attributable to inequality. The intersection of race, gender and class impact the experience of violence and the abused woman's options in accessing justice. This intersectional understanding of IPV has spurred some feminists to embrace restorative approaches as they understand that carceral approaches do not serve the justice needs of marginalised survivors.

This was made apparent in Minaker's study which focused on identifying the needs of survivors whose needs had not been met by the criminal justice system in Australia. In taking seriously the question of survivor-centred justice, it is important to foreground the needs of IPV survivors. Before interrogating the ways in which RJ better responds to needs, we need to examine which needs are in issue.

### **2.3 What are the Needs of IPV survivors?**

Minaker provides a useful categorisation of IPV survivor needs which was established by conducting a standpoint feminist analysis. This is an analysis grounded in women's material realities.<sup>91</sup> The shared standpoint of the participants is the experience of IPV and interacting with the criminal justice system although their experience would also be shaped by their race and class. This position provided a standpoint from which to examine the effectiveness of the criminal justice system in responding to survivors' needs. Minaker conducted semi-structured qualitative interviews with 15 women who shared the common experience of abuse from intimate partners and efforts to enlist the support of the criminal justice system. She found that survivors do not see their needs specific to their identity as abused women. They related more broadly to their lives as mothers, workers and spouses.<sup>92</sup> Minaker reads the decisions and choices that women can make as a negotiation between what they need and the resources available to them.

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<sup>91</sup> JC Minaker, 'Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women's Needs' (2001) 13 *Canadian Journal of Women and the Law* 74 80.

<sup>92</sup> As above, 83. The women were largely working class and unemployed. They experienced economic marginalization. All but three of the women, resided in working class neighbourhoods. 12 of the 15 women were mothers.

This negotiation is mediated by the race and class of the survivor. Minaker recognises that despite the constraint of power relations, survivors can still play a role in meeting their needs. Women are active agents capable of deciding how to respond when they are harmed even when they act in conditions of constraint.<sup>93</sup>

Minaker identified needs that she grouped into seven categories as follows:

- 1) Understanding is the need to be heard, listened to and believed. It entails recognition and validation.
- 2) Reprieve is a need which involves safety. For all the women physical safety was a pressing need. They often thought of safety in the short term. For some survivors it entailed escape, for others being temporarily separated from the abuser and for some being involved in the process. For some safety entailed protection provided by the police but not necessarily a legal intervention.
- 3) Survival related to biological needs such as sleep, medical attention, food as well as managing the effects of the abuse. To some survivors survival meant moving away from their partner or moving forward with their lives in some other way.
- 4) Children factored strongly into how survivors deal with abuse. The needs of the children are as central to survivors as their own.
- 5) Means includes resources to cope with or escape from the abuse. These included constructive coping mechanisms, social networks, information about a forward direction and accessible coping mechanisms.
- 6) Remedies encapsulates a need for remedial services – for more than half of the women this related to services which support the partner to rehabilitate. There was less emphasis on criminal justice intervention and more focus on social services and community based support.
- 7) Rebuilding encapsulated the needs for healing, emotional security and long – term survival. For some survivors it was important for their partners to take responsibility in order to provide a sense of closure.<sup>94</sup>

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<sup>93</sup> As above, 102.

<sup>94</sup> As above, 90 – 99.

Although Minaker's sample size is small, the findings are mostly consistent with the needs identified in the SA context.

Hargovan points out that women's primary concerns are obtaining protection for themselves and their children, deterrence of future abuse and the rehabilitation of their partners.<sup>95</sup> She echoes the need for reprieve for women and their children. Rasool's research shows that women are more likely to seek help when the children get affected.<sup>96</sup> Women navigate their responses to GBV as part of a web of relationships, not based on their atomised needs. It is important for the relational web to inform conceptions of justice.<sup>97</sup>

Fedler's research with South African women identifies reprieve, survival and means. 'A commitment to ending violence in the home must deliver to women the means of survival.'<sup>98</sup> C Quince Hopkins *et al* assert that beyond safety, most women want an opportunity to speak about what has happened and acknowledgment of wrongdoing. This is more important to them than the punishment of their abuser.<sup>99</sup>

Overall Minaker found that the increasing 'tough on crime' approach was inconsistent with the needs of survivors who required more ameliorative options to support them in the negotiation of their choices.<sup>100</sup> RJ is a response to the reality that carceral responses to harm will not satisfy the needs of all women.<sup>101</sup>

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<sup>95</sup> H Hargovan, 'Restorative approaches to justice : "compulsory compassion" or victim empowerment?' (2007) 20(3) *Acta Criminologica : African Journal of Criminology & Victimology* 113 121.

<sup>96</sup> S Rasool, 'Help-Seeking After Domestic Violence:The Critical Role of Children' (2016) 31(9) *Journal of Interpersonal Violence* 1661.

<sup>97</sup> N Luwaya and J Omar, 'Working against Violence against Women: How Far Have We Come? Violence against Women: Law, Policy and Practice' (2020) *Acta Juridica* 120.

<sup>98</sup> J Fedler, above n 12,251.

<sup>99</sup> C Quince Hopkins, MP Koss *et al*, above n 40, 292.

<sup>100</sup> JC Minaker, above n 91, 106.

<sup>101</sup> L Goodmark, above n 31, 375-380.

### 3 Restorative Justice in the context of IPV

Restorative Justice is an umbrella term for a range of practices that are adopted to respond to harm and/ or crime. As Randall has noted, RJ has an elastic meaning because of the variability of practices on the ground.<sup>102</sup> Despite the range in definitions and practices, there are certain features that characterise a dispute resolution process as restorative. These features are captured in the following definition where RJ is defined as:

‘an approach to justice that aims to **involve the parties** in a dispute **and others affected by the harm** (victims, offenders, families concerned and community members) in collectively **identifying harms, needs and obligations** through **accepting responsibilities, making restitution**, and taking measures **to prevent a recurrence** of the incident and **promoting reconciliation**.

Restorative Justice sees crime as **an act against the victim** and shifts the focus to **repairing the harm** that has been committed against the victim and community. It believes that the offender also needs assistance and seeks to identify **what needs to change to prevent** future re-offending.<sup>103</sup> (emphasis added)

This definition (‘DOJ definition’) captures the key features of RJ that I will unpack, highlighting key differences in the IPV context. Before this discussion, I will provide a brief overview of the format of RJ processes and the South African evidence I will rely on.

#### 3.1 South African Evidence of RJ and IPV

##### 3.1.1 Format of RJ process

The Department of Justice outlines three examples of RJ processes: Victim – Offender Mediations, Family and Group Conferences and Peace and Sentencing Circles. The discussion will focus on Victim Offender Mediations and Group conferencing as these are the processes most often applied in the IPV context.

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<sup>102</sup> M Randall, above n 45, 471.

<sup>103</sup> Department of Justice and Constitutional Development ‘Restorative Justice: the road to healing’ 2011 <https://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf> (accessed 11 May 2022) 3 - 4.

Victim Offender Mediation (VOM) is a process in which an impartial third party helps the victim(s) and offender(s) to communicate, either directly or indirectly. The mediator merely facilitates the discussion which encourages the survivor to narrate the story in her own words and the offender to learn about the crime's impact and to take responsibility for harm caused by the offence. The process allows the victim and offender the opportunity to develop a reparative plan that addresses the harm.

The group conferences mentioned above are also referred to as Victim Offender Conferences ('VOC') which bring together the victim, offender, family, friends and key supporters of both in deciding how to address the aftermath of the crime.<sup>104</sup> Key supporters can include trained professionals such as addiction counsellors.<sup>105</sup> Given the frequent co-occurrence of IPV and substance abuse, this type of intervention is useful in connecting survivors and people responsible for harm with prospects for appropriate support.

As many scholars have noted, it is important to customise RJ processes that address gendered violence. Generic RJ models are often inappropriate or insufficient to address IPV and sexual violence.<sup>106</sup> Skilled facilitators, well versed in the dynamics of IPV are essential to support this process.

### 3.1.2 Overview of Case Studies

In a 2003 study 'Giving Women Voice', Dissel and Ngubeni reviewed the results of a VOC intervention that was conducted in Gauteng.<sup>107</sup> The study focused on the specific impact

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<sup>104</sup> As above, 8 - 9.

<sup>105</sup> D Coker above n 29, 606.

<sup>106</sup> As above, 600. K Daly and J Stubbs, above n 35, 513.

<sup>107</sup> A Dissel and K Ngubeni, 'Giving women their voice: Domestic violence and restorative justice in South Africa' (2003) <<https://www.csvr.org.za/docs/gender/givingwomenvoice.pdf>> (accessed 5 March 2022) 9.

on women survivors in relation to issues of safety, their needs, and the extent to which RJ assists in preventing further violence.

Hargovan's 2008 study 'Doing Justice Differently' was based on the evaluation of a restorative justice intervention for IPV cases in KwaZulu-Natal. The study contains the largest sample group and revealed important survivor insights on underlying causes.<sup>108</sup>

The 2021 'Restorative or Risky' study was conducted in Tshwane by the Restorative Justice Centre which received a mandate from the National Development Agency in partnership with the Department of Social Development and the Interim Steering Committee on GBV and Femicide. They implemented VOMs for incidents of IPV where a party had applied for a protection order, at both a pre-charge and pre-trial stage.<sup>109</sup> Although the sample size is small, it is one of the few studies that includes insights from harmers.

## 3.2 Defining Features of RJ in the context of IPV

### 3.2.1 Unpacking Restoration

Generally the goal of restorative justice is restoration ie. to mend or make things right. As Tshehla explains restoration can mean a number of things and take different forms.<sup>110</sup>

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116 IPV cases were referred from the Magistrates Court. Dissel and Ngubeni reflected on the results 6 – 12 months after the process with 21 female survivors.

<sup>108</sup> H Hargovan, 'Doing justice differently: Is restorative justice appropriate for domestic violence?' (2010) (2) *Acta Criminologica: African Journal of Criminology & Victimology* 25 31-32.

<sup>109</sup> TJ Roy, 'Restorative or Risky? Victims & Offenders of Gender - Based Violence voice their experiences of Victim Offender Mediations by the Restorative Justice Centre' (2021) <<https://www.rjc.co.za/wp-content/uploads/2022/04/RESTORATIVE-OR-RISKY-victims-and-offenders-of-GBV-voice-their-experiences-of-VOM-by-the-RJC.pdf>> (accessed 19 June 2022). The report evaluated the effectiveness of VOMs for 5 couples out of 7 VOMs conducted in total.

<sup>110</sup> B Tshehla, 'The restorative justice bug bites the South African criminal justice system' (2004) 17(1) *South African Journal of Criminal Justice* 1 6.

Although the DOJ definition refers to ‘promoting reconciliation’ this consideration should be balanced against the survivor’s need for safety. What restoration means in the context of an abusive relationship is not simple and it does not necessarily entail preserving the existing relationship or returning to some prior state of wellness. Some restorative processes support partners to separate and implement appropriate co-parenting agreements.<sup>111</sup> In the ‘Giving Women Voice’ study five couples found support to separate and negotiate the terms thereof.<sup>112</sup> Restorative justice can also address violence between partners who want to remain in relationship, if this is desired.<sup>113</sup>

Restoration involves attention to the current conditions of the relationship and amending them towards a more just relationship in which parties have equal dignity, concern and respect.<sup>114</sup> This is achieved through a process of dialogue in which survivors identify the ways in which they have been harmed and what they need to repair that harm. This notion of repair is a broad one which necessarily and by definition includes the accountability of the offender.<sup>115</sup> The offender’s obligation is both to acknowledge responsibility for the harms caused to the victim and to the community, and to right the wrong by meeting the requirements for amends and accountability as determined in the restorative justice process.<sup>116</sup> The offender’s willingness to assume responsibility is particularly important in the context of IPV where minimisation or denial can retraumatise the survivor. Randall highlights how the offender’s acceptance of responsibility can spare the victim the arduous credibility testing which consumes a significant portion of criminal proceedings for gendered violence.<sup>117</sup>

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<sup>111</sup> E Sasson and C Allen, above n 34,7.

<sup>112</sup> A Dissel and K Ngubeni, above n 107, 10.

<sup>113</sup> K Daly and J Stubbs, above n 39,512.

<sup>114</sup> D Coker, above n 29, 618 read with J Llewellyn and RL Howse, ‘Restorative justice: A conceptual framework’ (1999) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2114291](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2114291)> (accessed 2 July 2022) 15.

<sup>115</sup> M Randall, above n 45, 472.

<sup>116</sup> As above, 476.

<sup>117</sup> As above, 469.

### 3.2.2 Empowered Participation

The DOJ definition refers to the involvement of all affected stakeholders in the resolution of a dispute. A core tenet of RJ is that those affected by a harm need to be active participants in addressing the harm and determining what justice requires.<sup>118</sup> Pranis asserts that RJ involves trusting those closest to the problem to develop a solution.<sup>119</sup> Participation is one of the central benefits that is attributed to RJ in contrast to criminal justice processes where survivors become bystanders in the adjudication of their own matters. The RJ process enables survivors to shift from object to subject in relation to their own proceedings. Instead of being ‘victim witnesses’ to crimes not against them but against the state, the victim-centred process of RJ supports victims to become drivers of a process designed to repair the harm that they have suffered.<sup>120</sup> This involvement can fulfil survivor’s need for reprieve, which Minaker identifies, is met for some by involvement in the proceedings which addresses the harm they have suffered.

### 3.2.3 Voice

As discussed above, survivor voices are muted in the criminal justice system in several ways: when police officers minimise abuse, when they refuse to arrest abusers, when same – sex relationships are invalidated or when there is a lack of correlation between abuse complained of and the relief granted.<sup>121</sup>

Many scholars have acknowledged that restorative processes can amplify survivor voices.<sup>122</sup> Restorative dialogues provide space for the voice of the survivor to be heard and to be taken seriously. Although the DOJ definition refers to the collective

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<sup>118</sup>H Zehr and A Gohar, above n 41, 22.

<sup>119</sup> K Pranis above n 43,30.

<sup>120</sup> M Randall, above n 45,478.

<sup>121</sup> See the discussion in the introductory chapter.

<sup>122</sup> See for example K Daly and J Stubbs, above n 35, 512 and the list of scholars listed there.

identification of harms, in the context of IPV, it is the harm identified by the survivor that shapes the restorative process. A survivor is invited to define all the ways they have been harmed (emotional, physical, spiritual, financial) and what they need to repair the harm.<sup>123</sup> The more space a survivor has to tell their own story, the greater the likelihood of justice that is responsive to the specific details of the survivor's situation.<sup>124</sup> This supports the survivor's need for understanding which entails being recognised and being heard.

The survivors in 'Giving Women Voice' demonstrated how they were able to find their voice and communicate more openly about their experiences, and demand that their partners behave differently.<sup>125</sup> Some of the survivors found that their partners had never listened and had not understood the full impact of their actions.<sup>126</sup> These findings were echoed in Hargovan's study 'Doing Justice Differently.' Focus group members expressed their gratitude for the secure environment in which they could share their experiences. It was very meaningful for some survivors to be able to tell their story to the person who hurt them, ask questions, and express their feelings. This was especially true when the survivor heard the harmer accept responsibility for his actions.<sup>127</sup>

Most of the survivors in 'Restorative or Risky' benefited from expressing the harm they had experienced. Participants felt empowered to confront what their partner had done and make future decisions.<sup>128</sup> Given their relationship dynamics survivors do not usually have opportunities to express themselves. Hargovan notes that the empowerment of stakeholders is a fundamental difference between traditional criminal justice and restorative approaches.<sup>129</sup>

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<sup>123</sup> D Coker, above n 29, 617.

<sup>124</sup> B Hudson, above n 13, 624 -631.

<sup>125</sup> A Dissel and K Ngubeni, above n 107, 11.

<sup>126</sup> As above, 8.

<sup>127</sup> H Hargovan, above n 108, 35.

<sup>128</sup> T J Roy, above n 109, 17.

<sup>129</sup> H Hargovan, above n 70, 54.

The process of communicating their experiences, their justice goals and being an active participant in shaping how they will be met creates a sense of agency for survivors. The exercise of agency challenges the notion of IPV survivors as helpless victims.<sup>130</sup> This recognition of survivor agency is a significant departure from early liberal, essentialist approaches which assumed that the state was best placed to make decisions for all survivors.

### 3.2.4 Accountability instead of punishment

The DOJ definition includes obligations on the harmer to accept responsibility, make restitution and ensure that there is no reoccurrence of the harm. This forms the basis of accountability. Restorative justice processes are more concerned with accountability through reparations and rehabilitation rather than punishment and incarceration.<sup>131</sup>

Accepting responsibility for the central facts of the dispute, including the harm of the survivor is usually a precondition for the start of a restorative process.<sup>132</sup> When harmers accept responsibility for harm, it fulfils survivors' needs for rebuilding and acknowledgement of wrongdoing identified by C Quince Hopkins *et al.*<sup>133</sup>

Accountability in a restorative process also entails engaging the harmer on how to prevent recurrence of the harm. The reparative plan at the end of a restorative process includes commitments from the harmer about changes in future behaviour. Meaningful accountability involves behavioural change.<sup>134</sup> This is particularly important for survivors

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<sup>130</sup> L Goodmark, above n 31, 376.

<sup>131</sup> A Spies, above n 38, 274.

<sup>132</sup> D Coker, above n 29, 606. This does not necessarily entail formal admission of legal elements.

<sup>133</sup> As Minaker identified, for some survivors rebuilding entails their partner taking responsibility for their actions to provide them with a sense of closure.

<sup>134</sup> M Mingus, 'The Four Parts of Accountability & How To Give A Genuine Apology' (December 18, 2019) <<https://leavingevidence.wordpress.com/2019/12/18/how-to-give-a-good-apology-part-1-the-four-parts-of-accountability/>> (accessed 3 October 2023).

and is the most direct way of ensuring their future safety. Dissel and Ngubeni state that the real test of the efficacy of RJ is in behavioural change. They also note the complexity in assessing this given that many factors influence behaviour. Despite this complexity, Dissel and Ngubeni found that couples who had reported physical assault had not experienced any further physical abuse a year after the restorative conference.<sup>135</sup>

The ‘Restorative or Risky’ study is notable in that it included offenders in the follow up analysis. Of the five couples involved in the study, three reported a change in the offenders’ behaviour. Two couples agreed on a positive change in behaviour, particularly in relation to improved communication. One couple was ambivalent about the changes in that the offender was no longer physically but emotionally abusive. This same offender noted a change in seeking the support of elders in times of conflict, as had been agreed at the restorative mediation.<sup>136</sup> In all the relationships, it was noted that there was a need for ongoing case specific interventions. In addition, it was recommended that both victims and offenders require counselling – either to come to terms with the trauma of abuse or to deal with learnt behaviour that results in abuse.<sup>137</sup> What emerges is that while the once – off VOM had some impact in improving an aspect of the relationships, ongoing support is required beyond the restorative conference.<sup>138</sup>

### 3.2.5 Preventing the Recurrence of Violence

#### *Addressing Underlying Causes*

The criminal justice system tends to isolate the violence that occurs between intimates from broader structural factors and underlying causes that enable it.<sup>139</sup> This means that

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<sup>135</sup> A Dissel and K Ngubeni, above n 107, 10.

<sup>136</sup> TJ Roy, above n 109, 17.

<sup>137</sup> As above, 16. Two victims who had agreed to seek counselling had not done so at the time of the follow up. The report noted the importance of the facilitator supporting participants to connect with relevant services.

<sup>138</sup> Similar findings were echoed in ‘Giving Women Voice.’

<sup>139</sup> A Polavarapu, above n 83, 135.

the remedies hold little promise for providing contextual relief or interrupting cycles of violence. If the root causes of IPV are not addressed, cycles of violence persist. RJ's commitment to addressing underlying causes is part of the restorative vision of ensuring that violence does not reoccur.

In 'Doing Justice Differently' survivors provide some insights into the underlying causes and solutions that they identify to address IPV. 205 research participants were asked what they considered to be the best way to deal with domestic violence. In addition to restorative justice interventions more than 75% of survivors identified life skills for victims and perpetrators and 69% identified substance abuse programmes for themselves and perpetrators. Less than 1% (11 participants) identified imprisonment as a suitable remedy. The survivors attributed IPV to the disillusionment and frustration that accompany economic hardship. They highlighted the need for RJ processes to address substance abuse and unemployment.<sup>140</sup> I will address RJ's ability to address systemic issues in the following chapter.

### *Rehabilitation*

The DOJ definition refers to addressing offender behaviour to ensure harm doesn't occur again. Addressing the causes of harm sometimes involves recognising that harmers are also victims of harm and significant trauma which they enact in later life.<sup>141</sup> Most IPV perpetrators are victims of childhood violence.<sup>142</sup> If it is necessary for the offender to deal with this, as part of a commitment to changing their behaviour, they can be connected to

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<sup>140</sup> H Hargovan, above n 108, 31-32.

<sup>141</sup> H Zehr and A Gohar above n 41, 28.

<sup>142</sup> N Abrahams and R Jewkes, 'Effects of South African Men's Having Witnessed Abuse of Their Mothers During Childhood on Their Levels of Violence in Adulthood' (2005) 95(10) *American Journal of Public Health* 1811-1814. Abrahams *et al* conducted a study to assess the impact of males witnessing maternal IPV. 'Our results indicate that witnessing the abuse of one's mother as a child is associated with engaging in several types of violent behavior in adulthood, such as using violence against an intimate partner, engaging in violence at work and in the community, being arrested as a result of both violent actions and antisocial behavior, and being arrested for possession of an illegal firearm.'

services. RJ can support harmers to change behaviour through its processes which encourage harmers to understand the impact of their actions and develop empathy, which is an important precondition for changed behaviour. Goodmark notes that shame – based carceral systems are unlikely to induce changed behaviour.<sup>143</sup>

Currently, the Department of Correctional Services has no budget for the rehabilitation of GBV and sexual violence offenders.<sup>144</sup> Even if more harmers were imprisoned for IPV, there are limited prospects of rehabilitation in South Africa’s ‘criminogenic’ prisons, where offenders are likely to experience more violence and a culture of toxic masculinity.<sup>145</sup> Recidivism rates in South Africa are among the highest in the world, exposing survivors to further risk when an offender returns home.<sup>146</sup> Rehabilitation is a critical component of prevention. Many survivors are more vested in the rehabilitation rather than the punishment of their abusers.<sup>147</sup> Rehabilitation fulfils survivor’s need for remedial services identified by Minaker.

Restorative justice is consistent with developments in the GBV sphere which have begun to include harmers in the conversations about prevention. Traditionally the IPV movement focused on women and largely excluded men from interventions.<sup>148</sup> Unlike previous IPV responses which essentialised the violence of men as inevitable, restorative approaches trust that men can change.<sup>149</sup> A key aspect of a restorative practice is the

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<sup>143</sup> L Goodmark above n 31, 380.

<sup>144</sup> CEDAW Report, above n 8, para 57.

<sup>145</sup>K Ledwaba ‘Prison Reform could help reduce gender-based violence in SA’ 9 December 2019 <<https://www.sowetanlive.co.za/news/south-africa/2019-12-09-prison-reform-could-help-reduce-gender-based-violence-in-sa/>> (accessed 10 June 2022).

<sup>146</sup> E Cameron, above n 59, 49.

<sup>147</sup> H Hargovan above n 95, 121.

<sup>148</sup> The focus on perpetrators is recent. It is only since the 1990s that the role of men has been foregrounded as part of the response to GBV. This focus remains contested as there is concern that it would divert funding away from resources that are needed for women. R Jewkes, M Flood *et al*, above n 9, 1580-1581.

<sup>149</sup> M Randall above n 45, 466.

goal to foster accountability in a way that doesn't pathologise or essentialise harmers. This is critical, challenging and will enable social repair.

### 3.3 RJ is a Feminist Practice

Despite being at odds with carceral feminism, Goodmark emphasises that RJ is consistent with foundational feminist conceptions of justice. It is also consistent with an intersectional approach which, she states has become a guiding principle of feminism. RJ creates space for women's voices, thereby fostering their autonomy and empowerment. RJ avoids gender essentialization by challenging the notion that there is a particular way for women to respond to harm. In recognizing the relational elements of crime, it is consistent with feminist community building. She also argues that it contributes to the broader feminist struggle to dismantle patriarchy: firstly by engaging men to challenge conceptions of masculinity and norms that uphold patriarchal violence; secondly in rejecting carceral responses it undermines the legitimacy of the criminal justice system which is a patriarchal site for justice. Goodmark's analysis cements RJ as a feminist practice which contributes to the broader struggle to end violence against women.<sup>150</sup>

### 3.4 Challenges to RJ

#### 3.4.1 Safety

The most common concern about the suitability of RJ is the safety of survivors during and after a restorative process. Safety concerns are also paramount for most survivors. The discussion below will outline how survivors think about safety in different ways. It is not a concept that can be essentialised. C Quince Hopkins *et al* assert that the question of safety is an empirical one.<sup>151</sup> In 'Giving Women Voice' there wasn't a uniform sense of

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<sup>150</sup> L Goodmark, above n 31.

<sup>151</sup> C Quince Hopkins, MP Koss *et al*, above n 40,301.

what created safety. Some survivors felt safe because they had a protection order, others felt safe because they felt they could fight back and others felt safe from the process of the mediation.<sup>152</sup> In ‘Giving Women Voice’ the authors emphasized the importance of (a) preparatory session(s) before the VOM to establish whether the participation of the survivor is voluntary, address safety concerns and remind the participants that they still had recourse to the police or could continue with the criminal process if they required further protection.<sup>153</sup> Survivors in Minaker’s study also defined safety differently - for some safety was associated with participation in the process and others separation from the abuser. The EU report on best practice emphasised the importance of addressing safety concerns contextually.<sup>154</sup> Hargovan highlights the importance of risk assessment to determine the suitability of participants for restorative processes. She suggests that protocols and safeguards based on victim safety, victim choice and system accountability could support the development of appropriate RJ models in the context of IPV.<sup>155</sup> Although caution is required, concerns about safety need not be an obstacle to pursuing restorative approaches to IPV.

### 3.4.2 Power Dynamics

Stubbs is cautious of overstating the benefits of RJ in the context of an abusive relationship. She cautions that while there is potential for survivor voices to be heard, the context of abuse constrains this possibility.<sup>156</sup> A survivor could limit her views to what she thinks she can get rather than what she wants.<sup>157</sup> Skilled facilitators who understand the underlying dynamics of abuse are crucial to mitigate the risk of survivors being intimidated and overpowered during a restorative process.

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<sup>152</sup> A Dissel and K Ngubeni, above n 107, 7.

<sup>153</sup> As above, 10.

<sup>154</sup> L Drost, B Haller *et al*, above n 34.

<sup>155</sup> H Hargovan, above n 70,55. (exploratory thoughts)

<sup>156</sup> J Stubbs, above n 34, 173.

<sup>157</sup> A Dissel and K Ngubeni, above n 107,7.

Stubbs warns that the agency of a survivor is limited by the threat of violence and presence of children which can be manipulated by abusers.<sup>158</sup> As Minaker outlined above, the needs of her children are as central to a survivor as her own. Survivors are often worn down by a range of interconnected and separate legal proceedings related to custody, maintenance and abuse.<sup>159</sup> As far as possible, reparative plans and agreements need to take into account the full context of a survivor's reality without treating her as an atomised unit.

### 3.4.3 Reprivatisation

Some scholars question whether RJ erodes the gains achieved by feminists in publicising violence. They are concerned that if RJ processes are delinked from the State, then the public crime of IPV will be relegated to a private dispute.<sup>160</sup> In South Africa RJ processes operate on a parallel and interlinked track with the criminal justice system.<sup>161</sup> This has been seen to support survivors' negotiation of power. Some women participating in the RJ process felt a sense of safety from having a protection order.<sup>162</sup> The possibility of criminal proceedings does contribute to the compliance of harmers.<sup>163</sup> Despite, the shortcomings of the criminal justice system, it is important not to lose sight of its coercive power. A dichotomous approach is not always helpful.<sup>164</sup>

Restorative approaches require courage and creativity. Although there are risks, these can be mitigated through careful consideration of existing research and skilled

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<sup>158</sup> J Stubbs 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang and John Braithwaite (eds) *Restorative justice and Family Violence* (2002) 42-45.

<sup>159</sup> D Smythe and L Artz, above n 15, 210-211.

<sup>160</sup> J Stubbs, above n 158, 52.

<sup>161</sup> H Hargovan, above n 70, 52.

<sup>162</sup> A Dissel and K Ngubeni, above n 107, 6.

<sup>163</sup> As above, 10.

<sup>164</sup> J Stubbs above n 158, 47-48.

facilitators well versed in the dynamics of abuse, community development and restorative practice.

Having unpacked the ways in which RJ can better serve survivor needs, it is important to consider how RJ can also enable repair on a societal level.

## **4 Social Repair**

### **4.1 Solidarity instead of Stigma**

Community involvement is necessary to change societal patterns. When community members participate in restorative conferences, they can support the person harmed, showing solidarity and expressing collective disapproval of behaviour that is rejected by the collective. This can lessen the shame, stigma and isolation that survivors often experience. It can also be healing for the survivor to receive public acknowledgement for the harms they have endured, particularly where their experiences have been denied.<sup>165</sup> This can go some way to fulfilling the survivor's need for understanding and acknowledgement. A lack of validation can exacerbate trauma and complicate the healing journey. Community disapproval and social support function as regulatory mechanisms in restorative processes. Offenders can be held accountable to change their conduct and supported to do so.<sup>166</sup>

### **4.2 Widening the Net of Support**

RJ's ability to widen the net of support around harmers and survivors is one of its main advantages.<sup>167</sup> Coker contends that facilitators can do this by identifying, and if

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<sup>165</sup> L Wexler, JK Robbenolt *et al*, '#MeToo, Time's up, and Theories of Justice' (2019) 2019 *University of Illinois Law Review* 45 71.

<sup>166</sup> L Presser and E Gaarder, above n 78, 184.

<sup>167</sup> As above.

necessary, building micro communities of support. A restorative intervention becomes a gateway for services, therapy and support by enlisting the material, social, emotional, and spiritual resources available within a community. This can address the survivor's need for Means as identified by Minaker. Coker reminds us that attending to the material aspects of IPV is critical given that IPV is one of the leading causes of poverty and homelessness for women.<sup>168</sup> Access to material resources has a significant bearing on a survivor's ability to navigate an abusive relationship.

Some critics are concerned that the impact of a restorative intervention will be limited by the availability of community resources. Stubbs, for example, points to the risk of placing more burdens on strained communities.<sup>169</sup> She identifies Pennell's restorative model which explicitly uses group conferencing to mobilise resources, as exemplary in addressing this challenge. It is commonly identified as one of the most successful RJ models which resulted in significant reduction in child and adult violence.<sup>170</sup> Pennell's model relied on feminist praxis and research to developing an RJ response suited to the contextual reality of a specific community.

### **4.3 Opportunity to Address Norms**

Restorative justice opens the doorway to shifting norms on community accountability in relation to IPV. In South Africa, IPV is rarely a secret. It is often known about by neighbours, family and people in close proximity with the couple. Often, these informal networks view IPV as a private matter between couples that doesn't warrant their involvement. Some incidents of IPV happen in the presence of other people who do nothing to challenge the harmer or protect the harmed. Rasool's work highlights that the inaction of social networks privatises IPV and cuts the survivor off from possible

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<sup>168</sup> D Coker, above n 29, 618.

<sup>169</sup> J Stubbs, above n 158, 57.

<sup>170</sup> C Quince Hopkins, MP Koss *et al*, above n 40, 305 – 310.

assistance.<sup>171</sup> This societal inaction perpetuates IPV. Where communities are engaged and provide support, there could be a shift in norms that see violence as a private matter.

A restorative conference addressing IPV would need to contend with norms that enable abuse. Restorative processes are an opportunity to address and shape norms that condone abuse. Often shared gender norms exist within support networks which creates an opportunity for critical dialogue to challenge norms that condone abuse.<sup>172</sup> Restorative justice processes that include the community create spaces to shape the moral authority of the community. Pranis notes that this can be more powerful than laws in shaping behaviour.<sup>173</sup> Restorative processes can transform communities by exposing them to new ways of thinking about GBV. Tamale contends that Africans are yet to unpack how African conceptions of humanity such as *ubuntu* can influence gender discourse and norms.<sup>174</sup> As Goodmark notes, RJ is not value neutral. The process is intended to counter the injustice caused by the harm.<sup>175</sup> Shifting norms is an essential component of the greater feminist vision to dismantle patriarchy and other systems that normalise and justify oppression.

One of the challenges in engaging community is defining who a community is and addressing lack of social cohesion. The structural disadvantage of communities coexists with a lack of social cohesion caused, in part, by the historical context of violence.<sup>176</sup> Turner, informed by critical race feminist perspectives, highlights how RJ has been

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<sup>171</sup> S Rasool, 'Do we accept the unacceptable? The privatisation of women abuse by informal networks in South Africa' (2012) 18(2) *Journal of Gender and Religion in Africa* 143.

<sup>172</sup> I Mwatsiya and S Rasool, "'We Need to Understand the Whole Story": A Discursive Analysis of the Responses of Informal Support Networks to Help Seeking by Women Experiencing Abuse from Men in a Small South African Town' (2021) 38 (09/01) *Gender Issues* 1

<sup>173</sup> K Pranis, above n 43,27.

<sup>174</sup> S Tamale, above n 88,229 - 234.

<sup>175</sup> L Goodmark, above n 31, 381.

<sup>176</sup> MM Geyser 'An exploratory case study analysis of a restorative justice intervention project that mediated domestic violence cases in KwaZulu-Natal, South Africa' Master of Social Science thesis, University of Kwa - Zulu Natal, 2017 45.

criticised for failing to develop effective responses for the systemic conditions that enable racial and gendered violence.<sup>177</sup> Like hooks, she argues that restorative approaches need to involve a commitment to a holistic anti – violence agenda. Since violence is rooted in white supremacy, patriarchy and global capitalism, it is essential to transform social and political conditions at the roots of violence. Part of the strategy to do this entails political education which challenges the logics that give rise to personal and systemic violence and the accompanying norms. Political education involves building a critical consciousness about racism, patriarchy, heterosexism and ways in which these systemic oppressions intersect with interpersonal violence.<sup>178</sup>

Transformative justice and community accountability approaches are instructive in addressing the limitations of RJ identified by Turner. Transformative justice falls under the banner of restorative approaches. It expands the scope of RJ by aiming to transform the societal conditions that gives rise to harm.<sup>179</sup> It includes these concerns as a central part of the restorative enquiry. Kim, a practitioner of transformative justice points out that community intervention models are not predicated on the existence of healthy communities. The process of bringing people together, works towards building community health.<sup>180</sup> Community accountability involves building, mobilizing and investing in groups of people over time to shift power relations and create new ways of living and being.<sup>181</sup> These interventions require long term engagement beyond once-off encounters. A lack of social cohesion is not necessarily a barrier to restorative interventions.

An intersectional feminist view of IPV requires solutions that take into account structural advantage in remedies to address it. A commitment to transforming societal patterns and

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<sup>177</sup> J Turner, above n 89,269.

<sup>178</sup> As above, 288 – 289.

<sup>179</sup> A full discussion of transformative justice is beyond the scope of this paper.

<sup>180</sup> M Kim 'Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges' in James Pcatek (ed) *Restorative Justice and Violence against Women* (2010) 193 196.

<sup>181</sup> J Turner, above n 89, 290.

nurturing social repair does require a little more of us. RJ can benefit from the input of critical perspectives that extend repair to addressing structural, social antagonisms that enable IPV.

## **5 Conclusion**

This research set out to explore how restorative justice can meet the needs of IPV survivors who prefer a non – carceral response. I also sought to understand how restorative justice can enable social repair. This exploration proceeded from the premise that the criminal justice system has been ineffective in meeting survivor needs and dealing holistically with IPV. Minaker’s work was central in identifying the needs of survivors whose sense of justice was unfulfilled after interacting with the criminal justice system.

The study established that some of the needs of IPV survivors seeking alternatives to the criminal justice system can be met by restorative approaches. Firstly, the availability of RJ creates choice for survivors whose needs are not met by the criminal justice system. The agency to choose an alternative justice pathway is significant. Survivor agency is further enhanced by processes based on the active involvement of survivors in a process that determines a reparative outcome based on their needs. Furthermore RJ can meet the needs of understanding, means to cope, remedial services, rebuilding and safety through the development of harmer accountability.

RJ is needed as an alternative for survivors who might otherwise not report at all – either because they do not perceive the State as a potential ally – because of real risk of mistreatment or psychological barriers. For this class of survivors, alternatives are important and provide benefits to survivors that might otherwise be unattainable. Alternatives might support people to come forward. Hayden has argued that the

availability of restorative justice options can increase the rates of reporting.<sup>182</sup> A cycle of abuse could be interrupted if survivors had more options to choose from in responding to IPV.

RJ enables social repair by facilitating community accountability. The processes of community accountability can begin to shift norms about IPV by engaging family and community members in restorative dialogues. Through processes of community accountability problematic norms that enable IPV can be addressed to transform interpersonal relations. Shifting social norms and behaviour creates the possibility of increased safety and interrupting cycles of violence Transformation can also extend to underlying systemic causes when communities engage in long – term political education and consciousness raising. As grassroots activists identified above, IPV cannot be separated from the broader political picture and societal antagonisms that fuel inequality and violence. This context limits the suitability of carceral approaches for some IPV survivors.

In the battle against IPV one is working towards a society in which the rates and impact of IPV are significantly reduced. The goal is for people to be safe within their homes and not risk their lives when choosing an intimate partner. Given the interconnectedness of systems of power and violence, this entails reducing the structural violence of patriarchy, poverty, unemployment and homelessness as well as reducing rates of violence against children. Attending to these problems makes it clear that IPV is a social justice issue that cannot be isolated from broader social ills. The violence within communities can only be

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<sup>182</sup> A Hayden 'Perpetrators' and Victims' Views of Restorative Justice and Intimate Partner Violence' in Anne Hayden et al (eds) *A Restorative Approach to Family Violence : Changing Tack* (2014) 167.

addressed when violence against communities is also tackled.<sup>183</sup> The solution is social justice, not criminal justice.<sup>184</sup>

The criminal justice approach has been researched, legislated and critiqued. There is a need to broaden the research and social reform agenda to meet the complex realities of IPV survivors. RJ should inform policy considerations in strategies to counter IPV. We owe it to the countless survivors to develop responses that centre their needs and repair the brokenness plaguing our societies. Other ways are possible.

Restorative justice is a pathway towards survivor -centred justice and social repair.

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<sup>183</sup> LJ Brown, H Lowe *et al*, 'High-Risk Contexts for Violence Against Women: Using Latent Class Analysis to Understand Structural and Contextual Drivers of Intimate Partner Violence at the National Level' (2023) 38(1-2) *Journal of Interpersonal Violence* 1007 1028.

<sup>184</sup> Sonke Gender Justice 'So what are the Solutions' undated <https://genderjustice.org.za/card/pollsmoor-remand-case-explained/so-what-are-the-solutions> (accessed 2 March 2024).

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