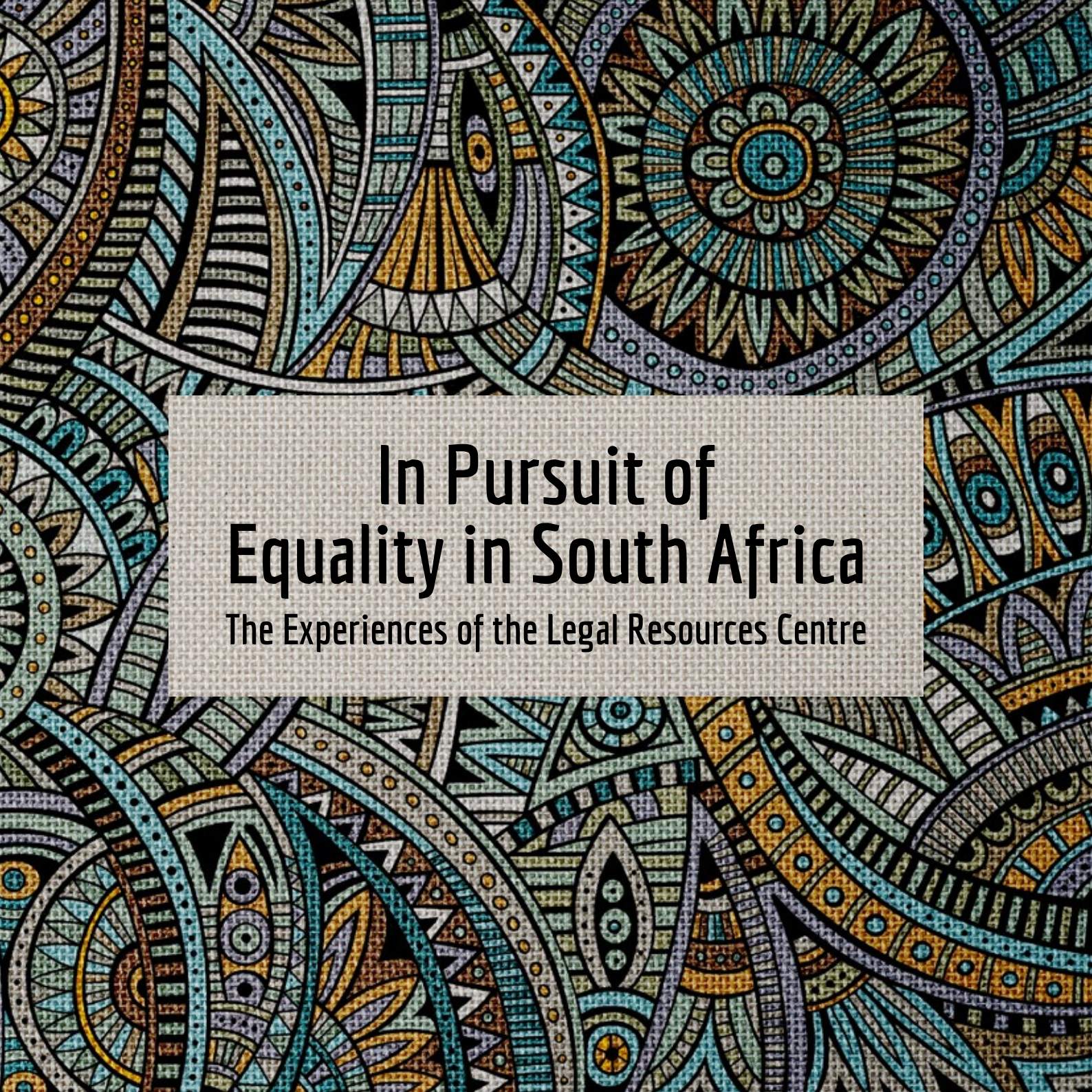

In Pursuit of Equality in South Africa

The Experiences of the Legal Resources Centre

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ACKNOWLEDGEMENTS

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INTRODUCTION

LRC's Equality and Non-discrimination Project

JANET LOVE, NATIONAL DIRECTOR

The Legal Resources Centre was established in 1979 with the primary aim of using the law as an instrument of justice for South Africa's marginalised and under-resourced populations. Within the troubling legacy of apartheid, the LRC continues to work towards three overarching objectives – equality, democracy and development – to foster enduring, sustainable progress through engaging in the gamut of social and economic justice issues. The organisation works as a public interest law firm delivering outcomes primarily via client-based litigation. However, particularly since the consolidation of the LRC's regional and global programmes, we have increased our research output and participated in formal advocacy initiatives.

Our offices are located in Johannesburg, Cape Town, Grahamstown, and Durban, but we operate satellite offices in order to provide wider access to justice in rural communities in Limpopo, Mpumalanga, KwaZulu-Natal, and the Eastern Cape. Members of LRC's staff – including attorneys, paralegals, support staff, and grant officers – have dedicated themselves to addressing pressing human rights issues in today's complex socio-economic and cultural context. Guided by fundamental rights enshrined in the Constitution, the organisation has committed to intersecting perspectives on existing challenges and, therefore, to a multidimensional approach to finding the answers. To this end, LRC's operations are subdivided into focus areas in pursuit of various related objectives.

The right to equality before the law is written into the South African Constitution as a founding principle and fundamental value. Taken broadly, as part of LRC's comprehensive outlook on the meaning of a safe and liberated community, this right encompasses an array of social and economic components. There remain significant and pressing gaps in the realisation of these goals throughout the country and LRC's Equality and Non-Discrimination (END) focus area has worked staunchly to remedy them since its inception. The END Project has worked to promote these values through creative and effective strategic combinations of litigation, advocacy, development, education, and networking. Thus far, the project has made diverse contributions to the development of jurisprudence on the issue.

This publication will provide insight into some of the work in which the END Project has been involved, and will reflect on the role of the LRC in upholding the fundamental constitutional rights to equality and non-discrimination. The project has made headway over its years in securing aspects of gender parity. Women's socio-economic rights are particularly critical to this goal; these incorporate but are not limited to the right to adequate healthcare, to suitable housing, and to live

without fear of unlawful eviction. LRC's work has also prioritised the rights of women in traditional communities and the issue of widespread violence against women – often interrelated and both central to the realisation of gender equality. The goals of ending child marriages, confronting domestic violence, and regulating harmful customary practices all fall under this objective. This publication will also cover some of the END Project's contributions to advancing children's rights, including the right for all children to quality education and adequate community resources and to ensure equal opportunities for success across lines of class and ethnic background. The equal rights of sexual and gender minorities, while enshrined in the Constitution, remain difficult to achieve in a cultural and social context that commonly sees harassment, discrimination and violence against LGBTI individuals go unchecked. Recent END Project work has centered on the rights of transgender and intersex persons, two groups that have long been neglected in the fight against discrimination based on sexual orientation and gender identity. This book will also summarize progress made with respect to the rights of refugees and asylum seekers – particularly those marginalised and made most vulnerable because of their gender, age, sexual identity and status, or disability. LRC has worked tirelessly to keep refugee offices open, stop unlawful detentions of migrants, secure social grants for asylum seekers and refugees with special needs, and to oblige the Department of Home Affairs to fulfil obligations to protect vulnerable migrants from volatile situations and threats to their security in their countries of origin. Throughout the book, lawyers, researchers and candidate attorneys who have participated in the END Project's work will identify key strategies in research, impact litigation, and advocacy used to empower and protect these groups.

The END Project continues to foster internal dialogue to assess and determine the ideal role for the LRC in our on-going fight for Constitutional rights. Our work is made possible because of the determination and commitment of our clients, and the solidarity and support we receive from partner organisations in and outside of South Africa. We are deeply thankful for their roles in the change we seek. While LRC has been pivotal in many human rights breakthroughs since its establishment, we recognise that the context in which we work requires continual initiative on our part and an on-going quest for new ideas. Human rights challenges abound throughout South Africa and a significant amount of work remains in the realm of equality and non-discrimination. We continue to be up to the challenge – to work towards realising the promises of equality, democracy and development and of supporting those who need it most. We hope you enjoy this window into our work.

CHAPTER 1

SHORTFALLS IN THE IMPLEMENTATION OF THE DOMESTIC VIOLENCE ACT

CHARLENE MAY AND MANDIVAVARIRA MUDARIKWA

I INTRODUCTION

South Africa has one of the highest statistics for violence against women in the world.[1] In an attempt to address this and to combat violence against women, the Government of South Africa has ratified the main international and regional women's rights instruments which directly or indirectly protect women from violence. In addition, the government has also enacted various laws, policies and guidelines towards its commitment to combat violence against women and to give effect to its treaty obligations. Governmental departments have also been established to ensure implementation of the legislative and policy framework.[2] Notwithstanding these positive developments, violence against women – in particular domestic violence – continues to be widespread.

In light of the foregoing, this article seeks to provide an analysis of the shortfalls in the implementation of the Domestic Violence Act (DVA) by the responsible government departments. The research will examine submissions made by civil society organisations (CSOs) and Independent Police Investigative Directorate (IPID)/Independent Complaints Directorate (ICD) reports.[3] The research also relied on the submissions made by CSOs to the Portfolio Committees on Justice and Constitutional Development, the Portfolio Committee on Police, and that of Women, Children and People with Disabilities.[4]

1 Masimanyane CEDAW Working Group NGO Shadow Report to CEDAW: *South Africa: Violence Against Women* (1998).

2 For a more detailed discussion on the obligations of the State in respect of domestic violence, we recommend reading a *Desktop Review of the Obligations of South Africa* in relation to domestic violence undertaken by the Legal Resources Centre.

3 In their report to the Portfolio Committee on Police on 7 August 2012 IPID/ICD.

4 Civil Society Organisations on whose information we rely are: The Women's Legal Centre, Tswaranang Legal Advocacy Centre, Gun Free South Africa, NICRO, Child Safe South Africa, Advice Desk for the Abused, RAPCAN, Alexandra Justice Centre, Centre for the Study of Violence and Reconciliation, Justice and Women, Lethabong Legal Advice Centre, Lifeline, Stop Gender Based Violence helpline, Lungelo Women's Organisation, Nisaa Institute for Women's Development, and Thohoyandou Victim Empowerment Programme.

II SHORTFALLS OF THE SOUTH AFRICAN POLICE SERVICE (SAPS) AND POLICE STATIONS

(a) *Lack of attendance to the victim*

(i) *At the station*

An audit and research conducted by IPID and the Legal Resources Centre (LRC) at various police stations indicated that most stations were not fully compliant with the DVA prescripts.

Some of the non-compliance issues identified include:

- lack of or no completing of forms;[5]
- the Domestic Violence Act and National Instruction were not readily available;
- a list of service providers were not available or updated;
- copies of protection orders and warrants of arrest were not filed properly;
- no file of domestic violence warrants kept;
- failure to take witness statements; or
- lack of trained staff available to meet the needs of victims of violence points to a lack of implementation of the Act.

(ii) *At the scene*

CSOs have reported that SAPS are often not able to attend to the scene of domestic violence, citing unavailability of police vehicles or lack of staff and knowledgeable officers in DVA. In these instances victims have to wait in a potentially harmful situation until a SAPS officer can be sent out or victims are informed to come into the station themselves.

LRC's monitoring exercise found that resources were not being fully utilised in some stations, as they had the personnel capacity, vehicle availability, educated and knowledgeable officers but these were placed in stations where domestic violence cases were reported in smaller numbers compared to other police stations monitored. Clients also reported that SAPS would attend to crime scenes, but that they would merely warn the offender. The officer would seek to calm the situation or remove the offender for a short period of time. This left the victim open to further abuse. She was not necessarily advised to apply for a protection order or to lay charges

5 The 508(a) forms are not filed properly and the 508(b) forms are not completed properly.

against the perpetrator. Clients also reported failures or delays in SAPS members serving notice of the application or interim orders on perpetrators, which left the victims open to further abuse from perpetrators.

(b) *Lack of real and legal assistance*

(i) *Failure to arrest*

CSOs and the ICD have reported the failure by SAPS to arrest perpetrators, despite a warrant of arrest ordering them to do so or in circumstances where an interim protection order has been contravened. There are also reports of the respondent being briefly detained and released without being charged or where the respondent is released without the victim being informed. This amounts to a failure to implement the DVA and is in breach of a court order issued in terms of the protection order.

It was recorded that SAPS are derelict in their duties to serve notices and Interim Protection Orders on respondents. This was illustrated in reports from applicants having to continuously follow up with the SAPS station to confirm when the notice of the application for a protection order or the Interim Protection Order will be served.

(ii) *Failure to remove dangerous weapons*

CSOs raised instances where weapons used in committing physical acts of abuse are not removed or confiscated from the perpetrator or the scene of abuse. In support of the above, the ICD reports have stated failures to establish whether the person has a valid licence to possess the firearm, failure to search and seize arms (firearms) and ammunition, and failure to seize a dangerous weapon and/or firearm.

(iii) *Failure to inform survivors of service providers*

CSOs highlight the importance of providing victims with access to shelters or places of safety, but record that SAPS do not refer victims to shelters nor do they keep records of available shelters and counselling services in the area where the victim (complainant) resides. This leaves the victim open to the continued cycle of abuse because they are either compelled to return home, live with relatives or on the street.

Through representation of clients, we have come across an informal and arbitrary system that has been implemented by the City of Cape Town that sees emergency housing being provided to victims of abuse.[6] However, this is not an official policy and the provision of places of safety for women and children who are victims of abuse are left largely to civil society and community-based organisations. Although this is commendable, these services only offer a temporary reprieve.

6 One of our clients indicated that she obtained emergency housing in the form of a TRA (?) after going to the local housing office to complain that she had nowhere to live and that her husband was beating her on a daily basis.

One of the concerns relates to the provision of psycho-social support for victims of domestic violence. Women are largely left to locate these services within their communities without any referral from SAPS or the Courts, which means that women continue to suffer the trauma of their abuse without receiving any form of counselling.

CSOs reported that the SAPS did not refer or accompany victims to seek medical attention and they do not explain that a J88 form needs to be completed to prosecute cases of assault with grievous bodily harm. This leads to victims not having any medical proof that they were victims of violence. As a result, perpetrators are charged with lesser offences when prosecution takes place.

(c) *Failure to record and register domestic violence incidents*

Registers documenting and recording domestic violence complaints are not being kept and SAPS, as a result, are unable to adequately provide statistics on domestic violence matters. A study[7] conducted in Mpumalanga and presented to the Portfolio Committee on Women, Children and People with Disabilities indicated that only 5 per cent of domestic violence incidents reported to the relevant police station were recorded in the required register.

It has been the experience of the LRC that the lack of proper record keeping has led to dockets in prosecutions of domestic violence matters being struck off the roll. Investigations and statements are not properly taken and this influences the successful prosecution of domestic violence matters. Prosecutors are left hamstrung when the content of the docket does not indicate the presence of a prima facie case.

(d) *Reasons for SAPS's failures to implement DVA*

Lack of training of SAPS members on the content, duties and obligations as outlined in the DVA has also been identified as a hindrance to the implementation of the Act.

The LRC's engagements and the reports from clients also point to the fact that SAPS members often do not have the necessary gender sensitivity and appreciation of gender-based violence, and even less of domestic violence. Complainants are, therefore, open to secondary victimisation by the very people who are meant to ensure their safety and security.

(e) *Recommendations*

The reports from CSOs all point to a systemic failure in respect of the SAPS's implementation of the DVA since its inception, with very few changes or improvements in over a decade. The focus of this article is in no way an attempt to compile a full

7 Tshwaranang Legal Advocacy Centre to End Violence Against Women and Others *Submission to the Portfolio Committee & Select Committee on Women, Youth, Children and People with Disabilities: Implementation of the Domestic Violence Act, No. 116 of 1998* available at http://www.tlac.org.za/wp-content/uploads/2012/01/Implementation-of-the-Domestic-Violence-Act.pdf

and extensive list of recommendations to remedy all of the problems that we have noted. We do, however, feel that it is worth noting some key recommendations that will speak to the overall implementation of the Act.

In order to identify comprehensive solutions to the identified problems, we encourage the SAPS to engage with civil society in order to formulate a strategic and practical plan towards the proper implementation of the Act.

Failure by members of the SAPS to comply with an obligation imposed in terms of the DVA or the National Instructions constitutes misconduct.[8] Once such misconduct has occurred, the IPID must be informed immediately. Unless instructed otherwise by the IPID, the SAPS management must institute disciplinary proceedings. The IPID must now, every six months, submit a report to Parliament regarding the number and particulars of matters reported to it, and set out the recommendations made in respect of such matters.

Although the ICD (predecessor of IPID) was able to submit comprehensive reports to Parliament, this role and function has now been taken over by the IPID,[9] and we need to monitor how this task is done by them in the future. The National Commissioner of the SAPS must, every six months, submit a report to Parliament regarding steps taken as a result of recommendations made by the ICD. Overall SAPS compliance with these requirements has been very problematic since the inception of the Act. Largely, the challenges are that some SAPS management did not take disciplinary action against members when they failed to comply with the DVA and some SAPS members did not apply for exemptions.

Generally it is believed that SAPS members do not understand how the DVA operates, which is exacerbated by the existence of a culture of silence around domestic violence and the appearance of SAPS impunity, as it takes a long time to discipline SAPS members. SAPS members' attitude regarding domestic violence is reflected in the behaviour of the society from which they stem. In general, there is a culture of silence that surrounds domestic violence and gender abuse. It is often viewed as a private matter to be dealt with by the family and not to be discussed in public. SAPS members are, therefore, only expressing and representing the cultural taboo surrounding gender discrimination. SAPS training should, therefore, focus on the capacity for change that lies in the reform of the law and in its application.

Gender and transformative training models should form part of basic training, and not be considered additional training that is offered to certain members of SAPS. The fact that training is potentially a long and costly process should not be a barrier; instead it should be considered an investment in enabling the creation of a society that embraces gender sensitivity and transformation. Training must be systematic and rigorous, and must integrate legislative and socio-psychological themes so as to ensure that members not only know the law, but also appreciate the context surrounding a complaint.

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8 Section 18 of the Domestic Violence Act and South African Police Service Act.

9 See section 2 of the Independent Police Investigative Directorate Act No. 1 of 2011 which outlines the object of this Act. Some of these objectives are to ensure independent oversight of the South African Police Service and to enhance accountability and transparency by the South African Police Service.

The SAPS must start monitoring and evaluating the implementation of the Act in a proactive manner. It is clear that no monitoring or accountability mechanisms are in place at station level, which means that the National Instructions are simply not followed. The efficacy of the system cannot be reliant on a complaints mechanism, as members of the public who are not aware of their rights will not be in a position to report non-compliance. An internal process must be undertaken to ensure that continued negative and critical reports are received by IPID on the lack of implementation of the Act.

For the DVA to be properly implemented, a concrete effort must be made by the SAPS in terms of resource allocation, financial allocation, as well as training. The implementation of the Act requires a mind shift from those in authority, who set the example for the members at station level, that domestic violence should be a priority crime and should be policed accordingly. Domestic violence will continue to be prevalent in our society if the department tasked with safety and security themselves violate the rights of victims.

III DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

The Department of Justice and Constitutional Development is the department tasked with the implementation of the DVA. The Department, therefore, has numerous obligations to ensure proper implementation, which ranges from the availability and creation of courts, provision of qualified clerks, as well as the relevant resources that would require that the government's obligations in combating gender-based violence are met. However, as indicated below, the current situation does not reflect the fulfilment of these obligations.

(a) *Lack of resources and incorrect advice*

One of the intentions with the enactment of the DVA was to make courts easily accessible to victims of domestic violence. The introduction of forms that victims could complete themselves, and the informal procedure that is outlined in the Act, was, therefore, specifically designed to avoid victims having to incur unnecessary costs in obtaining legal representation.

In order for the intentions to be realised, however, the court system available to complainants must be functioning at optimal level. The availability of qualified staff and proper court facilities has been identified as a concern. Very often victims need to report to court early in the mornings, as some courts have been identified as having certain operational times. This leaves many victims without protection and with the burdensome task of having to travel to the courts on another day to once again try and apply for a protection order.

Other concerning issues are clerks' lack of knowledge about the completion of the forms and the type of remedy sought by the victims. The LRC has also encountered instances where victims, who rely on perpetrators for financial support and maintenance of children, are not advised to request an order for emergency monetary relief as envisaged by the Act.

Another important point is that instances have been noted where weapons and firearms are present and used in and during abuse, but where victims are not advised that they can ask for the removal of these weapons or firearms from the home or from the perpetrator.

Through our engagement with the courts, we identified the critical need for clerks to be trained on other applicable legislation, such as laws on succession, recognition of customary marriage and family law. Incorrect information particularly relates to customary marriages where women are often told that their marriages are not valid or where there is a general assumption that the marriage is not valid and that the victim does not have any rights to property, emergency monetary relief or to ask for an ejectment order.

Of concern are refugees and asylum seekers living in the country. These women fall within a particular vulnerable category as they often come to the country with their spouses or come to join their spouses in South Africa. They are not familiar with the laws of the country, the laws in South Africa are very often more progressive than in the countries from which they fled, and they require more attention in terms of advice and education on the protection that is available to them in South Africa. The provision of foreign language interpreters at the application phase of the protection order therefore becomes critical, as we have received complaints from refugee and asylum seeker women that were not assisted by clerks at the court or by the SAPS when they wanted to apply for orders or when they reported the abuse.

(b) *Failure to grant urgent interim orders and ejectment orders*

A specific criticism that has been levelled at Magistrates is their failure to consider urgent matters, as allowed for in terms of Section 5 of the Act. CSOs working with victims of domestic violence have reported to Parliament that Magistrates are often reluctant to grant interim orders, even where prima facie cases are presented. This relates mostly to cases where victims report being psychologically and verbally abused. Even though the Act clearly identifies these acts as being abuse and forms of violence, Magistrates still make disparaging remarks towards victims that seek orders against this type of violence.

Magistrates will often make interim orders based solely on the application form and affidavit without ever engaging with the complainant to establish whether weapons are present in the home or being used in the commission of the abuse. Again, this is a varying practice, but the LRC's experience has been, in many cases, that applicants will not see a Magistrate at the application phase, but only consults with the Clerk and complete the forms. The Magistrate will then make a determination on whether the order should be granted on the basis of the submissions made in the form that the Clerk provides to the applicant. This system is problematic as the LRC has experienced that clerks are often not well versed in the law, and the victim applying even less so.

In the majority of cases, the LRC has found that Magistrates confuse ejectment orders with eviction proceedings. Although it is acknowledged that there are abusive applications that are brought precisely to circumvent eviction laws, Magistrates, in the LRC's opinion, do not always interrogate the request sufficiently and promptly. An example of this is an ejectment order that is usually delayed for the trial, as opposed to being granted as part of the interim order.

In some of these cases there was no physical violence present and an ejectment order was obtained on verbal and psychological abuse alone. Although the LRC were able to argue successfully that the threat of imminent harm does not require physical harm, but could very well relate to harm to health and mental wellbeing, it appeared that Magistrates would only accept this interpretation in cases between elderly parents and their adult children.

In cases concerning married couples or partners in a romantic relationship, the LRC struggled to obtain ejectment orders even when physical abuse was present. Magistrates in these cases would enquire about divorce proceedings and ownership of the property and even, in some cases, how the property was obtained. The private property rights of the respondent would more often than not take precedence over the right to safety and security of the complainant. The complainant was often advised to seek a divorce order to obtain her rights in the property, or advised to move in with relatives, as the relationship had clearly broken down.

IV COURT PROCESSES AND THE JUSTICE SYSTEM

Confusing court processes and victims' unsuccessful navigation of systems were two of the first issues that were picked up during the practical implementation of the LRC's project. At least one court had initiated a practice of only issuing Notices to Show Cause[10] even when a *prima facie* case was made out that warranted the issuing of an interim order. This form should only be issued in the event that the applicant has not been able to show that there is a *prima facie* case for domestic violence.

In at least one of the cases that the LRC offices dealt with, the issue was quite serious as the perpetrator had been recently released from prison after having been awaiting trial on charges of raping the complainant. She could not proceed with the criminal matter and charges were dropped as a result. Since the perpetrator's release, he had been sending the complainant SMS messages threatening her. The Clerk of the Court, however, advised her on two separate occasions that no abuse had taken place as he was merely making threats and had not 'actually done anything yet'. This response leads complainants to believe that some form of attack or physical violence is required before an interim order can be obtained against the perpetrator, which is not the case.

When enquiries were made, we were advised by the Clerk in question that the system was being implemented so as to not overburden the Magistrate with frivolous applications. Only people who really needed the order would return on the date, and then a trial would be conducted, avoiding the delay of an interim order and interim period. Although this system might have worked well in terms of court process and relieving possible backlogs, it goes against the direct intention and purpose of the Act. After raising the practice with the Department of Justice and Constitutional Development, the LRC is happy to report that it was stopped.

(a) *Failure to appreciate the seriousness of psychological and emotional abuse*

Our experience has been that, where abuse relates to psychological and verbal abuse[11] and harassment, Magistrates have failed to identify them as abuse and, as such, have not finalised or issued final protection orders.

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10 Form 5 Notice to Respondent to show cause (submit response) why a protection order should not be issued.

11 Section 1 of the Act defines 'domestic violence' as '… emotional, verbal and psychological abuse; … where such conduct harms, or may cause imminent

In one specific matter, a senior male Magistrate cautioned the applicant by saying that, although he was granting her a final order, she should not call the police just because the respondent has sent her text messages or called her, as it was clear to him that the respondent was merely having trouble adjusting to the end of the relationship. The Magistrate expressing his view in front of the perpetrator meant that the perpetrator could continue with the harassment as he heard the Magistrate telling her not to call the police when the perpetrator contravened a court order. The order was, therefore, relegated to the status of a useless piece of paper that could provide the victim no protection from the abuse.

The Artz research study found that, 'Magistrates presented numerous scenarios that revealed a strong scepticism – or perhaps cautiousness – about three (sexual violence, economic abuse and psychological/emotional abuse) forms of domestic violence.'[12] The Artz study also explored and found that court personnel were desensitised to cases of interpersonal violence, especially cases of non-physical interpersonal violence. The experience, and that of our clients, certainly confirms this assessment.[13] The LRC's experience in a number of cases before a senior Magistrate was that she simply dismissed cases of non-physical violence and verbal abuse as interpersonal problems or relationship problems.

The LRC believes that there is a strong link between non-physical violence escalating into physical violence. Magistrates, therefore, must take the necessary care to establish in each and every case whether there is a possible risk of harm to the complainant, whether physical or non-physical. Failure to do so leaves the complainant at risk, but also leaves the complainant with the feeling that she is being punished for not wanting to divorce her abusive husband or leave an abusive relationship.

(b) *Discrimination and secondary victimisation*

The LRC has also recorded that clerks, based on their own stereotypical views, deny victims the right to apply for protection orders, or advise against the application for domestic violence protection orders. Clerks especially have a negative view of victims who repeatedly apply for protection orders, but who do not finalise their applications.

The frustration that they express is indicative of service providers who do not understand the psychology of the victims of gender-based violence who they are meant to serve. They lack sensitivity when discussing domestic violence and have little to no regard for the emotional or psychological trauma that victims suffer as a result of gender-based violence. This leaves victims who approach the courts in a vulnerable position and open to secondary victimisation.

Applications are normally processed out in the open, without due regard and necessary privacy. Often, clients report not being comfortable or not having felt comfortable in detailing the abuse they have suffered as a result of the lack

harm to, the safety, health or wellbeing of the complainant'.

12 Artz, L. *Magistrates and the Domestic Violence Act: Issues of Interpretation.* Institute of Criminology, University of Cape Town: South Africa (2003) at 23.

13 Artz op cit note 38 at 23.

of privacy or sensitivity shown by the clerks of the court. This is especially relevant in cases where sexual abuse has been listed. There appears to be little to no regard given that women are required to detail what amounts to rape in the open, without the necessary support provided.

Clients also report having felt interrogated by clerks on personal issues that are not relevant to the abuse that they are suffering. Disparaging comments have been reported by clients who are often asked, 'why, if their husband has been abusive, do they still want to be married to them'; 'are they coming to apply for an order because their husband/boyfriend is sleeping with another women'; 'they should just get divorced' or 'why have they not left their homes to live with family members rather than remain in abusive relationships'. This type of questioning often makes the victim feel guilty about the abuse and has the potential of discouraging victims from coming forward as complainants, as they believe that they are to blame for the abuse that they suffer.

Issues of secondary trauma have also been reported and attributed to prosecutors who lack an understanding of the emotional trauma that victims experience. There is an overall lack of psycho-social support for victims of domestic violence. Where some CSOs, such as MOSAIC Centre, provide court support services, their services are too few and leave many victims without support during the process of applying for a protection order, but also during the prosecution of perpetrators when criminal charges for contravention are brought. In many instances, victims opt for withdrawing criminal charges or simply do not return to court to have protection orders finalised.[14]

(c) *Recommendations*

Even though Magistrates and clerks do not report to or fall under the authority of the Department of Justice and Constitutional Development, the Department is still responsible for ensuring that the Act is properly implemented. The Lower Court Management Committee,[15] along with the Department of Justice and Constitutional Development, developed and released a *Guide to the Domestic Act* to assist Magistrates in the implementation of the Act. We are, however, unsure of how many Magistrates have received training on the Act itself, enabling them to address the issues in a gender - and victim sensitive manner. This training is the key to the proper implementation of the Act.

Clerks of the Court have a critical role in the proper implementation of the Act. They require gender sensitivity training that is focused on gender-based violence, which would enable them to approach and engage with victims in a manner that understands and appreciates the abuse that the complainant has suffered.

In addition, the clerks require training on basic laws that would enable them to advise and assist complainants who approach the courts for assistance. The DVA must form part of the training programme and clerks need to be continuously

14 Lillian Artz and Diane Jefthas *Reluctance, Retaliation and Repudiation: The Attrition of Domestic Violence Cases in Eight Magisterial Districts (2011)*

15 A forum comprising all Regional Court Presidents and Chief Magistrates in South Africa.

reminded of their role as service providers. They need to be provided with an enabling court environment where resources are allocated properly, from computer and printing resources, to paper, in order to ensure that they can meet their obligations. This requires that the Department of Justice and Constitutional Development adopts a holistic budgeting process that ensures the proper implementation of the Act.

V CONCLUSION

In order to ensure that the justice system functions optimally to protect women from domestic violence, government departments charged with the obligations of enforcing and protecting the rights of women will need to acknowledge the systemic failures. They will need to implement strategies that will adequately address budget allocations to ensure proper implementation that can be monitored and evaluated in an effective manner.

We have attempted to make recommendations to address some of the identified shortcomings, but the purpose of this article was focused on identifying the shortcomings. As the LRC, we believe that this should be the starting point for deciding on strategies towards sustainable solutions. At the end of the day, it is government's duty to ensure that women's rights to equality, dignity and to a life free from violence and abuse is respected, promoted, protected and fulfilled.

CHAPTER 2

KHAYELITSHA COMMISSION OF INQUIRY: POLICE LOSING THE WAR ON RAPE IN KHAYELITSHA

MANDIVAVARIRA MUDARIKWA

In *S v Chapman*[1] the Supreme Court of Appeal stated that:

> '[t]he rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'[2]

In South Africa, one of the major disruptions to women's abilities to enjoy constitutional rights is the high prevalence of gender-based crime, especially in low-income areas and informal settlements. Statistics on rape in South Africa released by the South African Police Service (SAPS) illustrates that 44,751 rapes were reported between April 1994 and March 1995. About ten years later this number had increased to 64,514 rapes in 2010/11, and 62,649 in 2013/14.[3] It is, therefore, not surprising that the United Nations Office on Crimes and Drugs statistics show that South Africa has had the highest rape rate since 2004.[4]

The experiences of women living in Khayelitsha, a township on the outskirts on Cape Town, of violence, especially rape, are gloomy and highlight the continued struggles with rape in the area and in South Africa generally. As the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha (the Commission) stated in their report:

> 'Khayelitsha has very high rates of contact crime, which mean that people feel unsafe much of the time. Feeling unsafe, coupled with the debilitating effects of deep poverty, make Khayelitsha an especially hard

1 *S v Chapman* 1997 (3) SA 341 (SCA) 344.

2 bid para 4.

3 'Crime situation in South Africa' available at *http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2014/crime_stats.php,* accessed on 12 October 2015.

4 'South Africa Crime Stats', NationMaster. Retrieved from *http://www.nationmaster.com/country-info/profiles/South-Africa/Crime,* accessed on 12 October 2015.

> environment for all who live and work there. Nevertheless, it is important to understand that Khayelitsha is made up of a patchwork of neighbourhoods, with different conditions and varying levels of its socio-economic disadvantage. Perhaps most importantly the history of Khayelitsha in the early years was one of conflict and violence, in which the South African Police, the predecessor of SAPS was implicated in a manner that did not forge a relationship of trust between the police and the residents of Khayelitsha. This history casts a long shadow over the present.'[5]

Within this context and other policing inefficiencies in Khayelitsha, five civil society organisations (CSOs) – Social Justice Coalition (SJC), Equal Education, Treatment Action Campaign (TAC), Ndifuna Ukhwazi and Triangle Project (the complainant organisations) – lodged a complaint with the Premier of the Western Cape in 2012. In their complaint, the complainant organisations alleged that there were policing inefficiencies and a communication breakdown in relations between the SAPS and the community of Khayelitsha. Subsequently, the Premier established the Khayelitsha Commission of Inquiry (the Commission) to investigate the complaint in terms of section 206(5)(a) of the Constitution. Retired judge, Kate O'Regan, and Vusi Pikoli headed this Commission. The Legal Resources Centre (LRC) represented the five complainant organisations at the proceedings of the Commission.

The complainant organisations alleged that members of the Khayelitsha community routinely experience violations of their constitutional rights when they require the services of the SAPS. They further alleged that the SAPS in Khayelitsha are overburdened and under-resourced; investigating officers and prosecutors appear not to cooperate effectively; investigating officers often do not communicate with victims of crime regarding the progress of investigations or prosecutions, including informing them about court dates and bail hearings; and investigations and securing of crime scenes, gathering of forensic evidence, interviewing of witnesses and other basic procedures are often not complied with or are performed incompetently. Additionally, the SAPS had failed to adequately address the issue of vigilante killings, as well as develop a policy that provides guidance as to how police could visibly patrol informal areas in Khayelitsha.[6]

Specific to gender-based violence, the organisations reported that girls and women were frequently beaten and raped while walking to and from communal toilets, or when fetching water from communal taps close to their homes, and that domestic abuse posed a threat to the safety of many women within their own homes.[7] A victimof this violence was

5 'Towards A Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha', page 46, available at *http://www.khayelitshacommission.org.za/images/towards_khaye_docs/Khayelitsha_Commission_Report_WEB_FULL_TEXT_C.pdf,* accessed on 12 October 2015.

6 Ibid Chapter 1 of the report.

7 Ibid pages 98, 227.

Nandipha Makeke, who was raped and murdered while using a communal toilet.[8] The complainant organisations also noted that, in December 2003, Khayelitsha was the scene of the sexual assault and murder of 22-year-old Lorna Mlofana by a group of young men who learnt that she was HIV-positive. Lorna Mlofana was the leader of the TAC for her area. At that stage, the community and CSOs began calling upon the State to provide improved police and other services for rape victims.[9]

During its proceedings, the Commission heard that, in 2010, the national branch of the SAPS gave an instruction that each police cluster – of which there are 25 in the Western Cape – must have a Family Violence, Child Protection and Sexual Offences Unit, commonly known as FCS units.[10] The Khayelitsha FCS Unit serves the eight police stations in the Khayelitsha cluster, which includes a number of other stations. Principally, the Provincial Commander: Family Violence, Child Protection and Sexual Offences Unit (the Provincial Commander) placed evidence about the Khayelitsha FCS Unit before the Commission.[11]

In her evidence, the Provincial Commander identified challenges facing the Khayelitsha FCS Unit, including that FCS Unit staff members suffered from low morale due to the nature of the cases that they dealt with, as well as that the unit was understaffed.[12] Although the national instruction regulating the FCS Unit requires that unit members, including the officers, go for debriefing sessions every six months, this is often not observed.[13]

The evidence put before the Commission revealed that incomplete or poor police investigations conducted by the FCS Unit resulted in some cases being struck from the roll or withdrawn by magistrates.[14] Further, FCS investigators pursue unstructured, unfocused and therefore ineffective investigations.[15] It was further noted that the FCS Unit did not have crime intelligence capacity in the way that police stations do, and it was suggested that the appointment of a crime intelligence officer to the Unit would be valuable, especially in dealing with serial rapist cases.[16]

The policing inefficiencies experienced by the Khayelitsha community causes the community serious frustration, which was argued as one of the main causes of vigilante killings. The Commission heard from SJC of an incident in where

8 Ibid pages 82–83.

9 Ibid pages 83–84.

10 Ibid page 247.

11 Ibid pages 247–251.

12 Ibid pages 248–248.

13 Ibid page 250.

14 Ibid page 250.

15 Ibid page 250.

16 Ibid page 249.

AT's[17] three-year-old daughter was raped and the incident was reported to the police. For two days following the crime, police failed to take her statement or assist her and her child in any way. AT's neighbour even contacted the police at Site B Police Station and provided AT's address, but the police failed to arrive. Following the inaction by the police, community members went to the home of the person suspected to have committed the crime home to confront him. The suspect ran to the police station and handed himself over.[18] Without the community confronting the suspect, he would have continued to walk free without facing the consequences of his actions.

An inspection of the Khayelitsha FCS Unit highlighted some of the inefficiencies that had motivated the complainant organisations to lodge a complaint. An inspection of the Khayelitsha FCS Unit conducted by the Police Inspectorate in June 2013 revealed that members of the Unit were not registering their informers, despite this requirement being included in members' job descriptions.[19] Additionally, although the Provincial Commander had attempted to ensure that their workload was reduced, the two officers at the Unit were not managing the office adequately to achieve their purpose. It was found that the Khayelitsha FCS is the worst performing of all units in the province.[20] The Inspectorate, 'concluded that the Khayelitsha FCS is the worst performing unit and is bringing the whole FCS component down, that the unit is not performing well, although they receive fewer cases than [other units] … that the unit needs "new blood" … "willing to work" and that management of the unit "continues to be in a pathetic state".'[21]

In light of the evidence placed before the Commission by the complainant organisations, community members, experts and the SAPS members, the Commission concluded that the FCS Unit in Khayelitsha was performing very poorly. The Commission found that there were policing, 'inefficiencies in the manner in which it investigates cases, in the way in which it liaises with other stakeholders such as the Thuthuzela [Care] Centre, and the prosecutors at the Khayelitsha Magistrates Court.'[22] The Commission found that the reasons for these inefficiencies included poor quality management, understaffing of the FCS Unit, low morale among members and possibly burn-out of some members. The Commission recommended that these issues be addressed as a matter of urgency to ensure that the FCS Unit performance improves.[23]

17 Anonymised to avoid revealing her identity.

18 Evidence before the Commission, Bundle 1(5), File E, Document number 30 at para 84.

19 Ibid page 212.

20 Ibid page 212.

21 Ibid pages 212–213.

22 Ibid pages 382–383.

23 Ibid page 383.

The final report of the Commission details a number of recommendations and findings of policing in Khayelitsha, some of which would impact on the operational efficacy of the FCS Unit in investigating rape and other sexual offences, including:

- The three police stations in Khayelitsha and the FCS Unit must be monitored to ensure that inefficiencies are eradicated,[24] including monitoring the implementation of the Domestic Violence Act and crime statistics for the twenty most serious crimes, including rape;
- Urgent Change of Management Process by Leadership of Khayelitsha Cluster, Khayelitsha FCS Unit and Three Khayelitsha Police Stations[25] to address policing inefficiencies; and
- Urgent Strategic Review of Detective Services at all three Khayelitsha Police Stations and the FCS Unit[26] in order to ensure that the detectives are equipped to investigate crimes effectively, including rape.

Since the final report and recommendations of the Commission were published in August 2014, it is not clear what will come from this report. The National Police Commissioner in her letter to the Premier of the Western Cape doubted the legitimacy of the report and questioned the appointment of Vusi Pikoli as the Western Cape Police Ombudsman.[27] Generally, the text of the letter by the Police Commissioner on the findings of the Commission either dismisses the findings or defensively argues that the recommended measures are already in place within SAPS.[28] It is worth noting that a year after the report was published, a joint task team, including the Western Cape government and SAPS, was set up to work through the implementation of the Khayelitsha Commission of Inquiry's recommendations.[29] It is not clear what is envisaged for the joint task team, as their terms of reference have not been made public and the timelines for their operation are uncertain.

What will come from the report and recommendations of the Commission continues to be unclear despite the setting up of the joint task team, and women living in Khayelitsha continue to live in fear of violence, including rape.

It is well recognised that as one of the most visible and powerful organs of the State, the police have a very significant and determining role to play in promoting, building and upholding democratic rights and principles.[30] Equality,

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24 Ibid page 444.

25 Ibid page 446.

26 Ibid page 447.

27 'Text of the letter from SAPS National Commissioner Riah Phiyega to Western Cape Premier Helen Zille, Jun 5 2015', available at *http://www.politicsweb.co.za/documents/saps-response-to-khayelitsha-commissions-recommend,* accessed on 27 November 2015.

28 Ibid.

29 'Western Cape and Police establish Khayelitsha Commission of Inquiry joint task team', available at *http://www.gov.za/speeches/khayelitsha-commission-inquiry-joint-task-team-be-established-24-aug-2015-0000*, accessed on 12 October 2015.

30 Evidence before the Commission, Bundle 12, Expert reports, Gareth Newham's Report, page 31.

non-sexism, human dignity and the advancement of human rights are some of the founding values as entrenched in the South African Constitution. Further, the Bill of Rights in Chapter 2 of the Constitution is described by the Constitution as the, 'cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'[31] The State is obligated to respect, protect, promote and fulfil rights as entrenched in the Bill of Rights. The SAPS have an obligation to uphold and promote these values.

In this constitutional framework, it must be emphasised that SAPS' single most important role is the reduction of crime.[32] If SAPS understand their most important role to be crime prevention, then SAPS members are required to anticipate what criminal activities may occur in the future and prevent them from happening. However, if SAPS understand their role as maintaining order, then their role and interventions are mostly reactive to the events and incidences of crime, geared towards addressing the outcome of the particular crime.[33]

As noted to the Commission by Dr Chris de Kock, there is a link between the reduction of crime and the creation of a safer environment. In his report he used the example of Alexandra in Gauteng:

> '… in Alexandra, Johannesburg there was a street bordering an informal settlement with many toilets. When ladies went there in the middle of the night, rapists were waiting. Many years back the late Minister Steve Tshwete visited Alexandra and when he received a crime briefing he was informed about this. He personally intervened and convinced the Metropolitan Council to move the toilets closer to the shacks. This had the result of a very significant decrease in rape in Alexandra. The late Minister after that became a very strong supporter of the idea of analysis and even on various occasions asked the SAPS management to strengthen the Crime Information Analysis Centre.'[34]

This understanding of the role of police in Khayelitsha and other areas where women are routinely raped could positively impact the daily experiences of women and girls in such communities. This would be the difference between women *having* the right to equality, privacy, bodily integrity, and freedom and security, and women actually *living* equally, free from violence, with privacy and with the right to enjoy their bodily integrity. Ensuring that communities are safe is one of the ways of ensuring that women in Khayelitsha can use a toilet without fear of rape and/or violence. It is hoped that this understanding is infused in the work of the Joint Task Team, as well as the SAPS, which will hopefully see the recommendations of the Commission implemented.

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31 Section 7 of the Constitution of South Africa.

32 Evidence before the Commission, Bundle 12, Expert Report, Dr Steinberg's Report, page 6.

33 Ibid page 6.

34 Chris Paul de Kock 'Is Crime Combating Intelligence Led and Is It Effective in Greater Khayelitsha?' (2014), para 19.

CHAPTER 3

SEXUAL VIOLENCE AND XENOPHOBIA: THE SILENT SCREAM

CHARLENE MAY AND MANDIVAVARIRA MUDARIKWA

I INTRODUCTION

The South African Immigration Act broadly defines the word 'foreigner' to describe non-nationals. In this chapter, the words 'foreigner' and 'migrant' will be used interchangeably to refer to non-nationals, regardless of their immigration status.[1]

The May 2008 xenophobic attacks started in Alexandra, Diepsloot and Tembisa, and soon spread to other communities throughout South Africa. Between 11 May and 14 June an estimated 62 deaths, hundreds of injuries and the displacement of more than 100,000 foreigners nationally had been reported.[2] Although the victims of the attacks included both South African citizens and foreign nationals, the violence revealed the presence of powerful xenophobic sentiment that remains to this day. While estimates are available to account for the deaths, injuries, displacements and rand value of property damage or loss, there is a dearth of information about victims of sexual violence.

Prior to 2008, xenophobic attacks on foreigners were isolated and random at best, while the 2008 attacks were sustained and the scale of violence incomparable.[3] Nevertheless, the attacks exposed many of the tensions that exist in the country.

While the perpetrators of the 2008 xenophobic attacks did not discriminate on the basis of gender, the vulnerabilities of migrant women are often overlooked. The prevalence of violence in South Africa, particularly gender-based sexual violence, is well documented and researched. Legislation has been passed to further protect complainants and to combat the high incidence of sexual offences. However, the prevalence of sexual violence in the domain of the 2008 xenophobic attacks remains, largely, undocumented.

1 The status of foreign nationals is governed either by the Immigration Act or the Refugees Act 130 of 1998.

2 SAHRC Report on the SAHRC Investigation into issues of Rule of Law, Justice and impunity arising out of the 2008 Public Violence against Non-Nationals (2010) 21.

3 G Friebel, JM Gallego and M Mendola *Xenophobia attacks, migration intentions and networks: Evidence from South Africa* J Popul Econ (2013) 26 555–591.

Xenophobia and sexual violence are often thought to be separate and distinct. However, in South Africa there is a significant overlap between the criminal dimension of sexual violence and xenophobia. The challenges faced by migrant women have been described as a 'double jeopardy'.[4] As both foreign and female, migrant women are at a key intersection of two groups that are particularly vulnerable to violence, exploitation and abuse. It is at the intersection of xenophobia and sexual violence that foreign women are left vulnerable, with little or no intervention from significant role players.

II WHAT IS XENOPHOBIA?

The word 'xenophobia' originates from the Greek words for foreign (xenos) and fear (phobos).[5] Literally translated it is the 'hatred or fear of foreigners or strangers'. Bronwyn Harris argues that xenophobia is characterised by a negative attitude towards 'foreigners, a dislike, a fear, or hatred'.[6] While there is no legal definition of xenophobia in South Africa, the South African Human Rights Commission (SAHRC) defines it as the, 'deep dislike of non-nationals by nationals of a recipient state'.[7] Describing xenophobia, Lesley Wexler states that:

> 'Such hatred manifests itself in the misguided fears that migrants drive up crime, disrupt cohesive communities, and use valuable government resources without making positive contributions in return. Once citizens see immigrants as outsiders in the relevant community, it becomes much easier to dehumanize them and treat them poorly. Similarly, many at the bottom of the socioeconomic ladder view migrants as threats to their livelihoods because migrants take dirty, dangerous, or degrading jobs, often at lower pay than what citizens demand.'

According to Wexler, xenophobia goes beyond disliking migrants and takes it a step further by engaging in the dehumanising treatment of migrants because of the economic or social threats they are perceived to be.

III CAUSES OF XENOPHOBIA

The possible causes of xenophobic attitudes and behaviour have been alluded to and are numerous, complex and go beyond the ambit of this chapter. However, a brief consideration of some of the opinions may provide some useful context.

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4 R Sigworth (Fuller) *Double Jeopardy: Women Migrants and Refugees in South Africa* (2009).

5 J Crush *The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa* (2008) at 15.

6 B Harris 'Xenophobia: A Pathology of a new South Africa?' in Hook D and Eagles G (eds) *Psychopathology and Social Prejudice* (2002) at 169–184.

7 South African Human Rights Commission, Braamfontein Statement on Xenophobia, 15 October 2008.

Similarly, in South Africa, xenophobic sentiment manifests itself in political rhetoric, the media and in public attitudes. In each of these forums, specific groups of foreigners are targeted, revealing unmistakable negative attitudes toward foreign nationals. Although many organisations have made recommendations on measures that can be taken to avoid xenophobic violence in the future, the risk of further xenophobic violence remains a sad reality for many foreigners. Most of the suggestions made require interventions that the government has, so far, been either reluctant or slow to implement.

Some researchers have theorised that xenophobia can be understood in the context of limited resources such as housing, education, health care and employment. As provided in the description of xenophobia by Lesley Wexler, foreigners are 'scapegoats' for social ills and personal frustrations.[8] Xenophobia is, therefore, caused by poor service delivery in the form of jobs, housing and limited social benefits that citizens feel entitled to, but find themselves unable to access. One of the most common examples of this is the role that economic opportunities play through the interaction between locals and migrants in the spaza shop phenomenon.

Others argue that the isolation experienced by South Africans during apartheid and the post-democratic transition that has led to the opening up of the South African borders, is a possible explanation for xenophobia. Here, violence against foreigners in South Africa is traced back to the months immediately following the country's first democratic elections. In December 1994, news reports detailed the destruction of foreign-owned property in Alexandra by armed South African youths who demanded that foreigners be removed from the area.[9] This view does not suggest that xenophobia did not exist prior to 1994, but simply suggests that the return of South Africa into the global economy has exposed it to more interaction with the outside world than before. It is this exposure that has led to more migrant interaction with locals that has possibly resulted in xenophobic tension.

Some academics argue that xenophobia, all over the world, is a symptom of poor intercultural communication.[10] The argument here is that people will always be suspicious of the unfamiliar and unknown. The absence of cultural tools to deal with or embrace differences will lead to hostility and it is at this point that xenophobia manifests. Many scholars argue that no one theory provides an answer but recognise that xenophobia, as a phenomenon, is complex and multifaceted.

Whatever the causes of xenophobia in South Africa are, it is clear that all these theories could apply and play a role in helping us understand why xenophobic attacks occur. The importance of understanding the possible causes of xenophobia rests in our ability to identify it and to prevent its occurrence or to effectively deal with it when it occurs.

8 L Wexler *Human Rights Impact: An Immigration Case Study* (2008) at 22 Geo Immigration LJ 285.

9 Ibid (note 3) 21.

10 H Solomon 'Xenophobia in South Africa: Origins, Trajectory and Recommendations' presentation at the University of Pretoria.

IV HOW DOES XENOPHOBIA PRESENT IN SOUTH AFRICA?

Since the advent of democracy in South Africa in 1994, xenophobia has become more prevalent in politics, news media and in the general attitudes of the South African public. What is characteristic about the presentation of xenophobia in South Africa is the ease with which the negative attitudes transform into, 'intense tension and violence by South Africans towards immigrants'.[11] Acts of violence are, therefore, one of the main features of xenophobia in South Africa.

What is also interesting to note about xenophobia in South Africa is the distinct racial element. Not all foreigners are victims of negative attitudes and violent acts, but immigrants from the African continent appear to be the main targets of xenophobic sentiment and attacks. The xenophobic attitudes prevalent in South Africa reveal a level of racism or ethnic bias. Migrants from Europe and North America are received favourably, as are those from Botswana, Lesotho and Swaziland. Mozambicans and Zimbabweans are welcomed less favourably, and Angolans, Somalis, Nigerians and Congolese appear to be the least welcome.[12]

This racial element could be attributed to geographical proximity. Most xenophobic attacks have occurred in townships or informal settlements where people live in close proximity. African migrants are more likely to live and work with locals than non-African migrants. They are also more likely to belong to the same social class, leading to the perception that locals and foreigners will fight for limited resources. What is evident from research is that when analysing xenophobia, there is a considerable disconnect between perception and reality. As with any fear, most attitudes emanate from a wrong or biased perception of the feared/disliked thing or person rather than from a real or rational experience.

The 2006 South African Migration Project's (SAMP) Xenophobia Survey (2006 SAMP survey) found that, compared to citizens of other countries worldwide, South Africans are among the least open to outsiders and desire the greatest restrictions on immigration.[13] Interestingly, popular attitudes of intolerance towards immigrants have also created a unique national unity. South Africans share similar sentiments on the issue of immigration regardless of their race, level of education or income bracket. According to the 2006 SAMP survey, the proportion of people favouring immigration for the purposes of employment rose from twelve per cent in 1999 to 23 per cent in 2006. The survey also found that the proportion of those who wanted a total ban on immigration increased from 25 per cent in 1999 to 35 per cent in 2006. In 2006, 84 per cent of South Africans felt that too many foreign nationals are permitted into the country.[14] Furthermore, 74 per cent supported a

11 Harris at 170.

12 J Crush *The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa* (2008) at 30.

13 Crush at 21.

14 Crush at 24.

policy of deporting anyone who is not contributing to South Africa's economy.[15] When it comes to immigrants' rights, an overwhelming 85 per cent believed that unauthorised migrants should have no rights to freedom of speech or movement. At least 60 per cent feel that they should not enjoy police protection or access to services.[16] But when it comes to refugee protection, the survey found that South Africans are divided – 47 per cent support refugee protection, while 30 per cent oppose it. Additionally, only 30 per cent support permitting refugees to work.[17]

The 2006 SAMP survey notes that South Africans generally continue to consider foreign nationals as a threat to their social and economic wellbeing. The proportion of people who believed that foreign nationals undeservedly consume resources grew from eight per cent in 1999 to 67 per cent in 2006. The proportion that associated migrants with crime grew from 45 per cent to 67 per cent in 2006. In addition, the 2006 SAMP survey found that nearly half (49 per cent) of people believed that migrants bring disease into the country.[18]

The veracity of the belief that foreigners are guilty of criminal activity and usurping employment from local citizens has been frequently called into question. A 1998 survey of 70 immigrant entrepreneurs in inner-city Johannesburg found that each migrant employed between two and four people, at least half of whom were South African. These interviews also revealed that these entrepreneurs reinvested most of their profits back into South Africa.[19] In addition, the 2006 SAMP survey, for example, found that African migrants do not take jobs away from South Africans, but instead make a valuable contribution to the South African economy.

V SEXUAL VIOLENCE

Violence against women in South Africa has been described as 'endemic'.[20] The high incidences of sexual violence and the prevalence of sexual offences, in particular, are of grave concern.[21] To the extent that one is unable to provide an accurate comparison between countries when it comes to statistics, it becomes imperative to consider local perceptions.

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15 Ibid.

16 Valji at 3.

17 Crush at 26.

18 Crush at 29.

19 N Valji *Creating the Nation: The Rise of Violent Xenophobia in the new South Africa* at 16.

20 F Boonzaier and C de La Rey *'He's a Man, and I'm a Woman': Cultural Constructions of Masculinity and Femininity in South African Women's Narrative of Violence*' vol. 9 no. 8 at 1003–1029.

21 *Rape Crises Cape Town Trust Rape in South Africa: The Soul City Research Report* (February 2003).

The absence of reports on crimes against women during the xenophobic attacks raises some questions. To some extent it is not surprising that media reports of sexual violence during xenophobic attacks are close to non-existent. The very nature of sexual violation is that victims are reluctant to discuss their experiences in private, let alone in the public domain of the media.

The causes of sexual violence are difficult to identify and fall within the ambit of multidisciplinary studies such as psychology and criminology. One factor that has been said to contribute to sexual violence, is the pattern of female exploitation and patriarchy that extends back to colonial South Africa and which was reinforced during apartheid. Women in pre-colonial southern Africa did not wield extensive political power, but they held considerable influence over some decision making because of their productive and reproductive roles in society.[22] During colonisation by the Dutch and the British, and later under apartheid, the imposition of gendered hierarchies strengthened long-standing patriarchal structures and diminished what power and influence women previously held. Domineering Afrikaner masculinity was perpetuated and enforced by the white minority government through policies and laws that further oppressed women.[23] Rape was used as a weapon by the apartheid government: when tensions would flare, women were raped as a means of subduing resistance, asserting control, and ensuring obedience and conformity to the era's racial norms.[24]

Apart from the physical trauma that sexual violence caused, gender-based violence was an effective weapon of psychological torture and control. Women's family members, particularly their children, were also threatened if they did not obey the government's order. Sexual humiliation was also a common tactic used by police to harass and humiliate women while they were menstruating – security forces are known to have denied women access to sanitary pads as a means of ridicule.[25] The sexuality and modesty of African women was and is still seen, culturally, as something that must be preserved and kept private. Public sexual humiliation as a means of coercion was therefore particularly effective.

Since the end of apartheid, gender-based and sexual violence has assumed various forms. Rather than being used as a state-mandated force of coercion, it is now seen as a reactive or defensive response to shifting gender roles, the attempt by feminist and gender organisations at reordering civil society, and the overall political advancement of women.[26] As sexual violence was used by the apartheid government to punish and coerce, contemporary violence can be seen as serving a similar purpose. For instance, the sexual assault of lesbians or what is often referred to as 'corrective' rape, serves as a

22 H Britton *Organising Against Gender Violence in South Africa* (2006) at 32, Journal of Southern African Studies 148.

23 Britton at 145–163.

24 Britton at 145.

25 Ibid.

26 Britton at 150.

punishment for the failure of lesbian women to conform to western-imposed hetero-normative gender roles.[27] Also, it is not uncommon to read of men infected with HIV and AIDS who have sex with or rape young women or virgins believing that such acts will cure them of the virus.[28]

The government has pledged to prioritise sexual and gender-based violence,[29] but in the face of the evidence that sexual assaults have actually not decreased substantially, it appears that this pledge has not been followed up by action. One explanation for the lack of an effective government response to gender-based and sexual violence is that such crimes are perceived to be 'women's' or 'private' issues that are the concern of feminist and women's groups within civil society.[30] There continues to be a gap between the equality rhetoric, the enacted legislation and the realities of everyday life of women all over the country, who remain vulnerable to sexual violence.

VI SEXUAL VIOLENCE AND XENOPHOBIA

Given the backdrop of a violent society in which sexual assaults against women are endemic, it is not mere assumption to argue that foreign women are victims, as much as local woman are. The South African Police Service (SAPS) does not segregate the data it provides to the public according to the nationality of victims. Because of their gender and their foreign-ness, migrant women remain at a key intersection of two groups that are particularly vulnerable to violence, exploitation and abuse.[31] This vulnerability was exploited not only in the May 2008 xenophobic attacks, but before, and it continues to this day. Although migrant women in South Africa have proven their resilience in the face of their vulnerability, the South African government needs to take appropriate steps to alleviate the threats they face as victims of sexual violence during xenophobic attacks.

Xenophobia and sexual violence are often considered separate and distinct. Violence against women is generally perceived as criminal, domestic and private in nature, while xenophobic violence is considered political and motivated by the dynamics of exclusion and inclusion, access to resources and nationalistic identities. In South Africa, the line between the two is becoming increasingly blurred. We recognise that in some cases, incidents of rape are apolitical or purely criminal in nature – an effect of gender structures within society rather than of xenophobia.[32] However, as Fuller argues, violence against women is a central part of the xenophobic violence in South Africa and contains both political and criminal

27 Britton at 149.

28 Ibid.

29 State Report which lists the key elements of 2009–2011 National Strategic Plan, one of which is specifically focused on women's rights at page 120.

30 State Report at 147.

31 R Sigworth, C Ngwane and A Pino *The Gendered Nature of Xenophobia in South Africa* (2008) Centre for the Study of Violence and Reconciliation 8.

32 R Sigworth *Double Jeopardy: Foreign and Female* (May 2012) at 2.

dimensions.[33] Rape is often used as a tool to punish and humiliate women of different nationalities and ethnic groups. Women have historically been viewed as property owned by men, and because that ownership is considered fouled through the act of rape, the abuse of women becomes a political tool.[34]

In practice it may be difficult to differentiate between rape perpetrated due to an atmosphere of violence, rape motivated by xenophobia or assault perpetrated opportunistically. Research into this has not been conducted and perpetrators have not been interviewed to determine their motivation. The lack of reporting is greatly exacerbated in the context of migrant women. Not only are these women foreigners in a country where the police are associated with corruption, intimidation and xenophobia, but they are living in a society where victims of sexual violence frequently suffer secondary victimisation at the hands of those tasked with assisting them. This victimisation is made worse when the victim's immigration status is suspect and could be questioned by the officials she reports the crime to. These factors contribute to the creation of a foundation of fear that has likely deterred many migrant women from reporting rapes.

While it is difficult to ascertain the exact reasons why xenophobia disproportionately affects migrant women, two contributory factors are critical to, at least, a superficial understanding of the underlying issues. Research indicates that women and children often fall prey to xenophobic violence because they are central to the settlement process.[35] Women are the traditional caregivers and bear the bulk of the responsibility of clothing, feeding and, to some extent, providing shelter for their families. A host population may view migrant men as being transitory because they are only present for the purposes of employment or better economic circumstances, and are therefore not necessarily a permanent resident. Women and children denote a more permanent move and the laying down of roots in the new country. The settlement of family units can be read as an indication that the male earner does not intend to leave as he is prospering to the point of being able to bring his family to the host country. It is this element of perceived prosperity that may be greater than that of the host community that becomes a source of tension, and woman and children may bear the brunt of this conflict.

Secondly, xenophobia against migrant women has, to a large extent, been attributed to competition for resources, particularly over housing and employment opportunities, between migrants and locals. A study conducted by the Centre for the Study of Violence and Reconciliation (CSVR) found that the tension extended beyond mere resources, to the very nature of many migrant women. The CSVR noted that migrant women's entrepreneurial spirit, independence from government assistance and their drive to improve their quality of life evokes envy and dislike from South African nationals. These same characteristics exposed migrant women to xenophobia when they try to make a life for themselves in South Africa through employment, starting their own businesses or educating themselves and their children.[36]

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33 R Fuller *Double Jeopardy: Women Migrants and Refugees in South Africa* (2009) at 7–8.

34 R Fuller at 7.

35 R Fuller at 8.

36 R Sigworth, C Ngwane and A Pino *The Gendered Nature of Xenophobia in South Africa* (2008) at 35.

VII REPORTED SEXUAL VIOLENCE IN THE XENOPHOBIC ATTACKS OF 2008

Migrant women in townships were disproportionately affected by the May 2008 xenophobic attacks. Not only were their homes burnt and looted, but they suffered physical injuries due to beatings and rape. Attacking a woman's home has far-reaching symbolism and implications, as the home is considered a place of safety and security.[37] Threats of sexual violence were used to force migrant women and their families to flee their homes. For example, a woman in Gauteng was threatened: 'If you do not leave by tomorrow you will be raped.'[38]

The true scope of the number and impact of sexual violations during the 2008 violence is impossible to verify for the same reasons that general sexual violence statistics remain elusive. These reasons include underreporting due to fear of arrest and/or deportation, the lack of trust in police and health care providers, the low level of awareness of the value of seeking swift medical assistance, the stigma associated with the acknowledgement of violence, the lack of information on how to report crimes, and the lack of standardised reporting procedures.[39] A woman in the Boksburg internal displacement site in Gauteng said that, 'women are afraid to report cases of sexual violence because they are afraid of being deported.'[40] Another female migrant in the Western Cape stated that foreigners cannot rely on the police to solve their problems and that police often tell them to go back to where they came from.

Young migrant girls in the Western Cape reported that they would not report sexual violence due to fear of losing their dignity.[41] The preservation of one's dignity with regard to sex is critical. Rape dehumanises victims, leaving them with intense feelings of personal and communal shame. As a result of the violent act perpetrated against a woman, and because of her status within a largely patriarchal society, a woman's self-value diminishes after she has been sexually assaulted. She risks being ostracised and identified with the stigma of being a rape victim. The victim also runs the very real risk of being abandoned by her husband or partner. The ostracism and abandonment only compound her vulnerability, as she remains in a foreign country and reliant on the support of family and fellow immigrants who are in South Africa with her.

Overwhelmingly, the women who have consulted with the Legal Resources Centre (LRC) have come to South Africa to join their husbands who are already settled. These women could be in relationships that have undergone problems and, more often than not, they are financially reliant on their husbands and male counterparts. The LRC assists about 20 refugee

37 R Sigworth *Double Jeopardy* at 1.

38 M Marsh *Inter Agency Assessment* at 12.

39 M Marsh at 3.

40 M Marsh at 12.

41 M Marsh at 12–13.

couples per month with joinder applications in respect of refugee status in terms of the Refugees Act 1998.[42] Many immigrant women are, therefore, not only economically dependent on male partners, but for many of them, their very status in the country is dependent on their partners or family members. During interviews at the Blue Waters Camp, women expressed fear of informing their spouses that they had been raped, fearing that they would be abandoned, left destitute and without legal status in a foreign country. Xenophobic violence and attitudes experienced by migrant women in South Africa augments the trauma that many of these women have faced in their country of origin, trauma that may have motivated their move to South Africa and their claim for asylum.[43]

A rapid inter-agency assessment of gender-based violence shows that women and girls were victims of threatened, attempted and actual sexual assault during the 2008 xenophobic attacks. Investigations by the United Nations Children's Fund (UNICEF) and the United Nations Population Fund confirmed the results of the assessment through both first-hand and anecdotal reports from the Western Cape and Gauteng provinces.[44]

Dee Smythe of the University of Cape Town's Law, Race and Gender Research Unit,[45] reports on women's accounts of reporting rapes during the attacks. One victim reported that the police had refused to help her and said that they do not assist *'kwere kwere'* (a derogatory term for African immigrants). They then told her to report the incident to the police in her home country, the Democratic Republic of Congo (DRC). The victim did not receive a medical examination, post-exposure prophylaxis to reduce her risk of contracting HIV, the morning-after pill, or legal support of any kind.[46] Other female migrants reported sexual assaults in supporting affidavits in the Blue Waters[47] case, where the LRC represented occupiers of the safety site. One Khayelitsha resident from Somalia reported being raped several times prior to the 2008 xenophobic violence. She said that, 'as a Somali woman, I could not report the rape to the police because we believe rape is a humiliating act which should not be publicised.' However, the victim obtained medical attention and fortunately tested negative for HIV and AIDS. When the xenophobic attacks broke out in 2008, she was again raped and her family members were beaten.[48]

Another refugee from the DRC and living in Kraaifontein revealed that one of her daughters had been raped prior to the 2008 attacks. Although the family reported the incident to the local police station, threats from local community

42 Section 3(c) of the Refugees Act 130 of 1998.

43 R Sigworth above at 4–5; Marsh above at 3.

44 M Marsh above at 3.

45 P Luhanga IOL News *'Some displaced female immigrants were raped'* 13 June 2008.

46 Ibid.

47 *City of Cape Town v All those adult males and females whose names are set out in in Annexure 'hs1' to affidavit and who reside at Bluewaters Site B and C, Lukannon Drive, Strandfontein Western Cape and Others* (5083/09) [2010] ZAWCHC 32 (24 February 2010.

48 Blue Waters pleadings at 10.

members forced them to drop the charges and relocate. During the 2008 violence her two daughters were sexually assaulted. When she reported one of the incidents to the police and camp management, they told her that the suspect was only sixteen years old and thus too young to be prosecuted. No further legal action was taken and her daughters never received medical attention or counselling of any kind.[49] In this instance, she had reported the crime, the perpetrator was known and identified, but the police and prosecution did not follow through with the case. As a foreigner she did not question the police on whether their advice was indeed correct and simply assumed that there was no further legal remedies available.

A third female migrant from the DRC living in Philippi was raped by two men during the 2008 attacks. When she reported the rape at the police station, the police told her that she could not make a report since she could not identify the two men who raped her. No docket was opened by the police and no investigation was conducted. Although the police advised her to go to a clinic in Khayelitsha for testing, she felt it was too dangerous to go to another township while reports of foreigners being attacked in townships persisted. She remained untested, even in the safety camp, until November 2008 when she finally attended counselling services offered by a local civil society organisation that had come to the safety site.

Studies conducted by the CSVR before, during and after the May 2008 violence found that migrant women viewed the 2008 violence as a magnified example of the sexual violence that they consider to be an unavoidable aspect of their daily lives.[50] However, it is not only migrant women who are vulnerable to xenophobic violence. Black South African men have long accused foreigners of, 'taking our women'. Given that sexual violence has long been a means of punishing and controlling women, rape is used against South African women to control and limit their ability to choose foreign men over South African men. During the integration visits after the 2008 attacks, the UNHCR compiled a report noting some of these comments, but the report formed part of the integration exercise and was never published. Consequently, South African women who marry or are in relationships with foreign men are also vulnerable to being ostracised from their communities or families and are vulnerable to xenophobic sexual violence.[51]

In this instance, rape reinforces the patriarchal view of women. If a woman steps outside the bounds of acceptable sexual behaviour she is punished through the act of rape so that she will conform to what her community requires of her. This form of 'corrective' rape perpetuates the notion that women are property and incapable of making independent decisions. Under such circumstances the question becomes one of assessing what government is doing to protect migrant and local women and whether the state bears such a responsibility. We argue that the Constitution demands such a responsibility.

49 Blue Waters at 11.

50 R Sigworth at 1.

51 Sigworth at 4.

VIII CONCLUSION

'Fear' is at the core of the definition of a refugee,[52] and those who come to South Africa seeking protection continue to live in fear owing to threats emanating from government and private parties. The South African Refugees Act grants refugee status to any person who shows a, 'well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion'. Because of their status, immigrants are vulnerable to attacks, abuses and violations of their basic human rights over and above the abuses that locals endure.[53]

Migrant women are 'ill-equipped' to defend themselves or assert their rights because they are often undocumented or consider their refugee or asylum status as unsecure, making them reluctant to follow through with reporting incidents. In addition, the fact that certain offences are not per se criminalised makes it even more challenging to report such incidents. Women, being more vulnerable to sexual violence, bear the brunt of the violence. Domestic and international law establish that South Africa has an affirmative duty to both respect and ensure the physical security of migrant women and refugees under their jurisdiction. As demonstrated, this obligation extends beyond the State refraining from violent acts and beyond creating laws that prohibit violence. The State is obliged to proactively engage the public, taking all reasonable and appropriate measures to ensure the fundamental rights of migrant women are upheld. Most importantly, the State must set the standard, showing, by example, that refugees and migrant women are to be treated with dignity and respect.

52 UN Refugee Convention Article 1(A)(2) and section 3 of the Refugees Act.

53 Wexler above at 290–291.

CHAPTER 4

THE TREATMENT OF VICTIMS OF SEXUAL VIOLENCE IN SOUTH AFRICA'S REFUGEE STATUS DETERMINATION SYSTEM

LARA WALLIS

According to United Nations High Commissioner for Refugees (UNHCR), at the end of 2013 there were approximately 65,668 recognised refugees and 243,948 asylum seekers with pending cases in South Africa.[1] South Africa receives the largest volume of its asylum seekers from the Democratic Republic of Congo (DRC) and Somalia. Both of these nations have been shaken by conflict in the last decade and, significantly, both are notorious for the employment of rape and other forms of sexual violence as weapons of war.

For this reason, it is essential that Refugee Status Determination Officers (RSDOs) in South Africa are sensitive and aware of the contextual background of claimants' countries of origin when assessing female claims. These claims need to be handled with care to ensure that women displaced by sexual violence in the context of conflict are protected and their fundamental human rights are respected. Sadly, the Legal Resources Centre's (LRC) first-hand experience in assisting such claimants demonstrates that, in practice, this is most often not the case.

This chapter will proceed as follows:

I. A brief background on rape in the context of the legal framework for refugee protection will be provided.

II. Key flaws in the refugee status determination system in the handling of sexual violence claims from conflict areas will be identified and explored.

III. Recommendations as to how these issues may be remedied will be provided.

I RAPE AND SEXUAL VIOLENCE IN THE CONTEXT OF THE LEGAL FRAMEWORK FOR REFUGEE PROTECTION IN SOUTH AFRICA

The first challenge that is faced by women who have fled conflict areas is that of actually being recognised as refugees in South Africa. In order to qualify as a refugee in South Africa, a claimant has to fall within the following definition enunciated

1 Statistics for the end of 2014 had not yet been published on the UNHCR website or the South African Government website at the time of writing.

in section 3 of the Refugees Act 130 of 1998:

> 'Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-
>
> a) owing to a well-founded fear of being persecuted by reasons of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or not having a nationality and being outside the country of his or her former habitual residence is unable or owing to such a fear, unwilling to return to it; or
>
> b) owing to external aggression, occupation, foreign domination **or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin** or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
>
> c) is a dependant of a person contemplated in paragraph (a) or (b)' [Emphasis added]

Section 3(a) above is the definition of a refugee adopted by the 1951 UN Refugee Convention while section 3(b) is taken from the extended definition of a refugee in the 1969 AU Convention.

As a starting point, it is helpful to examine how women who have fled conflict zones where they have been subjected to sexual violence fit into the definition of a refugee as found in section 3 of the Refugees Act.

Section 3(a) requires a claimant to have a well-founded fear of persecution on the basis of a so-called 'Convention ground' or by virtue of their being part of a particular social group. RSDO decisions in South Africa have frequently declined to recognise rape and sexual violence in the context of conflict situations as 'persecution' for the purposes of section 3(a) of the Refugees Act. It is submitted that this is patently incorrect and constitutes a failure to recognise a particularly serious form of persecution.

With regard to the meaning of 'persecution' in itself, no single definition has been established under refugee law. A prominent academic in the field of refugee law, Grahl Madsen, takes the view that the term 'persecution', which is critical to refugee status determination, was deliberately left undefined in order to leave room for interpretation. He states:

> 'The term "persecution" has nowhere been defined and this is probably deliberate… It seems as if the drafters wanted to introduce a flexible concept which might be applied to circumstances as they arise; in other words they capitulated before the inventiveness of humanity to think up ways of persecuting fellow men.'[2]

2 Grahl Madsen The Status of Refugees in International Law (2005) 193.

Academics are widely in agreement that for persecution to have occurred, there must be a violation of basic human rights and that it must be evident that the state has failed to protect the asylum seeker.[3] Rape and sexual violence clearly constitute serious violations of the right to dignity, as well as bodily and psychological integrity. In cases of rape in the context of conflict situations, government soldiers are frequently the agents of rape themselves and little or no protection is offered to asylum seekers. Rape, therefore, clearly constitutes persecution for the purposes of the Refugees Act, although this is frequently not accepted by RSDOs.

UNHCR has also expressly stated that rape can fall under the umbrella of persecution:

'There can be no doubt that when rape or other forms of sexual violence committed for reasons of race, religion, nationality, political opinion or membership of a particular social group is condoned by the authorities, it may be considered persecution under the definition of the term 'refugee' in the 1951 Convention relating to the Status of Refugees (Article 1(a)(2)). A well-founded fear of rape in such circumstances can thus provide the basis for a claim to refugee status.'

This refers to rape as persecution for the reason of one of the enumerated Convention grounds, namely race, religion, political opinion, nationality or a particular social group. The term 'particular social group' (PSG) is defined in section 1(xxi) of the Refugees Act and expressly includes gender. Thus, rape and sexual assault in a time of conflict can give rise to a valid claim for persecution within section 3(a) of the Refugees Act, based on gender or another listed ground (for example, if a person were to be persecuted in the form of rape on the basis of their religion or political opinion). It must be noted that the definition of a 'social group' in the Act is phrased using the words '… includes, among others, a group of persons of a particular gender, sexual orientation, disability…'. This demonstrates that the groups expressly stated do not constitute a closed list.[4]

The term 'particular social group' has been interpreted in foreign jurisprudence. It is widely accepted that in order to qualify as being part of a PSG, one must be part of a group of individuals who share a 'common, immutable characteristic'.[5] In other words, a PSG shares characteristics that cannot be altered by choice. We submit that, as a subcategory of gender, for the purpose of a claim under section 3(a), the PSG in cases of claimants from conflict zones could in fact be 'women in a period of conflict'. Women are frequently raped and abducted by soldiers during such times, as will be demonstrated upon examining country information below. The characteristics of being a woman during a period of conflict certainly cannot be altered by choice.

3 F Khan and T Schreier (eds) Refugee Law in South Africa 51.

4 Khan and Schreier 72

5 Khan and Schreier 72, Ward, Acosta.

In situations in which rape is utilised as a weapon of war, a claimant can also qualify for status under section 3(b) of the Refugees Act. Both the conflict itself and the systematic use of rape in warfare can be interpreted to constitute 'an event seriously disrupting the public order', therefore compelling an individual to leave their country of origin. In spite of this, as will be demonstrated below, RSDOs regularly reject claims for refugee status for asylum seekers who have fled conflict regions and who have experienced sexual violence in this context.

II FLAWS IN THE REFUGEE STATUS DETERMINATION SYSTEM IN THE HANDLING OF SEXUAL VIOLENCE CLAIMS FROM CONFLICT AREAS

In 2012, Roni Amit of the University of the Witwatersrand's African Centre for Migration and Society (ACMS) published a highly comprehensive report on the quality of refugee status determinations in accordance with international and domestic law entitled, *All Roads Lead to Rejection*. In a chapter entitled, 'All Roads Lead to Rejection: The Case of Gender-Based Persecution', Amit states that in addition to a 'widespread failure to recognise gender-based persecution as a ground for refugee status', key deficiencies can be identified, such as:

i) A lack of knowledge essential for decision-making, both in terms of a knowledge of refugee law as well as an awareness of country conditions.

ii) An 'absence of analytical ability such that even the clearest patterns of persecution went unnoticed."

iii) An 'unacceptable lack of literacy or care, leading to decision letters with little care or no bearing on the actual content of the claims.'[6]

Based on LRC's experience in assisting asylum seekers in preparing their appeal papers following being rejected for refugee status, LRC has identified the same deficiencies and align ourselves with Amit's analysis. Amit provides examples of RSDO rejections that clearly demonstrate these trends. This subsection will, therefore, examine and expand on the deficiency areas as identified by Amit, issues based on our experience in assisting clients, utilising examples of RSDO letters that we have encountered.

In line with Amit's findings in *All Roads Lead to Rejection*, LRC has identified the following trends in RSDO decision letters:

a) RSDOs have a tendency apply the burden of proof incorrectly, placing the burden of proof squarely on the applicant.

b) In many decisions, RSDOs ignore the issue of rape completely, demonstrating a lack of sensitivity towards claimants, as well as a lack of understanding of the application of section 3 of the Refugees Act.

6 ACMS Report p. 64

c) RSDOs generally fail to ascertain country information and fail to consider section 3(a) claims in context, or fail to acquire the necessary facts to make a determination of whether a claim falls within section 3(b) of the Refugees Act.

d) RSDOs frequently inappropriately reject such claims due to the erroneous reliance on the Internal Flight Alternative.

e) RSDOs fail to consider the application of section 5(e) of the Refugees Act in assessing sexual violence claims.

These issues will each be dealt with in turn, and extracts of RSDO decisions which clearly demonstrate them will be provided.

(a) *The application of the incorrect burden of proof*

In the vast majority of RSDO decisions, RSDOs tend to misstate the burden of proof requirement in refugee status claims. The majority of decisions contain the same copy-pasted sentence under the heading of 'Burden of Proof', namely:

> 'It is a general legal principle that the burden of proof lies on the person submitting the claim.'

This is the first sentence of paragraph 196 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook). However, if one goes on to read the remainder of paragraph 196, page 47, it significantly goes on to state:

> 'Often however, an applicant may not be able to support his statements by documentary or other proof and cases in which applicant can provide evidence of all his statements will be the exception rather than the rule… … Thus, while the burden of proof in principle rests on the applicant, the **duty to ascertain and evaluate all relevant facts is shared between applicant and examiner.** In some cases, it may be for the examiner to use all means at his disposal to produce necessary evidence in support of the application. Even such independent research may not always be successful and there may also be statements not susceptible of proof. **In such cases, if applicant's account appears credible, he should unless there are good reasons to the contrary, be given the benefit of the doubt.'** [Emphasis added]

Thus, in accordance with the UNHCR Handbook, the RSDO shares the duty to ascertain and evaluate all relevant facts in a given case and the applicant should also be given the benefit of the doubt unless there are good reasons to the contrary. RSDOs refrain from accepting this and frequently fail to adequately discharge this duty in cases involving women who have fled from incidences of sexual violence in the context of conflict. As will be demonstrated in subsection (c) below, RSDO decisions, more often than not, do not reflect any meaningful engagement with relevant country information at all.

In failing to play a part in the shared duty to ascertain and evaluate all relevant facts, RSDOs also place an unnecessarily onerous burden on the applicant to prove every element of her claim. This is especially problematic in a case involving sexual violence, as the claimants are often traumatised and embarrassed to fully disclose what has happened to them. The

failure to come to decisions in line with the approach stated in the complete paragraph 196 also demonstrates a lack of sensitivity towards these claimants. This will be explored in more detail in subsection (ii) below.

(b) *Ignoring the matter of rape entirely: A lack of sensitivity in the interview process coupled with a lack of knowledge of the law and country information*

In the LRC's experience in assisting female asylum seekers, in addition to a lack of knowledge of the law and country information, the issues of rape and other sexual and gender-based violence are not treated with sufficient sensitivity by RSDOs at the Department of Home Affairs.

Very often, in spite of the fact that it is acknowledged in the 'Claim' section of a decision that the claimant has stated that she has been raped, either no mention is made of the rape or the issue is treated in a callous manner.

An example of a decision in which rape was ignored entirely concerns a claim in which a woman from the DRC had a brother who was a policeman who had accidentally killed someone. The family of the deceased then came to search for her brother and she was raped by them. Under the heading of 'Reasons for Decision' in this claim, the decision simply stated:

> 'Your application for asylum is made on grounds other than those on which an application may be made under the Act.'

No effort was made to examine the possibility of rape as a form of persecution on the basis of an imputed section 3(a) ground.

In another decision regarding a woman from the DRC, the woman's claim was that she worked as a correspondence journalist in the DRC and was arrested and tortured. She had been charged with giving information about Bosco Ntaganda's activities to her employers. After she was released, soldiers came to her home and abused and raped her in front of her husband and family, and also raped her mother. The RSDO's 'Reason for Decision' reads as follows:

> 'There is no well-founded fear… You claim that you were arrested and released after two days. To me this is an indication that the authorities were not interested in harming/killing you, if they were interested in killing they were supposed to do so in prison because there was noone [sic] to stop them and the charges against you are not clear. You failed to state the dirt things [sic] that were done by officers. You failed to demonstrate that you were subjected to persecution and there is nothing to suggest that you were targeted [there are no series of events directed to you]. Although you claim you were a journalist and you seem not having a clue of journalism. There is reasonable threat in your life [sic] and you are not in need of protection and DRC's government can grant you [sic]'

The claimant's reference to the fact that she was raped in front of her husband and family is ignored completely by the RSDO. The RSDO, in stating that the claimant 'failed to demonstrate that you were subjected to persecution', is effectively negating the fact that rape constitutes persecution, which is patently incorrect in law.

An example of a situation in which the issue of rape was treated with a callous and dismissive attitude is as follows:

> Claimant X lived in Goma of North Kivu Province, with her mother and father. One night, at around 1am, six attackers wearing military uniforms and hoods entered her home by force. She was in her bedroom at the time and heard the men then shoot at the doorin order to enter the house. She heard her mother cry out as she was dragged to the living room and heard the men instruct her to remove her clothes as they argued over who would have her first. A soldier came to her bedroom and pulled her to the living room, and he told me to lie down and watch "what father had enjoyed". She was then taken outside by one of the soldiers who said that he was going to take her as his woman. He took her to a building where there were many other soldiers and women where the men marked their knees with a needles and a stone to show to whom they "belonged". She was kept there for three years where she was repeatedly raped, at first by the man who brought her there and then the soldiers began changing them among them. She also became pregnant three times and miscarried all three times. Eventually, she managed to escape when one day when she was sent out to fetch firewood.

Under the heading of 'Reason for Decision', the RSDO stated as follows:

> '… from the information you presented to the RSDO, it is not possible that the rebels could rape your mother in front of you and allow you to watch and do nothing to you and also allow you to just leave, rebels are people with more violence [sic] using force with matters [sic] therefore, your claim is unfounded and you failed to come up with reasons that justify that you must be recognized as a refugee and therefore your application for refugee status has been unfounded in terms of section 24(3)(c) of the Refugees Act no 130 of 1998.'

This is a clear example of the callous handling of the topic of rape and a lack of knowledge of the law. This claimant clearly falls into the category of section 3(a) of the Refugees Act in light of the persecution in the form of rape that she experienced based on her membership of the particular social group of women during a period of unrest. The RSDO gave no objective qualification as to why it would not be possible for soldiers to rape her mother in front of her and 'do nothing' to her. This statement was simultaneously highly insensitive and purely speculative. Furthermore, the soldiers did not in fact 'do nothing to her', as the RSDO stated. To be abducted by soldiers and kept as a sex-slave can hardly be said to constitute 'nothing'.

The lack of sensitivity on the part of RSDOs is a serious cause for concern. It puts claimants through undue stress and, most significantly, it results in incorrect rejections of claims for refugee status for women who have suffered enormously.

LRC has found that, since the introduction of the Refugees Act 130 of 1998, female asylum seekers seeking asylum on the grounds of having fallen victim to sexual violence were not automatically allocated the assistance of female RSDOs and interpreters. In addition, the decisions rejecting many female asylum seekers applying for asylum on these grounds demonstrated a lack of sensitivity on the part of RSDOs.

To the LRC's knowledge, no special training had been provided to officers for the purpose of interviewing women regarding sensitive or painful experiences. As a result of LRC's concern about the handling of decisions regarding female asylum seekers who have fled conflict-ridden countries, the organisation wrote to the Minister of Home Affairs to appeal to the Department to take measures to ensure that female interviewers and interpreters would be automatically provided for women applicants.

LRC emphasised that the failure to ensure that female interviewers are allocated to female applicants constitutes a denial of the fundamental rights of female asylum seekers, particularly in light of the fact that the claims of the majority of female asylum seekers in South Africa are based on rape as a weapon of war and other forms of gender-based persecution. Furthermore, UNHCR guidelines expressly require that women should be interviewed by female officials.

Guidelines on International Protection No. 1 consist of a set of Guidelines that pertain specifically to Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention/its 1967 Protocol Relating to the Status Of Refugees. These Guidelines complement the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva, January 1992). Such Guidelines are intended to, 'provide legal interpretive guidance for governments, legal practitioners, decision-makers and the judiciary'. Part III of the Guidelines on Gender-Related Persecution expressly states at Paragraph 35 that:

> 'Persons raising gender-related refugee claims, and survivors of torture or trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or communities.'

There have been a number of cases encountered by the LRC in which asylum seekers have been too ashamed to recount their ordeal to male officials. This is why it is of vital importance that female asylum seekers are interviewed by female interviewers.

The Guidelines go on to make recommendations of specific measures to be implemented to ensure that the gender-related claims of women are properly considered in the refugee status determination process. These include that women asylum seekers should be interviewed separately, without the presence of male family members, and that same-sex interviewers and interpreters should be provided automatically for women claimants.

However, it has been noted that some decisions by female RSDOs have also trivialised the issue of rape. Therefore, it is essential that proper training on the handling of clients who have suffered sexual violence is provided to female RSDOs to ensure that such claims are handled with the requisite sensitivity.

In addition to the highly insensitive approach to female asylum seekers, accurate contextual country information is not evident in RSDO decisions.

(c) *The failure to ascertain country information and consider claims in context*

In addition to the highly insensitive approach to female asylum seekers who have experienced sexual violence, accurate contextual country information is not evident in RSDO decisions. The UNHCR Guidelines expressly emphasise the importance of considering claims in context. Paragraph 42 of the UNHRC Handbook provides that:

> 'the Applicant's statements cannot… be considered in the abstract and must be viewed in the context of the relevant background situation. Knowledge of the conditions in the Applicant's country of origin – while not a primary objective – is an important element is assessing the Applicant's credibility.'

This clearly demonstrates that claims for refugee status under section 3(a) must be considered in context.

The Guidelines on Gender-Based Persecution also state that:

> 'Country of origin information should be collected that has relevance in women's claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status.'[7]

Based on the clients who have approached us for assistance, the RSDOs have not ascertained country information relevant to women's claims. Frequently, the rejections are bare and contain no country information whatsoever.

In order to demonstrate the impact that a failure to examine country information can have on a decision, it is helpful to briefly examine the country information of the DRC and Somalia in so far as the incidences of rape and sexual violence during conflict periods are concerned. These are two countries from which South Africa receives the highest volume of asylum seekers.

LRC has gathered a considerable volume of information regarding the employment of rape as a weapon of war

7 Para 36(x)

through its experience in compiling appeal affidavits for clients. News articles and reports demonstrate that sexual violence perpetrated against women by soldiers (both rebel and government forces) continue to be rife in DRC.

A UNHCR article, published in 2011, entitled, '48 women raped every hour in Congo, new study shows, far surpassing previous estimates'[8] refers to DRC as the, 'worst place on earth to be a woman' and states:

> 'Congo, a nation of 70 million people that is equal in size to Western Europe, has been plagued by decades of war. Its vast forests are rife with militias that have systematically used rape to destroy communities… The highest frequency of rape was found in North Kivu, the province most affected by the conflict, where 67 women per 1,000 had been raped at least once.'

This supports the submission that women of conflict areas qualify as a particular social group subject to persecution. A number of asylum seekers in South Africa have fled North Kivu province which, as described, is the area with the highest frequency of rape.

Support for the submission that women are particularly vulnerable during times of conflict is also found in a news story from UNHCR entitled, 'UNHCR statistics show alarming rise in rape and violence against women in North Kivu'[9] from 30 July 2013:

> 'The UN refugee agency warned on Tuesday that recurrent conflict in the Democratic Republic of the Congo's North Kivu province is uprooting more civilians and exposing an increasing number of women, girls and men to rape.
>
> Statistics gathered by UNHCR in North Kivu point to an alarming rise this year in acts of violence against women and girls in the province, particularly rape.'

Further support for this submission is found in the 2014 Human Rights Watch *Country Summary for the Democratic Republic of Congo*[10] which states the following:

> 'Armed conflict continued in eastern Democratic Republic of Congo, with Congolese security forces and non-state armed groups responsible for serious abuses against civilians. The Rwandan-backed M23 armed group committed widespread war crimes, including summary executions, rapes, and forced recruitment of children.'

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8 This article can be accessed at *http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&date=2011-05-12&cat=Africa.*

9 This news article is available at *http://www.unhcr.org/print/51f7ae846.html*

10 This report is available at *http://www.hrw.org/world-report/2014/country-chapters/democratic-republic-congo*

The Report states that women have been subject to rape and abuse at the hands of both Security Forces, as well as rebels.

The European Commission also produced a *Fact-Sheet on the Democratic Republic of Congo* published in February 2014[11] in which it states, inter alia, that:

> 'The chronic and complex humanitarian crisis in the Democratic Republic of Congo (DRC) persists. At least 40 armed groups continue to commit human rights abuses in the eastern provinces of the country… Abuses of power and violence, including looting, rape, abductions and forced recruitment of children by armed groups and the Congolese army continue to be a major concern… The lack of protection for civilian populations is the overarching problem in all conflict-affected areas…'

The 2013 Amnesty International Country Report[12] (Annexure 4 attached) states as follows, under the heading 'Violence against women and girls':

> 'Women and girls bore the horrific cost of intensified hostilities and were widely subjected to rape and other forms of sexual violence committed by the FARDC [the Armed Forces of the Democratic Republic of the Congo] and armed groups… Sexual violence was more pervasive where the national army lived alongside the population… Elsewhere in the country, members of the national police and other security forces continued to commit acts of rape and sexual violence'

The fact that the police and national security forces are themselves frequently the perpetrators of rape and sexual violence demonstrates the reality that victims of rape and sexual violence are unable to find protection in the DRC.

Country information on Somalia gathered by the LRC demonstrates that women have been the main victims of violence in conflict-ridden areas for more than two decades.

According to the Human Rights Watch *2015 World Report,*[13] sexual violence in Somalia continues to be a pervasive problem. The report states the following:

> 'While the full scope of sexual violence in Somalia remains unknown due to underreporting and absence of data, it is clear that internally displaced women and girls are particularly vulnerable to rape by armed men, including Somali government soldiers and militia members. Government forces and allied militia have also taken advantage of insecurity in newly recovered towns to rape local women and girls.'

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11 This report is available at *http://ec.europa.eu/echo/files/aid/countries/factsheets/drc_en.pdf*

12 *http://www.amnesty.org/en/region/democratic-republic-congo/report-2013*

13 This report is available at *https://www.hrw.org/world-report/2015/country-chapters/somalia*

Due to a lack of measures for accountability, women also face sexual violence from individuals on purported peace-keeping missions in the country. The Human Rights Watch report goes on to state:

> 'Some soldiers from Uganda and Burundi deployed as part of the African Union Mission in Somalia sexually exploited and assaulted women and girls on their bases in Mogadishu. In some cases, women and girls were offered humanitarian assistance, medicine, and food in exchange for sex. Few women filed complaints due to a fear of reprisals and an absence of effective and safe complaints mechanisms.'

A Human Rights Watch report entitled, *The Power These Men Have Over Us – Sexual Exploitation by African Union Forces in Somalia*[14] provides further details on this issue.

The United Nations Office of the Special Representative of the Secretary-General for Sexual Violence in Conflict has stated as follows in a report issued on 23 March 2015:

> 'Sexual violence remains widespread across Somalia, notably in the south central regions, with increases in frequency consistently observed during military offensives, particularly at checkpoints. According to the Gender-Based Violence Information Management System, 2,891 incidents of gender-based violence were reported between January and August 2014 in Mogadishu alone. Of these, 28 per cent were cases of rape and 9 per cent were sexual assaults. These numbers are regarded as a gross underestimation, as fear of stigma and reprisals inhibits reporting.'

The country information on both of these countries (current at the time of writing) lends support to the fact that the fear of future sexual abuse, on the part of victims who have fled sexual abuse in conflict areas, is well-founded and that there is an objective basis for the fact that a claimant's physical freedom would be at risk should they be forced to return.

Another relevant issue is that, frequently, due to the practical realities of the refugee status determination system, women only have their 'second interviews' anywhere between one and five years after their initial application for asylum. RSDOs reject individuals on the basis that, while they recognise that such claimants have experienced 'past persecution', there is no future risk of persecution to justify the claimant's well-founded fear. This is a further reason that it is problematic that RSDOs fail to ascertain country information that is specifically relevant to the situation of women in conflict zones.

The sources detailed above demonstrate that persecution of the same nature that claimants experienced when they fled from their country of origin, in many cases, continues to persist. This further emphasises the necessity of the ascertainment of current country information on the part of RSDOs.

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14 Available at: *https://www.hrw.org/report/2014/09/08/power-these-men-have-over-us/sexual-exploitation-and-abuse-african-union-forces.*

(d) *RSDOs frequently inappropriately reject such claims by the erroneous reliance on the Internal Flight Alternative.*

Although it is not referred to expressly, a ground for rejection often employed by RSDOs is that of the Internal Flight Alternative (IFA). RSDOs often suggest that sexual violence takes place primarily in eastern DRC and that women are free to simply relocate to other areas of the DRC and find safety there.

An example of the application of this reasoning can be found in a decision in which a claimant from Ruthshuru stated that she fled due to the fact that there was conflict in the area and many people were being killed and sexually abused. In relation to this, the RSDO's decision was the following:

> 'You again made mentined [sic] that there are women that are sexualy [sic] abused by the rebels and killed by the rebels however although you mentined that ebove [sic] however there is a newly paved road that is being constructed between Goma and Kisangeni and Katanga provided by the German Agro Aid group and in mid-2006 only 30 miles remained to be built. This means that the east of the country and the river Congo for the first time since the 1996-2002 civil conflict. moreover [sic] although there are practical difficulties in moving between areas under government control relocation [sic] by river or air is possible and is not unduly harsh. Those who are in fear of non-state agents in areas dominated by rebel forces are able to safely relocate to a different area to escape this threat.'

The substance of this decision is that anyone fearing death or sexual abuse at the hands of rebel forces can simply use the 'newly paved' road to move away from them and, therefore, their fear is unfounded This reasoning fails to take into account the expanded AU definition of a refugee, adopted under section 3(b) of South Africa's Refugees Act:

> '… owing to external aggression, occupation, foreign domination **or events seriously disturbing or disrupting public order** in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere' [Emphasis added]

It also fails to take into account the issue of sexual violence in conflict-ridden nations such as the DRC and Somalia as a whole. An analysis of country information shows that persecution in the form of rape is not limited to conflict areas alone. An article published on allAfrica.com on 2 June 2014 entitled, 'Congo-Kinshasa: Rape, Sexual Violence Targets Women Across the DRC':[15]

> 'Rape and other forms of sexual violence in the Democratic Republic of Congo (DRC) are not limited to the war zones in the eastern parts of the country - women detained miles away from conflict are suffering in similar ways to those in the east.'

15 Available at *http://allafrica.com/stories/201406020410.html.*

The article states further:

> 'Freedom from Torture's report is based on evidence from doctors' examinations of women raped and violated in the DRC who subsequently sought help from the charity, and asylum in the United Kingdom. Most of the women featured in the report were based in Kinshasa, far away from the conflict zones …'

This article serves to show that claimants in sexual violence refugee claims cannot simply be rejected on the basis that they can seek safety elsewhere in their country, without thorough research and analysis of current country information. The country information also needs to be focused on the precise issue of the frequency of rape in the DRC and other countries, both within and outside of conflict areas and periods.

The application of the IFA in these cases is, therefore, not appropriate.

(e) *The failure to consider the impact of trauma on an applicant's willingness to return to their home country in line with section 5(e) of the Refugees Act*

An additional provision in the Refugees Act that is relevant to status determinations in the case of women who have fled sexual violence in conflict areas, which is generally overlooked by RSDOs, is section 5(e) of the Refugees Act. Section 5(e) reads as follows:

> '(1) A person ceases to qualify for refugee status for the purposes of this Act if:
>
> (a) […]
>
> (b) […]
>
> (c) […]
>
> (d) […]
>
> (e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his nationality because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.
>
> (2) Subsection 1(e) does not apply to a refugee who is able to invoke compelling reasons **arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.'** [Emphasis added]

This provision was interpreted for the first time in South African jurisprudence in 2007 in the Transvaal Provincial Division of the High Court (as it was then called) in the matter of *Mayongo v Refugee Appeal Board and Others*.[16] This case turned on the issue of whether post-traumatic stress constitutes a compelling reason for an individual to refuse to avail him/herself of the protection of the government in his or her country of origin for the purposes of section 5(2) of the Refugees Act.

Significantly, in that case, the court found that the fact that the Refugee Appeal Board had refused the applicant refugee status did not render section 5 inapplicable to him in spite of the fact that the section uses the term 'refugee'. The court stated at paragraph 8:

> 'According to the UNHCR handbook a person is a refugee as soon as he/she fulfils the criteria contained in the definition. That takes place before he/she applies for refugee status. Recognition of refugee status does not make the person a refugee but only declares that he/she is one. "He does not become a refugee because of recognition, but is recognized because he is a refugee." I agree fully with that approach.'

Thus, the applicant in *Mayongo* was held to fall under section 5(e) despite the fact that he was still an asylum seeker in the technical sense. The case concerned a man from Angola who was forced to eat cooked parts of his father's body after his father was killed. The court in that case found that the applicant's post-traumatic stress caused by this experience in his home country constituted a compelling reason for him to be unwilling to avail himself of its protection. Based on this, the court substituted the decision of the Refugee Appeal Board with its own and ordered that the applicant be granted refugee status.

If one follows the Court's line of reasoning in this case, in relation to asylum seekers having fled their countries following brutal incidences of sexual violence, section 5(2) could be applicable and appropriate for such claimants. It can be argued that the trauma that impacts an individual after an incident of rape never truly leaves them. Rape Trauma Syndrome (RTS) is a recognised form of Post-Traumatic Stress Disorder and affects victims for many years. It is submitted that RSDOs should give due consideration to the application of section 5(e) of the Refugees Act when assessing the claims of victims of sexual abuse.

III POSSIBLE RECOMMENDATIONS AS TO HOW THESE ISSUES CAN BE REMEDIED

It seems the best possible solution to the issues raised, with regard to the quality of RSDO decisions with respect to women who have fled conflict zones, lies in ensuring that the individuals charged with the responsibility of making these decisions are adequately trained. Training is required in the following areas:

16 [2007] ZAGPHC 17, South Africa: High Court, 4 April 2007, available at: *http://www.refworld.org/docid/46c5b8af2.html [accessed 9 July 2014]*

a) It needs to be ensured that RSDOs have a thorough and detailed understanding of the body of refugee law and of the nature of rape as persecution so that valid claimants are not erroneously rejected.

b) RSDOs need to be given thorough sensitivity training on how to deal with claims relating to sexual violence. Female asylum seekers should automatically be allocated female RSDOs and interpreters.

c) RSDOs must have good research skills and it must be ensured that current and *relevant* country information is ascertained in all claims, both those under section 3(a) and section 3(b) of the Act. In this regard, as South Africa's refugee legislation has been in force for a shorter period than many other countries, it is beneficial to look to other jurisdictions. The Department of Home Affairs offices in Canada, the United Kingdom, the United States of America and Australia all have open access country information pages on their websites, which are regularly updated. The implementation of a similar system in South Africa would greatly assist RSDOs in producing more adequately substantiated decisions.

IV CONCLUSION

This chapter has demonstrated that the handling of the asylum claims of individuals who have fled areas of conflict and who are victims of sexual violence is alarming. Amit in *All Roads Lead to Rejection* states that the problems with refugee status determination in South Africa point to, 'inherent weaknesses in the system', but that, 'it may also be the case that these apparent weaknesses are deliberate strategies that serve a fundamental anti-asylum seeker bias' (should be referenced) within the Department of Home Affairs. LRC is of the view that these problems arise from a combination of capacity-related weaknesses, as well as the 'deliberate strategies' Amit alludes to above. Whatever the cause, it is essential that the Department of Home Affairs addresses these issues. At present, the system at fails to ensure that the rights of vulnerable women who have fled conflict zones are protected in line with South Africa's Constitution and its obligations in terms of the United Nations Convention Relating to the Status of Refugees.

CHAPTER 5

RESISTING THE TRADITIONAL COURTS BILL

WILMIEN WICOMB

I INTRODUCTION

One of the most radical but lesser known innovations of the South African Constitution was the recognition of customary law as an independent system of law equal to the common law. Some recognition of customary law has been a feature of most African legal systems for decades; in fact, selective recognition of customary law rules, often officially distorted for convenience, was a feature of colonial projects of indirect rule. The Constitution rejects that approach. It rejects a notion of customary law as a peculiar set of rules applicable only within the boundaries of traditional communities. Instead, it recognises that it is a system of law with its own operational rules and insists that it be understood within its own context. Wherever it is applicable, it must be applied *subject to the Constitution*.

With that recognition, the Constitution took a significant step in eradicating racial discrimination, which was at the root of the historical rejection of customary law as a lesser form of law. At the same time, a progressive approach would ensure that the discriminatory and harmful aspects of customary law be developed, as these are brought under the same constitutional scrutiny as the other sources of South African law rather than being hidden from view.

Regrettably, the progressive approach to customary law of the Constitution and the Constitutional Court has not resonated with the legislature. Apparently under some political pressure to appease the increasingly significant constituency of traditional leaders, the statutory regulation of customary law has remained a top-down affair, with the recognition, status and powers of traditional leaders being virtually the exclusive focus.

There are many problems with this approach. It has ensured that traditional leaders remain accountable to government, who pays them, rather than to the communities they purport to serve. Contrary to actual customary systems of governance, it centralises power in the hands of a single leader and, as we shall see, attempts to place legislative, judicial and executive power in those same hands. Perhaps most significantly, it turns customary law into the law of the chief rather than the law of the people – with significant impacts for women.

The outcome is the entrenchment of crude forms of discrimination against the people of the former homelands: some pay forms of taxes to their chiefs for basic citizenship rights such as proof of identity and of residency, which other

South Africans don't. Others are often refused the right to lay charges with the police for crimes committed against them – crimes that may include rape.[1] Almost all these communities are routinely denied the right to access the formal courts, as they are considered to have no standing outside the representation of their (often imposed) traditional leader. This is made worse by the fact that the former homelands continue to be the poorest and most deprived areas of South Africa, with women disproportionately impacted.

The Constitutional Court has repeatedly confirmed its understanding of customary law as a living, evolving system. In fact, it has distinguished between the history and the practice of customary law: there is the law that the elders remember and there is the law as the community (and not its leaders) practises today. Both help the Court in understanding the content of the law.

Most interesting is the evidence that has emerged in the last decade of how women in traditional communities use the new language of the Constitution, notably concepts such as 'equality' and 'women's rights', to develop the often deeply patriarchal systems in line with the new South African rights' landscape. A survey in three former homeland areas in South Africa by the Community Agency for Social Enquiry, released in 2011, indicated that unmarried women were gaining increasing access to land despite no relevant legislation being in place. These women were negotiating better deals for themselves through the empowering discourse of women's rights and the Constitution. As a result, new rules and new rights emerged. This happened in the case of Ms Shilubana, whose community decided to develop their customary law to allow a woman to become their chief – a development later confirmed by the Constitutional Court.

The problem is that legislation that entrenches top-down power fails to provide the necessary room and recognition for law to be developed by the community practising it.

II THE TRADITIONAL COURTS BILL

The Traditional Courts Bill (TCB) was first introduced in the South African Parliament in April 2008. It followed the introduction of two other pieces of legislation[2] that seemed relatively benign at first, but turned out to have devastating impacts on communities living under the jurisdiction of traditional leaders.

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1 The Chief would insist on dealing with the matter himself.

2 The first piece of legislation, the Traditional Leadership and Governance Framework Act, introduced in 2003, gave every indication that Parliament sought to protect the power of traditional leaders, rather than the people they are meant to serve and represent. The Act entrenched the distorted and illegitimate boundaries of so-called 'tribal authorities' (created by the colonial and apartheid governments) to facilitate separate development and ensured that these leaders would be accountable to government rather than to their people. Few communities or activists realised exactly how dangerous the Act was when it was first passed.

In 2005, the second piece of legislation – the Communal Land Rights Act (CLRA) – sailed through Parliament despite severe opposition from rural people. By that stage, the trajectory of rural democracy under the new Constitution was clear: power and decision making was centred in the hands of traditional leaders who could barely be held accountable by their 'subjects'. The CLRA, which formalised the transferral of control over land to traditional leaders, was challenged by four communities and declared unconstitutional in 2010.

Accordingly, when the TCB arrived in Parliament in 2008, communities were far more aware of the dangers of seemingly 'toothless' regulatory legislation. The TCB allowed for traditional leaders to have their powers further extended to make, administer and dispense with the law within their communities, and it caused such an uproar that it was quickly withdrawn.

In 2011, an identical TCB was reintroduced. What made it so offensive?

For one, it provided that anyone who refused to appear at the chief's court when summoned was guilty of a criminal offence. Given that thousands of South Africans find themselves within the boundaries of jurisdiction of traditional leaders they do not recognise – but who assert their authority over them anyway – this provision has obvious problems.[3]

The TCB further allowed for forced labour to be meted out as a sanction and, worse still, for 'customary entitlements' – which would include rights in land – to be taken away by the presiding officer. Given that the TCB envisioned very limited opportunities to appeal, this would give abusive traditional leaders carte blanche to deal with dissenting voices as they wished.

These fears were far from hypothetical: in some communities where traditional courts operate, these are used to mete out interdicts stopping people from meeting without the consent of an leader or paying excessive fines for 'crimes' such as 'disrespecting the chief'. It thus came as no surprise that the few rural communities who came to know of the TCB rejected it outright. In addition, some constitutional lawyers and activists bemoaned the fact that the TCB made no attempt to reflect the law as it was practised on the ground, i.e, bolstered by strong accountability mechanisms that are customary and bottom-up (rather than exclusively top-down, as set out in the TCB). Traditional leaders, on the other hand, made no secret of their reasons for supporting the TCB: without this law, they argued, they had no power over their communities and thus could not perform their 'functions'.

But perhaps the loudest resistance came from women's groups. In particular, they voiced their deep concern with the TBC's lukewarm response to the very real discrimination against women in many existing traditional courts. From across

3 This provision should be understood in the context of traditional leadership in South Africa. Here, as in many other African countries, colonial legislation and the later apartheid project of forced segregation distorted customary governance systems into key building blocks of a system of indirect rule. Rural people became the subjects of traditional leaders no longer accountable to them in terms of customary law, but accountable to the government. Traditional leaders who sought to give a voice to the resistance of rural people against forced removals and draconian laws were pushed aside in favour of incumbents who were willing to abide by government policies for the sake of a salary and, at times, a piece of land. In addition, those very forced removals ensured that tens of thousands of people were moved onto land under the jurisdiction of a leader who they did not recognise and forced into a 'tribe' where they did not belong.

In order to supress the obvious opposition that emanated from these measures and to replace the systems of accountability that constrained traditional leadership powers under customary law, the apartheid government introduced, in 1951, the Bantu Authorities Act. The legislation solidified government-drawn boundaries in the spirit of ethnic division of the time. It clothed traditional leaders with the untouchable status of government officials and afforded governmental powers to those leaders to make and dispense justice within their now official boundaries. Whereas customary governance systems were based principally on the ability of people to move between chiefs – as a means of holding them to account – these legislated boundaries.

the country, women from traditional communities attended Parliament to tell MPs that they are not allowed to enter the traditional court, even when they are the ones on trial. One brave woman from KwaZulu-Natal raised her hand to show the MPs where her traditional leader had bitten off her finger in anger over her rejection of his advances. The Rural Women's Movement described how women in mourning dress were not allowed near the courts. Often, they said, this resulted in women being evicted from their houses. In addition, as courts are most often presided over by male councillors, this meant that the court favoured men, regarded it inappropriate for women to get involved in family disputes, and found those who do to be unruly. From Limpopo, women related the trauma caused by rumours of witchcraft and the frustration at not being allowed to defend oneself against these claims.

It was difficult to understand how these stories could emanate from a constitutional democracy that prides itself on its founding principles of equality and freedom. More worrying was the TCB's response to these realities: it proclaims, on the one hand, that women must be afforded 'full and equal participation' in the proceedings (s9(2)(i)), but on the other, that a, 'party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom' (s (3)(b), thereby ensuring that women in particularly patriarchal communities will continue to be represented by men.

(a) *Resistance campaign*

It quickly became clear that the TCB was introduced in 2011 with every intention of getting it passed in Parliament at all costs. Stopping the TCB would thus not merely be a matter of ensuring the rejection of the TCB at public hearings in Parliament – it would require an attack on multiple fronts. The problem was that the women and men most deeply affected by the TCB lived in the provinces farthest away from Parliament, in inaccessible areas where communication (other than text messaging) was near impossible. In addition, the TCB did not offer the threat of clear-cut abuses around which communities and organisations across a spectrum could easily unite; rather the real problem with the TCB was its position within the existing legislative framework and the implications of many of the provisions read together with existing legislation. In the same way, the formalistic 'protections' for women that the TCB did provide, meant nothing in the context of deeply entrenched patriarchy. Within this context, a thoughtful and coordinated strategy was required.

A handful of the organisations most active in this field[4] decided to form the Alliance for Rural Democracy (the Alliance) for this purpose. The Legal Resources Centre (LRC) became the legal representative to the Alliance. The objective of mobilising the Alliance was to provide a vehicle for many more organisations to support the struggle, even those that did not work on rural governance issues directly. It also meant that the Alliance could design a multipronged strategy to resist the passing of the TCB by drawing on the strengths of different organisations and delegating tasks accordingly.

4 Coordinated by the Centre for Law and Society at the University of Cape Town.

A question emerged early on: should the focus be on the TCB as a narrow issue or on the broader struggle for rural democracy and entrenched patriarchy? After broad discussions, the Alliance decided that it was better to pick a battle that could possibly be won – thus, the campaign focused only on the passing of the TCB.

The struggle emerged on multiple fronts: some member organisations, in particular community-based organisations (CBOs), raised awareness in communities across all the provinces about the TCB and its problems, mobilising them to make comments to Parliament and encouraging them to attend hearings. Endless workshops were held where more experienced organisations trained those entering the Parliamentary fray for the first time. Information went out through text messages, on community radio stations and, where appropriate, through email chains.

Others ensured that multiple opinion pieces and articles appeared in various newspapers, and inserts were aired on radio and television as often as possible, in particular every time the TCB was discussed in Parliament. The strategy was to elevate a discussion about rural people – in many ways completely marginalised from the mainstream media – to the public discourse. The challenge was to find ways to communicate the nuanced and complex difficulties of the TCB and its potential impact on rural women in ways that would appeal to listeners and readers unfamiliar with the legislation and rural realities. For this purpose, the campaign mixed academic and activist pieces with human interest stories. For example, it profiled stories of women who had faced discrimination and traumatic experiences at the hands of chiefs and traditional courts, and who were now afraid of the TCB's potential to further enhance the chiefs' powers. In the process, traditional courts became the hot topic of the day.

(b) *Harnessing the law*

The South African Constitution provides that legislation that has impacts on certain issues, including customary law, must be passed by Houses of Parliament. Both houses, and their committees responsible for debating the TCB, have independent mandates of public participation. As the lawyers to the Alliance, the LRC focused on ensuring that Parliament took its mandate in this regard seriously – and would not get away with simply 'ticking the box' by only holding meaningless public hearings. The LRC studied the rules of Parliament and all applicable legislation in intricate detail and wrote on a regular basis to whichever committee was seized with the TCB at any given time, reminding the committee members of their responsibilities and, in particular, pointing out to what extent their public participation procedure was inadequate. All the while, the Alliance dangled the threat of litigation if the process of public participation failed to pass constitutional muster.

(c) *Outcomes*

The pressure from non-governmental organisations, CBOs and communities had a remarkable effect. The Select Committee of the National Council of Provinces tasked with considering the TCB, held round after round of public hearings, apparently unable to choose between rejecting the TCB and risking the political consequences, or pushing it through and facing the wrath of rural communities. In February 2014, the committee seized with the TCB at the time held a meeting to consider

the views of the various provinces on the TCB. The LRC prepared and circulated a document reflecting the widely opposing views of the provinces expressed before the meeting, indicating that the Committee could never pass the TCB and pass constitutional muster.

The meeting all but descended into chaos, with various members expressing disbelief at the fact that the TCB was still in Parliament. Two quoted directly from the document we provided to support their case. Most remarkable was the fact that the objecting members represented all the political parties – including the ruling party. It was the first time since 1994 that the ruling party had turned on itself.

After an abrupt end to proceedings, a quiet announcement followed some days later: due to an apparent 'oversight', the TCB had not been correctly reintroduced and had thus lapsed on the basis of a technical knock-out. While this outcome denied rural communities the opportunity of a public celebration, it could do little to erase what was an exceptional victory for democracy.

In an address to the University of the Western Cape soon thereafter, former Constitutional Court Judge Albie Sachs cited the victory over the TCB as one of the most significant post-constitutional indications that the South African democracy is indeed alive and well.

A key moment in the Alliance's campaign came when the Minister of Women, Children and People with Disabilities (whose political career seemed in jeopardy) decided to strongly oppose the TCB as an election strategy. It was proof that the issue had taken on a significant public interest dimension and that the Alliance had won a significant political battle of elevating the marginalised rural poor to the front of the political contestation over votes.

At the same time, the LRC, as the legal representative of the Alliance, insisted on keeping the Parliamentary debate within the confines of the law – regardless of the political storm brewing. This served two purposes: it ensured that, whatever the outcome of the activism, there would always be a constitutional challenge as a backup plan and, secondly, it provided the relevant politicians with an alternative if they had to save their reputations – they could 'blame' the law, rather than public pressure, for having to change their minds.

CHAPTER 6

THE PRACTICE OF UKUTHWALA IN *JEZILE V THE STATE*

MANDIVAVARIRA MUDARIKWA

1 FACTS OF *JEZILE V THE STATE*[1]

Between December 2009 and January 2010, Jezile, who was 28 years old at the time, travelled to his rural home village in the Eastern Cape with the intention of finding a girl or young woman to marry according to his custom.[2] From the evidence presented in court, his requirements for the girl or young woman were that she should be younger than eighteen years old because most girls over that age would likely have children. Jezile also wanted a virgin, ideally sixteen years old.[3] It was during this time that Jezile noticed the complainant, who was fourteen years old, and deemed her suitable to be his wife. She lived with her grandmother and had just enrolled in Grade 7.[4]

Jezile and the complainant had neither spoken nor been introduced to each other. Jezile noticed the complainant when she was sent by her uncle to fetch a cigarette from a house where he was visiting at the time.[5] On the same day that Jezile noticed the fourteen-year-old complainant, he instructed his family to start *lobolo* negotiations with her family. From the evidence before the court, these negotiations were concluded on the same day.[6]

The next morning, the complainant got ready for school, but before she could leave she was called to a meeting of male members of the two families and she was informed by a man unknown to her that she was now married to Jezile. Her resistance to the marriage was ignored by these men and her uncle instructed her to remove her uniform. Afterwards

1 (WCC) (unreported case no 127/2014, 23-3-2015).

2 Ibid para 5.

3 Ibid para 5.

4 Ibid para 6.

5 Ibid para 6.

6 Ibid para 7.

she was dragged to Jezile's village by force.[7] Upon arrival she was dressed in *amadaki* (specially designed attire for the new bride, or *makoti*, which was referred to in the trial as 'the makoti attire or clothing')[8] and expected to participate in traditional ceremonies to become Jezile's 'wife'.

Unhappy with the circumstances of her 'marriage', the complainant ran away and hid in a nearby forest. Once her mother, who worked in a nearby town, heard of her daughter's 'marriage', she instructed the complainant to hide at another house. She was, however, found and immediately returned to Jezile's home by the male members of her family.[9] Immediately after this, with the permission of male members of her family, the complainant was taken to Cape Town by Jezile. In Cape Town, both of them stayed with Jezile's brother and his wife, where the complainant was expected to stay at home to attend to the chores while everyone else went to work.[10]

Sexual intercourse between Jezile and the complainant took place on various occasions, with the complainant maintaining that it happened seven times, including one incident where the complainant was injured. Jezile denied this.[11] The complainant managed to flee from the home where she stayed with Jezile in Cape Town and immediately reported him to the police. The police took her to a doctor and Jezile was criminally charged.[12]

On 7 November 2013, Jezile was convicted by the Wynberg Regional Court of a single count of trafficking of the complainant for sexual purposes in terms of section 71(1) of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007[13] (the Sexual Offences Act); three counts of rape of the complainant; a single count of assault GBH (grievous bodily harm); and a single count of common assault.[14] Following his conviction, Jezile appealed to the Western Cape High Court, arguing that the trial court:

> '…had misdirected itself in not proceeding from the premise that the merits should have been determined within the context of the practice of ukuthwala, or customary marriage. It was submitted that "consent"

7 Ibid para 7 and 8.

8 Ibid para 9.

9 Ibid para 10.

10 Ibid para 10.

11 Ibid para 11.

12 Ibid para 11.

13 At the time when this incident of trafficking occurred, the Prevention and Combating of Trafficking in Persons Act 7 of 2013 was not yet in force so Jezile was charged in terms of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007, which only came into effect on 9 August 2015 – see *https://www.greengazette.co.za/notices/prevention-and-combating-of-trafficking-in-persons-act-7-2013-commencement_20150807-GGR-39078-00032-01.pdf*, accessed 15 November 2015.

14 *Jezile* supra (note 1) Para 1.

within the practice of ukuthwala is a concept that must be determined in accordance with the rightful place which customary law has in our constitutional dispensation, because it is an integral part of ukuthwala that the "bride" may not only be coerced, but will invariably pretend to object (in various ways) since it is required, or at least expected, of her to do so.'[15]

II THE LEGAL RESOURCES CENTRE'S INVOLVEMENT IN THE CASE

The Legal Resources Centre (LRC) represented four *amici curiae*[16] because of the facts of the case and Jezile's defence, but also because the status of customary law and the practice of ukuthwala had to be pertinently addressed in the proceeding. The LRC made submissions to the court on the following issues:

- the practice of *ukuthwala* through the use of expert evidence given by Professor Nhlapo;
- the impact of *ukuthwala* on the rights of rural women and children as a vulnerable class of persons, which was submitted though affidavits from the LRC's clients and their women constituents' experiences of *ukuthwala*;
- the constitutionality of the practice of *ukuthwala,* including the possibility for developing the customary law in a manner that is consonant with the Constitution and, if developed in line with the Constitution, the extent to which *ukuthwala* can be a valid legal defence to the charges that Jezile faced;
- the validity of the customary marriage allegedly concluded between Jezile and the complainant; and
- the international and regional obligations of the state to protect women and children from harmful customary practices.

In its participation in this matter, the LRC, through the submission of evidence from women who had been *thwalad,* enabled the Court to decide the merits of the case within the context and ambit of women's and children's rights. As the defence advanced by Jezile related to a customary practice, the LRC also ensured that the Court adjudicating the Jezile matter was fully cognisant of the manner in which the content of customary law should be determined and adjudicated in South Africa as set in the *Shilubana* case.[17] Lastly, perhaps more importantly, the LRC assisted the Court to understand the key elements and nature of the practice of *ukuthwala* in order to enable the Court to pronounce on Jezile's defence.

15 Ibid para 52.

16 The Rural Women's Movement, Masimanyane Women's Support Centre (Eastern Cape), the Commission for Gender Equality and the CRL Commission (Commission for Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities).

17 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).

III FINDINGS OF THE COURT

The Court emphasised the constitutional context of the application and status of customary law as set out in section 211(3)[18] of the Constitution of the Republic of South Africa. The Court further emphasised that a child is a person below the age of eighteen,[19] every child has the right to be protected from maltreatment, neglect, abuse or degradation[20] and that a child's best interests are of paramount importance in all matters concerning the child.[21] The Court also made reference to applicable sections of the Children's Act[22] and other relevant legislation[23] and international obligations.[24]

The Court found that *ukuthwala* is an irregular method[25] for commencing negotiations between the families of the intended bride and bridegroom directed at the conclusion of a customary marriage. It is not a marriage in itself.[26] The Court heard that the 'normal' marriage started off with a proposal, which, if accepted, commenced *lobolo* negotiations that ultimately led to marriage, including traditional ceremonies.[27]

The Court was also informed of and accepted that some of the essential elements of the traditional conception of *ukuthwala* are as follows:

- both parties must be of marriageable age (which was considered to be child-bearing age in customary law);
- both parties must consent to initiate their nuptials through the use of the practice of *ukuthwala* (it was noted

18 Section 211(3) states that: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

19 Section 28(3) of the Constitution of the Republic of South Africa.

20 28(1)(d) of the Constitution of the Republic of South Africa.

21 Section 28(2) of the Constitution of the Republic of South Africa.

22 28 of 2005. Jezile supra note 1 para 62. The Court also made reference to the Recognition of Customary Marriages Act.

23 Ibid from para 63 to where Court made reference to the Sexual Offences Act, Recognition of Customary Marriages Act 120 of 1998, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

24 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), The UN Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime ('Trafficking Protocol'), The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Convention on the Rights of the Child, The African Charter on the Rights and Welfare of the Child (ACRWC).

25 Examples of cases where an irregular method for marriage followed were set out by Professor Nhalpo in *Jezile* supra note 1 para 72.

26 *Jezile* supra note 1 para 72 where the Court made reference to the expert evidence of Professor Nhlapo, which was submitted by the LRC.

27 Ibid para 73.

that there are instances where a woman is taken unaware, and acquiescence in the process only occurs after the fact. If, however, the woman does not agree, the process fails and her father could institute a civil action against the man's guardian)[28];

- as part of the *thwala* process, the intending bride and groom would arrange a mock abduction of the bride at dusk and she would put up a show of resistance in order to preserve her modesty, but she would be aware of and have agreed to the abduction beforehand;
- once abducted, the intending bride would be placed in the safe custody of the women in the man's homestead in order to preserve her reputation. It was at this point that the intending groom's father would be informed of the presence of a woman in his house, who his son intended to marry;
- sexual intercourse was strictly prohibited during this time; and
- the intending groom's family then sent an invitation to the woman's village, either on the day of the mock abduction or the following morning, to inform her family that she was with his family, which was a sign that they intended to commence negotiations for marriage.[29]

The Court also accepted that, as *ukuthwala* is a portal to a customary marriage, the validity is determined by the requirements set out in the Recognition of Customary Marriages Act (RCMA).[30] The RCMA mandates that all parties intending to marry in terms of customary law must be eighteen years or older, must both consent to the marriage[31] and must celebrate the marriage according to custom.[32]

The Court also noted the two contrasting ways in which *ukuthwala* has been practiced. On the one hand, there is a traditional conception of *ukuthwala* that requires consent of both parties wishing to enter into a marriage, and on the other hand, there is what was referred to as an aberration of the traditional concept.[33] The Court heard and accepted that, in this case, Jezile had misapplied the customary practice of *ukuthwala* given the age of the complainant, her lack of consent to the 'marriage', the abduction process and, more importantly, the fact that *lobolo* was negotiated and paid before the *ukuthwala* occurred.[34]

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28 Ibid para 72.

29 Ibid.

30 120 of 1998.

31 The Court emphasised the finding of the Constitutional Court in para 74, 75 and 83 of *Mayelane v Ngwenyama and Another* (Women's Legal Centre Trust and Others as *amici curiae*) 2013 (8) BCLR 918 (CC), which found that consent of the parties is a requirement for validity of marriage.

32 Section 3 of the RCMA.

33 Ibid para 75–78.

34 Ibid para 75.

The Court heard and accepted that the abhorrent practice subjected women to violence and rape, and coerced them into forced marriages through violence; the *Jezile* case was just one example of the widespread nature of the misapplication of this custom. The Court found that Jezile's defence relied on the abhorrent version of *ukuthwala,* mistakenly supported by the belief that *ukuthwala* was a marriage.[35] The Court also rejected Jezile's claim that a woman would not expressly consent to abduction by a man but would simply pretend to resist the abduction, citing the use of the practice by two parties who had agreed to marry themselves.[36] Rather, the Court found that Jezile had not 'asserted any customary law precept to have justified his conduct, or that he had acted in the belief that he had entered into a customary marriage that permitted sexual coercion.'[37]

IV LESSONS FROM *JEZILE VS THE STATE*

- The marriage laws in South Africa, in both the RCMA and Marriages Act[38], that allow children under the age of eighteen to be married with their parents' consent can be argued as indirectly fuelling the rape, abduction, assault, trafficking and coercion of women into marriages in the name of custom. It is hoped that the responsible government departments will take steps to urgently amend these laws to not only ensure that children are not married off by their parents, but also to ensure compliance with a number of international and regional laws binding on South Africa.
- Given the evidence placed before Court specifically mentioning that the version of *ukuthwala* relied upon by Jezile and other similar abhorrent versions are practiced widely in South Africa, the law reform process being undertaken by the South African Law Reform Commission must be finalised as a matter of urgency. This will ensure that there is immediate and effective protection of women and children from harmful customary practices. The fragmented approach to regulating *ukuthwala* fails to appropriately capture the relationship between this practice and forced- and child marriages. It is imperative for this legislation to ensure that forced-, early- and child marriages are banned in South Africa, with accompanying criminal sanctions for those failing to comply with the legislation.
- The South African Police Services (SAPS) must be enlightened and empowered to deal with reported cases of customary practices. It is daunting to think of what would have happened to the complainant in the *Jezile* matter had the police refused to take her statement and take action.

35 Ibid para 85.

36 Ibid para 87.

37 Ibid para 92.

38 25 of 1961.

- It has been reported that, in some instances, the SAPS had not been willing to deal with such cases, claiming that customary issues were outside their jurisdiction.
- It is of paramount importance that the SAPS develop a standing operating procedure and/or a national instruction on how to deal with *ukuthwala* and other harmful customary practices. This will inform the nation that the police are co-ordinated and, hopefully, effective in handling any case of *ukuthwala*.
- An *ukthwala* and other harmful customary practices task force has been created in Bergville District. This may be necessary for all police stations in areas where women and children are abducted in the name of *ukuthwala*. There are various organisations and institutions (like Chapter 9 Institutions) that can inform the SAPS about the key areas where this should be done.

- Immediate steps must be taken to widely and nationally raise awareness about what the right to custom really entails for those who live in terms of custom. This is believed to be useful in ensuring that all who live in terms of custom not only understand their own rights, but also the rights of others in their communities, especially women and children. This would also have to focus on *ukuthwala,* as it has been widely reported as a harmful customary practice. South Africa has an obligation to eradicate harmful customary practices and protect women, which begins with an understanding of what it means for a person to have a right to live in terms of custom.
- The RCMA was intended to regulate customary marriages, but it is doubtful that it is widely understood and/or applied in customary marriages. It is fruitless for legislation to be enacted without informing the communities that directly benefit from the protection envisaged by the legislation.

V CONCLUSION

As the LRC, we hope that immediate steps are taken to address the current violent practice of *ukuthwala* that affects many women and children living in terms of custom. The *Jezile* case was just one example of how the practice of *ukuthwala* impacted on the complainant's life and wellbeing. For many girls who are *thwalad,* they do not have the opportunity to be separated from their abductors because their families will not welcome them back and they are unable to support themselves on their own. They have to live the rest of their lives with the same man who brutally and violently forced them into marriage, without any hope of being free from violence. Surely, as a country, we have to do better for our women and children?

CHAPTER 7

CONFIRMING THE VIRGINAL STATUS OF CHILDREN: THE IMPACT OF NON-COMPLIANCE WITH SECTION 12(3) TO 6 OF THE CHILDREN'S ACT

ZAMANTUNGWA KHUMALO

The Constitutional Court, as well as our Constitution, recognises customary law as a source of law. This is in line with the provisions in sections 30, 31[1] and 211(3)[2] of the Constitution,[3] which acknowledge customary law by recognising cultural and linguistic rights. In the *Richtersveld* case,[4] the Court stated that, while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of South African law. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law.[5] In doing so, the courts must have regard to the spirit, purport and objects of the Bill of Rights. The qualifier in the application of customary law is that the applicable custom must be in line with the values of the Constitution or any other relevant statutes.[6]

As it has played out in South Africa, virginity testing has caused much controversy and great debate. In 2004, Deputy President Jacob Zuma stated that,: 'virginity testing is a viable solution to curbing the spread of HIV/AIDS and

1 30. Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31. Cultural, religious and linguistic communities

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community

a. to enjoy their culture, practise their religion and use their language; and

b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

2 211(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

3 The Constitution of the Republic of South Africa (1996).

4 *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

5 Note 4 at para 51.

6 Note 3, Section 211(3).

teenage pregnancy,'[7] and that, 'girls knew that their virginity was their family's treasure.'[8] Those who are opposed to the practice argue that it is a violation of several rights, most significantly the rights guaranteed in Section 28 of the Constitution.

This chapter aims to analyse the nature and content of virginity testing and its impact on children, as well as the consequences of non-compliance with Section 12 of the Children's Act (the Act).

1 WHAT IS VIRGINITY TESTING?

Virginity testing is designed to affirm the virginal status of a girl or woman by determining whether her hymen is still intact.[9] The participants are between seven and 26 years old.[10] In some instances the participants are graded with an A, B or C grade. An 'A' grade indicates that the participant has not had any intercourse and she is further marked with a white dot on her forehead as an indication that she has passed. The 'B' grade indicates that the participant may have had intercourse once or twice or may have been sexually abused. A 'C' grade means that the participant has failed. She is marked with a red dot.[11] Those who fail the test are precluded from participating in festivals and face social isolation, honour killings, abuse, financial penalties, family shame and poor marriage prospects[12].

During the early parts of the twentieth century, virginity testing fell into disuse, due largely to the erosion of family structures through migrant labour, forced removals and Western influence. However, since the late 1980s, the practice has re-emerged, especially in KwaZulu-Natal. The practice in earlier times was usually private, as it was conducted by mothers or senior kinswomen within the family. Today, however, it has become a major public ritual in KwaZulu-Natal, and includes two festivals, namely *Nomkhubulwane* and *umKhose womhlanga*.[13]

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7 'Zuma takes a stand on virginity testing' Mail & Guardian 23 September 2004.

8 'SA leader urges virginity tests' BBC news 23 September 2004, available at *http://news.bbc.co.uk/2/hi/africa/3683210.stm,* accessed on 16 November 2015.

9 Taylor & Francis Group 'Virginity testing in South Africa: should it be banned?', available at *http://newsroom.taylorandfrancisgroup.com/news/press-release/virginity-testing-in-south-africa-should-it-be-banned#.VkmmLNIrIdU*, accessed on 16 November 2015.

10 TW Bennett, C Mills and G Munnick 'Virginity testing: A crime, a delict or a genuine cultural tradition?' (2010) TSAR 254.

11 Ibid page 255.

12 Ibid Note 9.

13 Ibid Note 10 at page 254.

II FOCUS ON CHILDREN

> 'There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace.' – Kofi Annan

In the *Teddy Bear Clinic* case,[14] the Constitutional Court stated that children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. In the same case, the Court recognised that a child is a person under the age of eighteen years. This is in line with Section 28 of the Constitution, as well as international law recommendations.[15] The Constitution goes further and provides that a child's best interests are of paramount importance in every matter concerning the child.[16] Given the steps taken by the Constitution to uphold children's rights, it has become imperative that legislation dealing with children protects their interests, as often they cannot speak for themselves.

To date, the question regarding the legality of virginity testing has not been brought before the Court. However, the Act[17] has regulated six cultural practices prominent in South Africa, including male circumcision, female genital mutilation and virginity testing.

Most significantly, Section 12 provides:

- Virginity testing of children under the age of sixteen is prohibited.
- Virginity testing of children older than sixteen may only be performed-
  a) if the child has given consent to the testing in the prescribed manner;
  b) after proper counselling of the child; and
  c) in the manner prescribed.
- The results of a virginity test may not be disclosed without the consent of the child.
- The body of a child who has undergone virginity testing may not be marked.

The Act standardises the consent provision by providing that the child and the person conducting the test must complete

14 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) (3 October 2013).

15 UN General Assembly, *Convention on the Rights of the Child,* 20 November 1989, United Nations, Treaty Series, vol. 1577.

16 Note 3, Section 28(2).

17 The Children's Act, 2005, Act No. 38 of 2005.

a prescribed form. In addition, the form should be accompanied by the child's proof of age. The section concludes that a Commissioner of Oaths must commission the form.[18]

Bennett submits that the set requirements attempt to enforce basic health and human rights standards that are openly ignored by traditional leaders and those responsible for the inspection procedure. He adds that, should the Sexual Offences Act[19] be enforced, the attitude of those conducting the tests may change due to the risk of them facing rape charges in light of the Act. The Criminal Law (Sexual Offences) Amendment Act defines rape as ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of ('B'). In addition, the definition provided in Section 3 of the Criminal Law Amendment Act could be interpreted to include virginity testing as rape in light of the above definition. The tester would be guilty of rape as the practice includes 'penetration'.

In addition, a child under twelve years of age is presumed to be incapable of giving consent and, if subjected to virginity testing, this would be synonymous with penetration without consent.[20]

The effect of the protections afforded by the Children's Act cannot be adequately assessed. Both Bennett and George[21] conclude that this is due to the non-compliance by the communities. George states that:

> '... legislative efforts to end harmful practices are seldom effective because the competing norms of a community and bonds of membership in a given "social-field" are often stronger than any law external to the community. It follows that the effective implementation of any human rights norm will depend less on lawmakers and more on the extent to which a community's leadership chooses to embrace a particular right.'

Without the participation and compliance by communities and the State, the protective measures put in place by the Act are futile.

III CUSTOMS, CULTURE AND CUSTOMARY LAW

The Constitutional Court in several judgments has given recognition to customary law and has emphasised that children have the right to freely participate in their culture. Those who argue in favour of the practice of virginity testing say that an

18 A child who is older than sixteen years of age and has a disability related to brain damage which renders the said child incapable of making a decision regarding virginity testing or a child with multiple disabilities who is not able to make such a decision, cannot be subjected to a virginity test.

19 Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 of 2007.

20 Note 19, Section 57.

(1) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

21 Erika R George 'Virginity testing and South Africa's HIV/AIDS Crisis: Beyond Rights, Universalism and Cultural Relativism Toward Health capabilities' (2008) *California Law Review* at 1464.

outright abolition of the practice would be a violation of the child's right to participate in cultural practices, as protected in sections 30 and 31 of the Constitution. Further, they state that children's rights are arbitrarily limited and that the limitation is tantamount to discrimination.[22]

In addition, the Constitution has recognised customary law as a source of law, the only qualifier being that the custom must be in line with the values and purport of the Constitution and any relevant statutes. Due to the recognition of customary law and cultural practices, those in favour would argue that virginity testing has to be recognised as a traditional practice. The practice has been recognised and regulated by the Children's Act.

(a) *Limitations and qualifiers*

The Constitutional Court in the *Pillay* case[23] had to determine whether the refusal to permit a pupil to wear a nose stud at school was an act of unfair discrimination and whether her religious rights were justifiably limited.

The Court used Section 14 of the Equality Act[24] to determine the unfairness in terms of Section 9 of the Constitution. Section 14 provides:

> (1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
>
> (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
>
> (a) The context;
>
> (b) the factors referred to in subsection (3); and
>
> (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria intrinsic to the activity concerned.
>
> (3) The factors referred to in subsection (2)(b) include the following:
>
> (a) Whether the discrimination impairs or is likely to impair human dignity;
>
> (b) the impact or likely impact of the discrimination on the complainant;

22 Children's Institute 'Virginity Testing and Children's Bill' Discussion Paper 11 October 2005.

23 *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

24 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-

  (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

  (ii) accommodate diversity.

In the context of accommodating religious beliefs in society, a unanimous Court in *Christian Education*[25] identified the underlying motivation of the concept as follows:

> 'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.'

When one reads the provisions collectively, it is apparent that there is an obligation on the State to allow people to openly participate in their religious and cultural practices. The Court in *Pillay* stated that this, 'ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms'. On the reasoning of *Pillay,* the participants in the practice should be allowed to participate in the practice freely and openly, as it is their customary practice.

25 *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000).

However, Section 36 and Section 211(3) of the Constitution provide the qualifiers. In the *Bhe* case[26] the Court stated:

> 'It is important to appreciate the distinction between the legal framework based on section 23 of the Act and the place occupied by customary law in our constitutional system. Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30 and 31of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a Court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, section 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.
>
> It is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution.'

Most significantly, the Court stated that:

> 'It should however not be inferred from the above that customary law can never change and that it cannot be amended or adjusted by legislation. In the first place, customary law is subject to the Constitution. Adjustments and development to bring its provisions in line with the Constitution or to accord with the "spirit, purport and objects of the Bill of Rights" are mandated. Secondly, the legislative authority of the Republic vests in Parliament. Thirdly, the Constitution envisages a role for national legislation in the operation, implementation and/or changes effected to customary law.'

Both sections 30 and 31 provide that the customary rights cannot be exercised in a manner inconsistent with the Bill of Rights. Therefore, although the participants can exercise their traditional practice this cannot be in contravention of the provisions protecting children and, by extension, the Children's Act.

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26 *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

IV STATE RESPONSIBILITY

In compliance with its obligation to report to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[27] committee, the Department of Women, Children and People with Disabilities (herein the Department) compiled a draft report[28] on the State's implementation of CEDAW recommendations of 2011.

During the review of South Africa's compliance with CEDAW, the recommendation from the CEDAW Committee pertaining to virginity testing in paragraph 22 states:

> 'The committee expresses its serious concern about a provision in the Children's Act of 2005 according to which virginity testing for girls above 16 years old is allowed if the girl has given her consent. The Committee is further concerned that the practice of virginity testing of girls as young as 3 years old is increasing in the State party without respecting girls physical and mental integrity and exposing them to increased risks of sexual abuse.'

The State was advised to amend the Act in as far as it allows virginity testing for girls irrespective of their age. The State was encouraged to design and implement effective education campaigns to combat traditional and family pressures in favour of the practice.

In its response, the State indicated that the traditional practices were protected by sections 30 and 31 of the Constitution. They also submitted that Section 9(3) and (4) of the Constitution prohibits unfair discrimination both directly and indirectly. The State went further and included an extract from the judgment in *Prince v President of the Law Society of the Cape of Good Hope*[29] in support of its argument.[30] The Court stated that:

> 'Our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our Constitution recognises this diversity. This is apparent in the recognition of the different languages; the prohibition of discrimination on the grounds of, amongst other things, religion, ethnic and social origin and the recognition of freedom of religion and worship. The protection of diversity is the hallmark of a free and open society.'

27 United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

28 Department of Women, Children and People with Disabilities *'Notice of Publication of the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) Report for Public Comment'*, Government Gazette No. 761 (28 August 2015).

29 *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002).

30 *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 para 49

The State submitted that it was important to protect cultural practices because they were not afforded any protection during colonial rule. The State added that cultural practices need to be interrogated in a constructive manner to the extent to which they conform to the Constitution. The State quoted Section 12 of the Children's Act, which prohibits social, cultural and religious practices which are detrimental to a child's wellbeing. The age requirements in section 12(4) and (5) were excluded.

The Legal Resources Centre made submissions to the Department. It was averred that the Department did not address the Committee's concern regarding the potential difficulty that a girl might experience in addressing her elders on the practice. The Department was further questioned on the steps it had taken to ensure that young girls could exercise their choice in undergoing testing. In addition, it was submitted that, should the girl not agree to submit to the test, she would suffer prejudice in her community.

The Department was cautioned on its argument in favour of cultural and traditional practices over the rights to dignity, bodily integrity and equality of a minor girl child.

The LRC emphasised that, should a challenge be brought against the provisions in the Act, quoted above, the provisions would be struck off in as far as they contradict the principles in Section 28 of the Constitution.

V CONCLUSION

Those who advocate for the practice promote a return to African tradition and a rejection of 'Western' or 'foreign' forms of knowledge. They are confident that virginity testing may provide a 'culturally appropriate' solution to the HIV/AIDS epidemic, reduce teenage pregnancy, and detect incest and sexual abuse.[31]

Though the motives of the advocates of the practice of virginity testing may be good, the Children's Act has solidified the procedure that needs to be followed for the customary practice to be in line with the values enshrined in the Bill of Rights. An absolute disregard of the provisions, as stated by Bennett, should result in criminal conviction under the Sexual Offence Amendment Act and the Children's Act. Should the provisions be challenged in the future, it is submitted that they would most likely be struck off. However, for now, compliance with the requirements is imperative and communities that fail to comply must be educated on the consequences of their omissions.

The State is also encouraged to take initiative and prosecute those who are not complying with the provisions.

31 Erika R George 'Virginity testing and South Africa's HIV/AIDS Crisis: Beyond Rights, Universalism and Cultural Relativism Toward Health capabilities' (2008) *California Law Review* at 1457.

CHAPTER 8

MAYELANE V NGWENYAMA ON THE IMPORTANCE OF CONSENT AND ITS APPLICATION TO ALL POLYGYNOUS MARRIAGES IN SOUTH AFRICA

MANDIVAVARIRA MUDARIKWA

Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent.[1]

I INTRODUCTION

On 30 May 2013, the Constitutional Court held that, if a man who is already married under Tsonga customary law decides to take another customary wife, he must get the consent of his first wife before doing so, in order to make sure the second marriage is valid. This was decided in *Mayelane v Ngwenyama and Another*[2], where the Legal Resources Centre (LRC) represented the Rural Women's Movement and the Commission for Gender Equality, who were admitted as second and third *amici curiae*. The case raised other legal issues, including the relationship between customary law, customary law legislation and the constitutional rights, but for the sake of this chapter, the author focuses on the need for consent in polygynous marriages and the reasons advanced by Court on why it is important. The article will also explain the extent to which the requirement of consent, as articulated in Mayelane, can be applicable to other customary systems in South Africa.

From the onset it is important to note that *Mayelane* does not deal with the constitutionality of polygynous marriages, despite their inherent inequality, as only men may marry more than once; women may not. As no party challenged the validity of polygyny in South Africa, the Court was therefore not in a position to decide on this issue. As such, the Court specifically left open the possibility of a constitutional challenge on the validity of polygyny within the constitutional framework of South Africa.

1 Para 72.

2 2013 (4) SA 415 (CC).

II FACTS

The factual scenario, which is very common to those in polygynous marriages, is as follows. In 1984, Mr Hlengani Dyson Moyana married Ms Modjadji Florah Mayelane (Applicant) in terms of Tsonga custom. In 2008, without his wife's knowledge or consent, he entered into a second customary marriage with Ms Mphephu Maria Ngwenyama (Respondent) and died a month later.[3] Both Ms Mayelane and Ms Ngwenyama subsequently sought to register their respective marriages under the Recognition of Customary Marriages Act (RCMA),[4] with each of them denying the existence and validity of the other's marriage.[5]

In her founding papers in the High Court, the Applicant alleged that Xitsonga customary law mandated the husband in an existing customary marriage to seek his wives' consent before concluding a subsequent customary marriage and, further, that she had not given such consent to her husband when he married the Respondent.[6] The Respondent argued that there was no proof that consent was currently required to conclude subsequent marriages in the Xitsonga custom. Both the High Court and the Supreme Court of Appeal had not decided on this issue, as they simply decided the dispute between the parties by focusing solely on section 7(6) of the RCMA.[7] Both courts, therefore, did not consider consent within the Xitsonga customary law. When the *Mayelane* case came before the Constitutional Court, the following issues had to be determined:

a. Should the consent issue have been determined by the Supreme Court of Appeal?
b. Is the consent of a first wife necessary for the validity of her husband's subsequent customary marriage? This entails considering -
    i. whether the RCMA directly prescribes the first wife's consent as a requirement for validity; and
    ii. whether living Xitsonga custom makes such a prescription.
c. If neither the express provisions of the RCMA nor Xitsonga customary law creates this requirement, does the Constitution require the law to be developed?

3 Para 4.

4 120 of 1998.

5 Para 4.

6 Ibid para 5.

7 Ibid.

III ARGUMENTS ADVANCED BY LRC ON BEHALF OF ITS CLIENTS

On behalf of the *amici curiae*, the LRC argued the following points in court:

- The need for constitutional recognition of living customary law as an independent source of law, rights and obligations, including in relation to the validity of customary marriages.
- Custom is alive and, as such, capable of change and adopting the principles of equality and dignity as enshrined in our Constitution.
- The method for the determination of the content of customary law articulated in the case of *Shilubana and others v Nwamitwa* 2009 (2) SA 66 (CC).
- The role of section 39(2) in the development of customary law in order to ensure that it is consistent with the spirit, purport and objects of the Bill of Rights. It was submitted that section 39(2) can only be engaged once the nature of customary law has been ascertained and it is determined that, in specific respects, it is constitutionally deficient.
- The role of patriarchy within custom cannot be ignored, especially how it places women in vulnerable positions. This, together with the equality of spouses as enshrined in both the Constitution of South Africa and the Recognition of Customary Marriages Act, supports a finding that consent ought to be made a normative requirement in concluding subsequent customary marriages. This finding would be a start in addressing the power imbalances imposed by patriarchy in polygamous customary marriages.
- In the event that consent is required, the nature and form of the consent (though the Court did not make a pronouncement on this).

IV FINDINGS OF THE CONSTITUTIONAL COURT ON CONSENT AND THEIR IMPLICATIONS

The Court found that the Recognition of Customary Marriages Act did not prescribe the first wife to give consent to her husband if he wished to conclude a subsequent customary marriage. Due to the fact that section 3(1)(b) of the Recognition of Customary Marriage requires any customary marriage to be negotiated and entered into in terms of customary law, the Court had to determine the content of Xitsonga custom. The Court, therefore, directed parties to provide further representations on Xitsonga customary law after the hearing had already taken place. A number of affidavits were filed by the parties. With the assistance of an expert, the LRC filed five affidavits, including one of a woman who was a third wife in a customary marriage. She detailed how she got married to her husband as a third wife with the consent of his first wife.

On 30 May 2013, the Constitutional Court held that if a man who is already married in terms of custom wishes to marry another wife under Xitsonga custom, he must seek the consent of his existing wife. This implies that the man's existing wife must first agree to allow her husband to marry another woman before he may do so. Should the husband proceed to conclude a subsequent marriage without his existing wife's consent, the subsequent marriage is null and void under law.

(a) *The equality argument*

In coming to this decision, the Court also emphasised Section 6 of the RCMA, which entrenches spousal equality by stating unambiguously that a customary wife has, 'full status and capacity'. As the Court pointed out in the judgment, capacity within the confines of marriage includes, 'the capacity to acquire and alienate assets, the capacity to conclude contracts, the capacity to conduct litigation and such further rights and powers as may be prescribed by living customary law.'[8] As the Court rightly pointed out, section 6 does not add any additional requirements that must be met when concluding a customary marriage; rather, it imposes spousal consequences on a customary marriage that is already concluded.[9]

The judgment emphasised the importance of the equality clause when it is stated that, 'the Constitution demands equality in the personal realm of rights and duties as well.'[10] The crucial need of equality in customary marriages is highlighted by the Court when they explain:

> 'It requires little imagination or analysis to recognise that polygynous marriages differentiate between men and women. Men may marry more than one wife; women may not marry more than one husband. Nevertheless, the validity of polygynous marriages as a legal institution has not been challenged before us and, for present purposes, we must work within a framework that assumes its existence and validity. Are the first wife's rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not. The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present. First, it must be acknowledged that "even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave disadvantage of women and children". While we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution.'[11]

The right to culture is recognised; however, its recognition and practice must not undermine the right to equality and dignity of women whose husbands want to marry subsequent wives. The Court here tackles the systematic benefit that men acquired from the development of societal values that generally favoured men. Within the constitutional democracy, the Court must ensure that the rights enshrined in the Constitution are respected, promoted and fulfilled. As such, the right to culture as entrenched in the Constitution must be balanced with the rights of women, and courts cannot allow a system that perpetually undermines the equality of wives to continue flourishing.

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8 Para 39

9 Para 39

10 Para 66

11 Para 70–71.

(b) *The patriarchy argument*

Patriarchy refers to a society characterised by existing and, 'historic unequal power relations between women and men where women are systematically disadvantaged and oppressed.'[12] In a patriarchal society, the subjugation of women is grounded on, 'the inequality of justified allocation of roles while gender encompasses the allocation of roles to individuals according to sex.'[13] Within the context of polygamous marriages, it has already been stated that only men can marry additional spouses, women cannot. The Court argued that, to allow men to marry additional spouses without seeking the consent of their first wife, is allowing the subjugation of women to continue. Allowing women to continue living in a society that favours the interest of men was contrary to the constitutional tenets, especially the right to equality and dignity.

Perhaps this argument could go further than simply tackling the role of women when a man who is already married wishes to marry another woman. Surely, within the same constitutional tenets, the fact that only men can marry more than one woman at a time would also need to be brought in line with the Constitution. However, this was not an issue before Court and it will probably be a topic for another court to decide should the premise be challenged constitutionally. For now, it suffices to note that the Court was emphatic in refusing to allow men already married to marry additional women at will, without seeking the consent of their existing wife.

(c) *The agency and dignity argument*

The Court recognised that Xitsonga custom operated in terms of a generous spirit aimed at accommodating the concerns and needs of the first wife and her family in the event that the husband sought to enter into another marriage.[14] However, only the man had the choice to marry again.

Having emphasised dignity as both a value and right that is firmly entrenched in the Constitution of South Africa, the Court affirmed the need for women to have agency over their own lives as an integral part of realising their right to dignity. Failure to allow a woman to exercise agency over her own life and marriage is an affront to dignity. As such, the Court specifically stated that:

> '… the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity. However, a wife has no effective autonomy over her family life if her husband is entitled to take a second wife without her consent. Respect for

12 'What is patriarchy?' available at *http://londonfeministnetwork.org.uk/home/patriarchy*, accessed 9 June 2016.

13 Brian Mathebula and Matshidiso Motsoeneng *Patriarchy and The Informal Economy: The Case for Women Empowerment,* SPII Working Paper 10 – MAY 15 available at *http://www.spii.org.za/wp-content/uploads/2015/06/Patriarchy-Paper-Working-Paper-10.pdf.*

14 Para 70.

human dignity requires that her husband be obliged to seek her consent and that she be entitled to engage in the cultural and family processes regarding the undertaking of a second marriage. Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent.'

Within this context, the Court also emphasised the need to ensure that in exercising agency over their lives, women in customary marriages must be able to make informed decisions about their personal life, sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Denying them the opportunity to consent to an additional wife being brought into the marriage undermines their right to dignity and equality.

V DOES THE JUDGMENT APPLY TO OTHER CUSTOMARY MARRIAGES CONCLUDED OUTSIDE THE XITSONGA CUSTOM?

The Constitutional Court has confirmed that in considering living customary law, law is not based on precedent but on the practices of the community.[15] As the Court stated, 'it should be borne in mind that customary law is not uniform. A particular custom may have one of various acceptable manifestations of a consent requirement, together with a wealth of custom-based ancillary rules dealing with the effects of not requiring consent, including its proprietary effects, for example, in the law of succession. All factors may be relevant in determining the validity of further customary marriages.'[16]

Though the custom that was before the Court was Xitsonga, it is argued that the judgment points to how the Constitutional Court will decide on the issues of equality and dignity of spouses in customary marriage. This should not be understood as saying that *Mayelane* set a requirement for consent for all marriages in all customs. The judgment, however, has a positive impact on all other customs that have customary marriages because of its emphasis on equality. It is a reassurance of equality of spouses as expressed in both the Recognition of Customary Marriages Act and the Constitution of South Africa. Within the context of equality, the judgment is also a pronouncement that in a constitutional framework of South Africa, polygyny cannot be allowed to exist in a manner that either obliterates or undermines rights of women. Rather, the spouses must be equally responsible for who is brought into the marriage and the consequence of this decision, especially for health and proprietary reasons.

Additionally, the arguments advanced by the Court with relation to patriarchy, agency and dignity are not limited to the Xitsonga customary values of marriage, but are rather a reflection of what these values mean within our constitutional democracy and marriage generally. As such, it is submitted that these arguments clearly indicate the roles that women play

15 *Mayalene* para 51.

16 *Mayelane* para 51.

in polygyny. They are no longer voiceless beings that simply comply with the will of their husbands. Whether this translates in reality or not, the message of the Court is clear. More will have to be done to raise awareness about equality, agency and choice for women in marriage and the constitutional mandate to bring all cultural marital laws and practices in line with the Constitution.

Every Court that will be faced with the issue of consent within another customary marriage framework will still have to comply with the steps set out in the *Shilubana*[17] judgment before deciding on whether or not to develop the custom before in relation to the requirement of consent. The steps set out in *Shilubana* are: (a) the determination of the traditions of the community concerned from a historical perspective; (b) the assessment of the variability of the customs and traditions by the community itself; (c) the need for flexibility; and (d) the need for the development of customary law in accordance with section 39(2) of the Constitution. This four-stage exercise is not important for its own sake; it is important because of the constitutional imperative that customary law must be given effect, where it is applicable. The four-stage exercise of *Shilubana* is also important in the role of section 39(2) of developing customary law in order to ensure that it is consistent with the spirit, purport and objects of the Bill of Rights. Therefore, within the ambit of the arguments in the *Mayelane vs Ngwenyama* judgment, it is hard to imagine that a court will come to a different conclusion on the need to ensure that the equality, dignity, agency and choice of women married in terms of a customary context is respected, promoted and fulfilled.

VI CONCLUSION

While it is recognised that there are a number of crucial issues that must still be addressed in the context of customary marriages, this judgment is an important step in chipping away at the subjugation of women in marriage, including customary marriages. It is the right direction in clearly affirming that patriarchy no longer has a place within our constitutional democracy. Instead, the court emphasised agency, choice and equality as some of the fundamental values that our Constitution strives for in marriage. For that, the *Mayelane v Ngwenyama* judgment is worth noting, even among some of its shortcomings that have been rightly pointed out in other contexts.

17 *Shilubana and others v Nwamitwa* 2009 (2) SA 66 (CC)

CHAPTER 9

MODERN TRADITIONAL MARRIAGE AND MATRIMONIAL REGIMES: THE LEGAL AND PRACTICAL IMPLICATIONS OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT

EKTAA DEOCHAND

'Beyond the Constitution, the Recognition [of Customary Marriages] Act is the starting point of this equality analysis. It must be understood within the context of its legislative design. Its avowed purpose … is to transform spousal relations in customary marriages. The legislation not only confers formal recognition on the marriages but also entrenches the equal status and capacity of spouses and sets itself the task of regulating the proprietary consequences of these marriages. In doing so, the Recognition Act abolishes the marital power of the husband over the wife and pronounces them to have equal dignity and capacity in the marriage enterprise.'[1]

I INTRODUCTION

The Constitutional Court in the case, *Gumede v President of the Republic of South Africa* recognised that the introduction of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) was a monumental step in addressing gendered inequality within marriage, and the marital power of the husband, by providing for equality between spouses. Despite the RCMA being an elegant solution with the potential to safeguard women from many of the material difficulties inherent in polygamy, there is an equally high risk of the RCMA being a paper solution, which fails to provide relief to a sector of society with the least access to a court.[2]

According to Statistics SA, the number of customary marriages registered in 2013 was 3 498, which declined from a total of 4 555 recorded in 2012, and accounts for approximately 2.15 per cent of the total number of marriages registered (customary and civil) in 2013.[3] It should be noted that although there are currently no accurate statistics pertaining to the

1 *Gumede (born Shange) v President of the Republic of South Africa and Others 2009* (3) BCLR 243 (CC) at par. 32

2 South African Journal on Human Rights, Volume 16 (2000) *Notes and Comments: Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998*

3 http://www.statssa.gov.za/publications/P0307/P03072013.pdf

number of unregistered customary marriages, it is reasonable to assume that some of the reasons that could be attributed to the dwindling number of registered customary marriages include the lack of knowledge and resources among the majority of rural and urban women to whom the RCMA would apply, as well as reports of the failure of officials of the Department of Home Affairs to assist members of the public to register their customary marriages because theyare not adequately informed of the terms of the RCMA.[4]

The Legal Resources Centre (LRC) has applied the RCMA to assist women who are spouses in polygamous customary marriages so that their patrimonial interests are secured, without negatively impacting on other spouses in the marriage. This article focuses on the case of *Nxumalo v Mchunu*, which illustrates the complexities associated with customary law litigation, as well as the practicalities of polygamous matrimonial property regimes.

II HISTORICAL BACKGROUND

One of the chief remnants of apartheid in South Africa is disrupted African family life. During apartheid, there was no complementary government policy on preserving African family life. The major priority was the prevention of further African urbanisation, while simultaneously ensuring that an adequate labour supply was available in the urban areas. The 'influx control' aim was to keep African families in the rural areas and to ensure that African labour only entered the cities on a temporary basis.[5]

Urban residential rights were granted in terms of the Blacks (Urban Areas) Consolidation Act 25 of 1945. In terms of this Act, where a couple wished to marry but the man did not have urban rights, the woman would legally lose hers if they married. Where a man had urban rights, his wife could only join him if he was born in a town/worked continuously in a town for more than 10 years or had approved accommodation in the area. The result was that many wives were prevented from joining their husbands, which resulted in many men entering into second or third marriages with women already residing in the cities.[6]

In terms of traditional customary law, upon marriage, a man was entitled to arable land and a residential site. The land belonged to the whole community; therefore he did not own it in a private law sense. He was only a 'caretaker' who administered it on behalf of all the family members. Registration of a marriage was not obligatory in rural areas as family

4 Mothokoa Mamashela and Thokozani Xaba 'The Practical Implications and Effects of The Recognition of Customary Marriages Act'

5 Urban Black Law – being a series of articles by a team of authors, first published in *ACTA JURIDICA* 1984 'The Interaction of Legislation Relating to Urban Africans and the Laws Regulating Family Relationships' S B Burman at page 92

6 Ibid at page 96

elders were usually always available to testify to the celebration of a marriage. In the context of control of property residing with the family head, and the rejection of the private law property concept, it would appear that proof of the marriage was not integral for the purposes of specific benefits.[7]

One of the consequences of the codification of customary law was the creation of a new version of customary law which gave the husband absolute powers over the family property. He became the 'owner' of the property. As a result, the wife's control and access to the family property depended on her husband alone and not the family or community.

The Black Administration Act codified the status of marital women as being a permanent minor. Her entire life was spent under the guardianship of her male relatives. The matrimonial regime that automatically applied to customary marriages was out of community of property, with the husband holding the marital power.[8] The introduction of the KwaZulu Act on the Code of the Zulu Law[9] slightly altered the position in favour of women's rights by recognising women's rights in terms of property, inheritance, succession and guardianship.

The misapplication of customary law in the previous dispensation, combined with increased urbanisation and economic and social transformation, sparked the legislature's promulgation of the RCMA. The RCMA would purportedly recognise traditional African culture, and address the equality and proprietary rights of women in a customary marriage in a manner that was consistent with the spirit, purport and objects of the Constitution.

III LITIGATION IN TERMS OF THE RCMA

The LRC has been involved in numerous cases that have aided women in customary marriages in accessing their right to the level of equality inherent in civil marriages. Most recently, the LRC obtained an order in the Durban High Court in the case *Nxumalo v Mchunu and Four Others,* which recognised the rights of a first wife in a customary marriage, whose husband entered into two other marriages subsequent to their marriage.

Two aspects of polygamous customary marriages under the RCMA will be discussed: firstly, the issue concerning the consent requirement by the first wife in order to assert validity of the second marriage, and secondly, the consequences that follow for failure to comply with the section 7(6) matrimonial property system contract.

7 Lea Mwambene and Helen Kruuse 'Form over Function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa' at 298

8 Urban Black Law – being a series of articles by a team of authors, first published in *ACTA JURIDICA* 1984 'The Interaction of Legislation Relating to Urban Africans and the Laws Regulating Family Relationships' S B Burman at page 94

9 Act 6 of 1981

IV *NXUMALO v MCHUNU AND FOUR OTHERS*

On 28 May 2012, SN married BM, a well-known KwaZulu-Natal radio DJ on a popular radio station. They were married at Nkandla by the Induna of the Cunu Traditional Council in accordance with Zulu customary law. Lobola had been negotiated and paid for in full before the ceremony took place. The ceremony included the "handing over ceremony" and was celebrated in accordance with customary law. In terms of Section 7(2) of the RCMA, *'a customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses'* (unless such consequences are specifically excluded in an ante-nuptial contract).

Section 7(3) provides for the relevant sections of the Matrimonial Property Act 88 of 1984 to apply to a customary marriage, giving customary law wives equal standing as civil marriage wives.

The customary marriage between SN and BM was not registered with the Department of Home Affairs but, in terms of section 4(9) of the RCMA, this does not invalidate the marriage. At the time of the marriage, SN and BM already had two minor children together, and now have three children, aged seven-, six- and one years old.

When SN was pregnant with their third child, she found out that her husband had entered into a second customary marriage with another woman, LK. This ceremony was also held at Nkandla and entered into in terms of customary law, despite SN not having given consent. The second wife and BM have a two-year-old child together.

During October 2013, SN was informed by a third party, NM, that she too had married SN's husband on 15 October 2014 at the Department of Home Affairs. This marriage fulfilled all the requirements of a valid civil marriage. It is uncertain whether the husband had any knowledge of the effect that this civil law marriage would have on his other marriages, but in the absence of a court order declaring otherwise, this marriage would effectively supersede both the first and second unregistered customary marriages (not unlike the position under The Native Administration Act[10]).

An application was launched in the Durban High Court for an order declaring that the second customary marriage and the civil marriage entered into by BM subsequent to his first marriage with SN, be declared invalid and void ab initio. LRC further requested that SN be entitled to register her customary marriage to BM with the Department of Home Affairs and that BM fulfil the requirements for a matrimonial contract as set out in Section 7(6) of the RCMA before any further customary marriages are entered into. Although the case was initially opposed by the third wife, she subsequently withdrew her opposition and the order was granted as prayed for. Both the first and second customary law wives were present in court on the date of the hearing in support of the application.

10 Native Administration Act 38 of 1927

Section 3(2) of the RCMA is clear that a civil marriage cannot coexist simultaneously with a customary marriage unless the spouses are exclusively married to each other. It stipulates that *'save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, during the subsistence of such customary marriage'.* In terms of section 10(1), when there is only one customary marriage, the spouses in that marriage may contract into marriage under the Marriage Act with each other, as provided for in section 10(1) of the Act.

V LACK OF CONSENT OF THE FIRST WIFE

In the absence of an annulment, and in the event of death of the husband, only the third wife would have been lawfully recognised as having any patrimonial interest in their husband's estate, as her marriage was the only one recorded with the Department of Home Affairs.

In *Mayalane v Ngwenyama*[11], the applicant had married her late husband in terms of customary law and the marriage was never registered. After her husband died, the applicant learnt that he had concluded a second customary marriage with another woman. She then brought an application to declare the second customary marriage invalid.

The LRC represented the Commission for Gender Equality and the Rural Women's Movement as the Second and Third *amici curiae* in the Constitutional Court. The LRC made submissions regarding the appropriateness of developing customary law to bring it in line with Section 39(2) of the Constitution, which requires that when interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport and objects of the Bill of Rights. It was submitted that the consent of the first wife should be a prerequisite for the validity of subsequent marriages. But the consequence of non-compliance with this rule should not automatically be the invalidity of the second marriage. An appropriate remedy will depend on all the circumstances of the case.[12]

It was further argued that permitting subsequent marriages without the existing spouse's knowledge would be a severe and unjustifiable violation of her right to equality, dignity, freedom and security of the person, privacy, property and health. If the spouse does not know of the new marriage, she is unable to consider or protect her position.[13]

While permitting additional marriages without consent violates the rights of the existing wives, visiting the new marriage with automatic invalidity would have serious negative consequences for the new wife. She too may have been in a vulnerable position where marriage provided her with economic and social benefits. Automatic invalidity either before or after the husband's death would place them both in a vulnerable position.[14]

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11 *Mayelane v Ngwenyama and Another (Womens' Legal Centre Trust and others as amici curiae) 2013 (8) BCLR 918 (CC)*

12 *Mayelane v Ngwenyama and Another* Heads of Argument on behalf of the Second and Third *amicus curiae* at par. 10

13 Ibid, at par. 58

14 Ibid, at par. 66

Taking into account the fact that marriage is a highly personal and private contract, the Constitutional Court found it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent.[15] The court found that the consent of the first wife is a necessary dignity and equality component of a further customary marriage. Section 3(1)(b) of the RCMA[16] means that, from now on, further customary marriages must comply with the consent requirement. A subsequent marriage will be invalid if consent from the first wife is not obtained.[17]

VI MATRIMONIAL PROPERTY REGIME IN POLYGAMOUS MARRIAGES

Traditionally, a man was responsible in every situation for providing for a woman and her children (who together formed a 'house' to which property accrued). The husband had obligations to protect the interests of each house, and his heirs inherited his obligations to provide for widows remaining under the heir's control.[18]

The RCMA now regulates the matrimonial property regime applicable to polygamous customary marriages and requires a court's approval after consideration of the relevant circumstances to protect each party's interests. Section 7(6) provides that *'a husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriage'*. Section 7(7) takes this further by directing that, in the case of a marriage in community of property or which is subject to an accrual system, the court must terminate the matrimonial property system which is applicable to the marriage and order a division of the property. Moreover, it will take into account all the relevant circumstances of the family groups which would be affected if the application is granted. A court may refuse the application if, in its opinion, the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

The main objective of section 7 is the equitable distribution of family property to all affected members of the family, particularly the first wife and her children.[19]

When interpreting the consequences of the failure to comply with section 7(6), the Supreme Court of Appeal in *Ngwenyama v Mayelane*[20] found that the requirements for the validity of customary marriages are found in section 3 of the

15 *Mayelane v Ngwenyama and Another (CC)* at par. 74

16 Section 3(1)(b) of RCMA: 'For a customary marriage entered into after the commencement of this Act to be valid, the marriage must be negotiated and entered into or celebrated in accordance with customary law'

17 Ibid, at par. 85

18 'The Interaction of Legislation Relating to Urban Africans and the Laws Regulating Family Relationships' S B Burman at page 92

19 Mothokoa Mamashela and Thokozani Xaba 'The Practical Implications and Effects of The Recognition of Customary Marriages Act'

20 *Ngwenyama v Mayelane & another* (474/11) [2012] ZASCA 94 at par. 37 – 38

RCMA and that the consequences of non-compliance with section 7(6) were adequately met by treating subsequent customary marriages as being marriages out of community of property. This overturned the High Court's interpretation that compliance with section 7(6) was an obligatory requirement for the validity of subsequent customary marriages. The Constitutional Court in *Mayalane v Ngwenyama* agreed with the interpretation of the SCA and held that section 7 does not deal with validity requirements, but only deals with the applicable matrimonial regime. To interpret it as imposing validity requirements over and above those set out in section 3 would undermine the scheme of the Act.[21]

Had SN remained the only spouse of BM, her customary marriage would be considered to be in community of property, and she would be entitled to an undivided and indivisible half share of the joint estate. If BM wished to enter into a civil marriage with anyone other than SN, it would have been necessary for him to first obtain a decree of divorce from SN. Should he have wished to enter into any subsequent customary marriages, in applying *Mayalane,* he is required to get consent from SN prior to entering into the marriage. Given that no matrimonial property regime contract was entered into, if the reasoning of the Supreme Court of Appeal (SCA) is applied, the subsequent two marriages would be considered out of community of property. Although this affords protection to the first wife, it could place the second and third wives in a prejudicial position based on the husband's failure to apply for a contract, which is no fault of their own.

VII CONCLUSION

From *Mayelane,* it is clear that the Constitutional Court has adopted an approach that has clarified the terms of the RCMA, specifically dealing with the requisite consent of the first spouse in a customary marriage. The case of SN v BM was a rare application, as all parties were still alive. In previous cases, applications to assert customary marriage rights were brought posthumously when dealing with benefits of the deceased's estate. The gap between practice and law is never fully closable.[22] Migrant labour, the exclusion of women and children from urban areas, and the enforced separation of families has created a framework within which modern family obligations have often been ignored.[23]

Although the practical application of the RCMA has been sporadic and sometimes ineffectual in the past, the recent developments presented in this article highlight that, when properly applied, the RCMA ensures that women are given the opportunity to access equal matrimonial rights, bridging the lacuna between the law and the lived reality of present-day South African women.

21 *Mayelane v Ngwenyama and Another* (Womens' Legal Centre Trust and others as amici curiae) 2013 (8) BCLR 918 (CC) at par. 42

22 Heinonline 1991 *Acta Juridica* 52 1991 'Law, State and Culture: Thinking About "Customary Law" After Apartheid' Martin Chanock at page 55

23 Ibid at page 63

CHAPTER 10

PIERCING THE VEIL: THE STRUGGLE FOR RECOGNITION OF ISLAMIC MARRIAGES IN SOUTH AFRICA

CHARLENE MAY

Our pre-constitutional jurisprudence is filled with judgments pertaining to the recognition of Islamic marriages. Ironically, the assimilation of jurisprudence has continued under our Constitutional democracy.

Early cases such as *Bronn v Fritz Bronn's Executors and others*[1], *Ebrahim v Mohamed Essop*[2], *Seedat's Executors v The Master*[3], *Kader v Kader*[4] and *Ismail v Ismail*[5] are all reflective of the discrimination and prejudice that existed in South Africa at that time. They are reflective of the colonialist impact and influence, as well as the apartheid legislation of the time, and so reflect religious and racial intolerance.

Cases such as *Seedat Executors* and *Ismail* took place within a time when 'blacks were denied most, if not all, basic human rights that we now take for granted. They were discriminated against. Their cultures and laws were not recognized except when they conformed to the "boni mores" of the "civilized peoples". Their marriages were not recognized. The law reflected the values of one section of society which constituted the minority.'[6] In essence, the judgments were uniform in treating marriages concluded in terms of the tenants of Islam as polygynous in nature and, therefore, contrary to what was perceived as the morals associated with the dominant and favoured Christian faith.

Under our new Constitutional dispensation, there are a number of new laws seeking to recognise and regulate the discrimination present in our family law. Legislation recognizing African Customary Marriages[7] was enacted and, after successful litigation compelling Parliament to address the issue of same sex marriages, the Civil Unions Act 17 of 2006 was

1 1860 (3) Searle 313.

2 1905 TS 59.

3 1917 AD 302.

4 1972 (3) SA 203 (RAD).

5 1983 (1) SA 1006 (AD).

6 *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) paras 51–52.

7 The Recognition of Customary Marriages Act 120 of 1998.

enacted. Clearly there was some impetus to rectifying the prejudice of the past on the part of government. However, the litigation surrounding the recognition and consequences of Islamic marriages has not abated.

It would be unfair to argue that the State has taken no steps to regulate or address the issue of non-recognition of Islamic marriages. In fact, in 1996 the then Minister of Justice recommended that the South African Law Reform Commission (SALRC) establish a specific task team to investigate the legal recognition of Islamic marriages and related matters and to draft legislation to recognise and regulate Islamic marriages under our new Constitutional dispensation. On 30 March 1999, the Minister appointed an Islamic Marriages Project Committee (Project Committee), which comprised nine members, headed by Judge Mohammed Navsa. Notably, only three out of the nine members were women.

The July 2000 Issue Paper provided the first opportunity for members of the public to understand and engage with the Project Committee on their mandate. The Issue Paper was the start of a long and extensive process of engagements with members of the Muslim community in South Africa. Individuals as well as organisations and religious institutions participated in making written submissions to the Project Committee. There were meetings with leaders of the Islamic religious community, three workshops (in Johannesburg, Cape Town and Durban) as well as written submissions.

The Issue Paper led to the publication of a Discussion Paper,[8] which included a draft Bill that provided for the legal recognition of Islamic marriages. Once again there was a round of engagements and written submissions were due on 31 January 2002. The Report that was released following the Discussion Paper dealt with the issues that had been identified from the various submissions they received. These included the status of spouses in Islamic marriages, the status of the children born from Islamic marriages, and the regulation of not only the marriage, but also the termination of the marriage. In particular, the Report recorded the difficulties especially women experienced in enforcing maintenance obligations, the consequences of the marital property regime and the difficulties encountered in terms of care of and contact with children born from the marriage. Since the initial Project Committee and the initial rounds of reports, there has been the publication of a Muslim Marriages Bill by the Department of Justice and Constitutional Development for general comment by the public. Since this draft Bill there has been little to no engagement with the public on the legislative drafting process or the enactment of legislation to recognise Islamic marriages.

In October 2005, the Commission for Gender Equality drafted a Recognition of Religious Marriages Bill. The Bill was in response to the SALRC process, but sought to be inclusive of marriages solemnised in terms of the various religions present in South Africa. So instead of a focus on Islam only, all marriages concluded in terms of the religious beliefs of South Africans would be recognised. Although there was some support at the time for the legislation, the process stalled along with the legislative development process undertaken by the State.

Throughout the above legislative development processes women have approached courts to seek relief from the negative impact that flows from the non-recognition of Islamic marriages. It is worth reflecting on some of these cases, the

8 Discussion Paper 101 of 2001.

judgments handed down and how, through jurisprudence, advancements have been made towards the recognition of Islamic marriages.

In the *Daniels'* case, the Constitutional Court addressed the issue of the definition of 'spouse' in the Intestate Succession Act. The Court extended the definition to include surviving partners in a monogamous Islamic marriage. Ngcobo J in the majority judgment said:

> 'The constitutional order rejects the values upon which these decisions were based and affirms the equality of all South Africans. The recognition and protection of human dignity is the touchstone of this new constitutional order. The new constitutional order is based on the recognition of our diversity and tolerance for other religious faiths. It is founded on human dignity, equality and freedom.'[9]

In *Khan v Khan*[10] the Pretoria High Court held that a polygamous Islamic marriage could give rise to a legal duty on the part of a husband to maintain his wife. The Court therefore found that section 2(1) of the Maintenance Act 99 of 1998 applies to a wife in a polygamous marriage. In judgment the Court stated that:

> 'The purpose of family law in general is to protect vulnerable family members and to ensure fairness in disputes that arise at the end of relationships. Polygamous marriages are a type of family and should be protected by family law. Polygamous marriages are accepted by the tenets of a major faith, ie. Islam, and the marriage between the appellant and the respondent was concluded in accordance with the tenets of such a major faith.'[11]

In the case of *Hassam*[12] the Constitutional Court dealt with the proprietary consequences of a polygynous Islamic marriage within the context of intestate succession. The Court found that section 1 of the Intestate Succession Act was inconsistent with the Constitution as it only made provision for one spouse in the inheritance of a deceased estate. The Court stated that:

> 'Contrasting the ethos which informed the boni mores before the new constitutional order with that which informs the current constitutional dispensation, the question remains whether affording protection to spouses in polygynous Muslim marriages under the Act can be regarded as a retrograde step and entirely immoral. The answer is a resounding "No". I emphasize that the content of public policy must now be determined

9 *Daniels v Campbell NO and Others 2004* (5) SA 331 (CC) para 54.

10 2005 (2) SA 272 (T).

11 2005 (2) SA 272 (T) para 10.5.

12 *Hassam v Jacobs NO v Others* 2009 (11) BCLR 1148(CC).

> with reference to the founding values underlying our constitutional democracy, including human dignity and equality, in contrast to the rigidly exclusive approach that was based on the values and beliefs of a limited sector of society as evidence by the remarks in Ismail.'[13]

It would appear that the courts have been open to recognition of Islamic marriages through upholding the right to equality in terms of the laws relating to maintenance and succession. The courts have managed to do this without distinctly recognising the marriages themselves, but through focusing on the discrimination and its impact on the lives of women. Indirectly, the courts are recognising the existence of marriages concluded in terms of the Islamic faith. The only outstanding issue is formal recognition through the enactment of legislation.

The Women's Legal Centre Trust in 2014 launched an urgent application[14] in the Western Cape High Court to challenge inequality within the marriage laws that exist in South Africa. There have been numerous delays in the matter being heard and at the time of this publication the case was set down for arguments in September 2016.[15] What has been interesting to note in this case is the State's response to the averments that there is a clear discrimination in the lack of recognition that is being given to Islamic marriages through government's failure to enact legislation to recognise and regulate Islamic marriages. Government maintains that no other religion has received any preference in the form of a distinct marriage law and, by enacting legislation that would seek to only recognise Islamic marriages, this would put Islam at an unfair position over other religions in the country. This response, which is contained in the Answering Affidavit of the Deputy Minister of Home Affairs, is somewhat at a disjuncture with the position the government has held throughout the SALRC process. The Minister has advised that the SALRC will undertake a process of review of the marriage laws in the country in efforts to unify all marriages under one law. We now await another round of SALRC processes that will examine marriage laws holistically. Until the outcome of this process or the outcome of the High Court case, women married in terms of Islamic law will continue to endure discrimination as a result of their marriages not being recognised.

13 *Hassam para* 26.

14 *Women's Legal Centre Trust and others v The President of the Republic of South Africa and Others* case number: 22481/2014.

15 The Legal Resources Centre is representing the Commission for Gender Equality in the case as *amicus curiae.*

CHAPTER 11

SUBMISSION TO THE SPECIAL RAPPORTEUR ON EXTREME POVERTY AND HUMAN RIGHTS: UNPAID WORK, POVERTY AND WOMEN'S HUMAN RIGHTS

MANDIVAVARIRA MUDARIKWA, CHARLENE MAY, BERNICE ROELAND AND MILLY PEKEUR

In this article, the Legal Resources Centre (LRC) showcases its submission on unpaid care work, poverty and women's rights to the Special Rapporteur on Poverty that was jointly prepared in collaboration with Wellness Foundation and The Parent Centre. This is part of international advocacy that the LRC has been undertaking in ensuring that the experiences, challenges and needs of women in South Africa are taken into account when policies and decisions are taken at the United Nations level.

I INTRODUCTION

In South African society, women have and continue to conduct work that does not usually yield financial benefit or recognition. This is often because the work conducted by women is under-valued and unrecognised as 'real work'. As a result of this perception, persistent images of women as 'supporters' rather than 'actors' continue to make women's work invisible. The impact of unrecognised work on women's ability to engage with the economy and provide and advance themselves financially can often have devastating consequences, and perpetuates women living in poverty. We therefore welcome and are grateful for the opportunity to make contributions on unpaid work, poverty and women's human rights.

II ORGANISATIONS MAKING THE SUBMISSION

(a) *The Legal Resources Centre*[1]

The Legal Resources Centre (LRC), established in 1979, is a South African-based human rights organisation with regional offices in Johannesburg, Durban, Grahamstown and Cape Town. The organisation uses the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless and landless people and communities who suffer discrimination by reason of race, class, gender and disability, or by reason of social, economic and historical circumstances. The strategies

1 *www.lrc.org.za*

employed to secure the protection and promotion of human rights include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level. The LRC through its Gender Rights Project ('the project') focuses on empowering women by providing: legal advice; legal representation and negotiation to victims of gender violence; and by participating in advocacy and law reform in the public space.

(b) *The Parent Centre*[2]

The Parent Centre is a primary prevention non-profit organisation based in Cape Town, South Africa, that aims to prevent child abuse through the promotion of positive parenting. The organisation was established in 1983 and provides education and training workshops, home-visiting programmes, community talks, support groups as well as parental counselling. In the Western Cape, the organisation works directly with parents and caregivers from the pregnancy stage till the early adulthood stage of parenting, as well as with professionals (e.g. teachers, social workers, psychologists) and community members who are concerned about the care of children. It also partners provincially and nationally with organisations that support and work with parents and caregivers. Some of the services offered include parent-infant psychotherapy, positive parenting skills training, teen parenting skills training, parent-infant intervention home visiting, parent and caregiver support groups, fatherhood programme, behaviour management (in schools and daycare facilities), training of (parenting skills training) facilitators – also known as the Train-the-Trainer Programme, mentoring and support to Train-the-Trainer Programme graduates, online parenting information and support, as well as a parenting library.

(c) *Wellness Foundation*[3]

The Wellness Foundation (previously AIDS Response) has been providing care and support to care-based organisations working in the HIV and AIDS and TB context across four provinces in South Africa since 2001. They provide direct psycho-social services (e.g. counselling, support groups, wellness sessions and self-care retreats) as well as capacity building (e.g. how to set up and run in-house care-for-the-carer programmes). Their interventions are primarily aimed at grassroots-based organisations across the prevention, treatment, care and support spectrum as part of health systems strengthening. Across southern Africa, unpaid, voluntary, informal networks of care providers have emerged as a critical vanguard in the provision of care to sick people and are filling a health care gap left by governments. This kind of work is not yet sufficiently acknowledged as an essential service, which forms the bedrock of our own response to HIV and AIDS and TB in South Africa. The work is stressful, unpaid, inadequately resourced and done by poor women, many of whom are themselves living with HIV and AIDS. The advocacy aspects of the organisation's work focus on the recognition and formalisation of care as work. Over the last few years we have also strengthened the capacity of a group of local Community Care Workers (CCWs) to establish

2 *www.theparentcentre.org.za*

3 *www.wellnessfoundation.org.za*

the CCW Forum, a platform for mobilising and organizing CCWs across various provinces around the call for recognition, decent work and a living wage.

III INTRODUCTION TO SOUTH AFRICA

Since the end of apartheid in 1994, when South Africa became a democracy, there has been notable social and political transformation that has, among other things, ushered in participatory democracy, refinement of democratic institutions and improvement in inclusive social services.[4]

> 'As the 20th largest economy in the world which contributes 38 percent of Sub-Saharan Africa's GDP, it has succeeded in transiting from an economy driven by the government to the one propelled by the private sector, and creating conducive investment climate and robust stock exchange. All these have contributed to:
>
> - A steady growth of GDP which rose from an average of 3% during 1994-2003 to 5% during 2004-2007.
> - Between 1999 and the first quarter of 2008, the real sector of the economy experienced uninterrupted expansion.
> - Between 2002 and 2005, the Rand was rated the world's most actively traded emerging market currency (a la the Bloomberg's Currency Scorecard).
> - Prudent macroeconomic policies and strong fiscal discipline (from a deficit of about 7% in 1993/94 to surplus about two years ago) has lead to low inflation (but currently being affected by global increase in food prices and recent weakness in Rand) and increasing investor confidence.'[5]

However, this is not to say that South Africa does not continue to battle with many challenges. Some of the main challenges that the country continues to face are:

- spatial poverty and accelerating inequality;
- high incidences of violence, particularly against women and children;
- high incidence of reported child abuse and neglect;
- high unemployment, with growth in labour force outstripping the growth of the economy;

4 National Context relevant to UN/UNDP development dynamics at *http://www.undp.org.za/the-country-programme/country-overview* [Accessed 3 May 2013].

5 Ibid.

- high rate of HIV/AIDS which has assumed a serious development challenge to the country;
- delayed or non-existent service delivery; and
- increasing low-skill content of the educational system, reducing the employability rate of youth.

IV INTRODUCTION TO CARE WORK IN SOUTH AFRICA

Various descriptive words are used within a South African context to refer to those who do work in communities related to the provision of health care. These terms include community caregiver, community-based worker, home-based carer, and ancillary health care workers; among others. These community workers generally do not possess any formal, professional health care qualifications. An evaluation of care work in southern Africa found that 91 per cent of carers are women.[6] In many instances, women had to forego income-earning opportunities in order to provide care (especially in cases where care is provided to family members who cannot afford medical health care or who cannot access it), which pushes the family deep into poverty and increases financial dependence on social grants paid by the State.

In the South African context, the majority of care workers are women, and fall into two categories[7] of care workers, namely voluntary care workers (who are not employed and fulfil the role of care worker to family and community members, as the need for health care is great) and employed care workers (who are either employed by the Department of Health or Department of Social Development or who are paid a stipend or a salary[8] by a civil society organisation). The increasingly high rates of unemployment in South Africa mean that, in the instances where a stipend is received, it is very quickly spent given the need within the family. Very often stipends are spent on the very clients who are cared for, as there are such high levels of poverty amongst those receiving home-based care.

The care work sector is largely unrecognised, but even where care workers are gainfully employed or are paid a stipend, women often have to live with a lack of job security due to the uncertainty of renewal of the funding[9] on which the programmes that employ them rely. 'Many young girls are often forced to leave school to care for a sick family member, thus forfeiting the chance of an education and future prospects of employment.'[10] Unpaid care work places girls in a perpetual state of poverty, as they will not have any skills or education to obtain professional employment, or otherwise, once the need

6 Ibid 104.

7 There is the possibility of sub-categories under the two.

8 It is worth noting that these salaries are by no means a decent wage, and neither are the conditions of work. South Africa does not have a basic minimum wage to protect vulnerable workers against exploitation.

9 Ibid 104.

10 Ibid.

for their care ceases. The fact that the care work that they conducted is not recognised as real work means they would also not be able to use it as experience within the recognised medical sector.

Though some community-based organisations (CBOs) received financial aid from the departments of Health or Social Development, a number of such organisations remain unfunded and provide care on a voluntary basis. As most of the care is provided to poor and marginalised communities who would not be able to afford private health care or who are unable to access health care through a government clinic, the carers are unable to charge a fee for their services. Some organisations are able to provide remuneration to carers through private funding and donations, but this is not secure as it is mostly dependent on the generosity of the funders and the continuation of funding for the specific programme. In recent years, the lack of funding as a result of the global economic crisis has had a devastating impact on many programmes that provide care. We have seen the growth of private care providers, where agencies act as labour brokers in providing community care workers with jobs in the private sector at exploitative rates and in unacceptable working conditions with very little, if any, protection and recourse.

(a) *HIV and AIDS Context*

The high impact of HIV and AIDS in South Africa has led to an increased number of people requiring care and support. Many HIV and AIDS patients who are discharged from hospitals usually do not have family members to care for them or they have to go to work to support their families. Sometimes family members, if available, are unskilled and ignorant about the treatment required to treat HIV and AIDS, and many of them unwilling to provide care fearing that they themselves will get infected.[11] It is crucial to note that many community care workers themselves are living with HIV and AIDS and, therefore, face the same situation as those they are caring for. The stigma and prejudice experienced by those inflicted and affected by the pandemic means that people living with HIV and AIDS are often discriminated against and neglected by their families at a time when they are most in need of care and support.

Many people who are HIV positive present late to the primary health care clinics, which increases the pressure on home care organisations. There are many instances where these patients are left alone at home, and community care givers have become the primary carers. Some of the functions include household chores, sometimes spending their own money for food and transport to the clinics.[12] The role of a carer is therefore not restricted to medical support, but often extends into areas of counselling. The function of a carer also extends to children orphaned by, and children infected with, HIV and AIDS. The function of the carers would include, 'facilitation of placement, helping to secure relevant grants and seeking programmes providing paediatric care'.[13] In various parts of the country there is an increasing breakdown in primary health

11 Cameron, S etl Community Caregivers in [find] at 100.

12 Ibid 101.

13 Ibid.

care services, most notably in rural parts of the Eastern Cape, where community care workers have to deal with the growing incidence of drug resistance and other issues around adherence. Other consequences, such as unwanted pregnancies due to interrupted family planning services, increased vulnerability to Mother to Child Transmission (MTCT) and increases in child and maternal mortality rates, also present challenges to community care workers on a day-to-day basis.

i) General Activities of Care Givers

The main functions of a community care giver generally include physical care, which includes bed bathing, wound dressing and cleaning those patients with frequent bouts of diarrhoea; assisting with securing relevant grants; limited financial support; training family members on home-based care; emotional support; administering medicines; and referrals to clinics and hospitals, among other functions. These functions are often performed after hours, usually exceeding their skills and ability to cope and thereby affecting their own families negatively.[14] When financial support is required, these carers usually sacrifice their own limited financial resources to assist.

Because of the nature of the work, they are often called upon to assist in bereavement counselling and helping to make funeral arrangements. This is a heavy burden to place upon and bear by people who receive little-to-no support, either financially or in respect of their own wellness.

CASE STUDY: WELLNESS FOUNDATION CARE WORK

Public health systems across the southern African region face a number of critical challenges that impact adversely on service provision to vulnerable communities. These include: under capitalisation, competing national priorities, ongoing brain drain of health care workers, and an increase in diseases such as malaria, TB, HIV and AIDS. South Africa's own AIDS response relies heavily on community-based caregivers to meet the prevention, treatment, care and support needs of over 90 per cent of the population of 50 million people unable to afford private health care. Numbering between 60,000 and 70,000, this predominantly female cadre of health foot soldiers has been providing a range of services (palliative care, community education on STIs, adherence support, referral of clients to health centres, psycho-social support to clients and families, nursing care, to name a few) providing a credible reach in rural and poor communities, in particular. Yet their work is not seen as 'real' work with proper working conditions, remuneration or protection under labour laws. Our own research has shown that they are at risk of burn-out and carer-fatigue due to the stressful nature of working in resource-poor settings, the lack of recognition for their work, the fear of contracting illnesses due to the unregulated nature of their work, and being faced with the rising cost of living and lack of food security.

With the South African government's recent announcement of its plan to revitalise the primary health care system through, amongst other things, the large-scale deployment of community care workers as part of community

14 Ibid 102.

health teams, there is cause for celebration and cause for concern. As a sector, we have been advocating hard for the recognition of care work and care workers to be formalised as part of the health care system. This has been achieved on paper as part of the revitalisation model. However, the battle is not yet over. Not enough is being done to get the voices of community care workers into the debates and decision making. Decent work for community care workers is not on the agenda, nor is the gendered nature of care. Experience has taught us that the interests of a group is best looked after by representative members of that group. In the absence of an appropriate movement or organisation that champions the interests of care workers, work needs to get done to ensure the formation and strengthening of such a representative group of care workers. Wellness Foundation's interventions are aimed at the individual-, organisational- and sector levels to strengthen individual and collective capacity to advocate for such a representative movement of community care workers.

Our target groups (community care workers and care-based organisations) are essential to realise the intention and scope of the National Strategic Plan (NSP)[15] across all four strategic objectives. Localised responses to HIV and community care workers are an integral part of the National Health Insurance (NHI) designed to close the gap between private and public health care, and address some fundamental service delivery challenges.

Providing care to those with HIV and AIDS remains a challenging priority for the State. As an incurable condition, HIV and AIDS cause considerable stress on a psychological, behavioural and physical level, not only for those infected, but also for those responsible for their care. Community care workers suffer from burn-out, compassion fatigue and secondary traumatic stress, among other conditions. Their performance is further negatively impacted by poverty (particularly the lack of food) and by personal risks faced by carers in the routine delivery of their service. Most CBOs/NGOs working in the HIV field often operate with a small core complement of professional staff whose primary responsibilities are the recruitment, training and support of carers, and often the lack of a conducive organisational environment – poor communication, inadequate or no supervision and counselling, limited resources and weak community support systems – exacerbates the burden on carers. Their contribution is not seen as 'work' and they do not have the necessary protection under the labour laws, nor do they earn a decent living given that they provide an essential service that is the responsibility of the State to provide to its people, as set out in Section 27 of the South African Constitution, which guarantees the right to access healthcare.

The average ratio of CCWs to clients is about 1:10, meaning that about 600,000 people are cared for by this cadre of health care worker.

Transformation is best effected by the people who will benefit most by the change. In this case, CCWs are best placed to articulate and champion their cause for recognition, decent work and a living wage. The Wellness Foundation Changemaker course aims to strengthen a first-and second-tier leadership structure of the Community

15 National Strategic Plan for HIV< STIs and TB 2012-2016.

Care Worker's Forum to mobilise and organise a critical mass of community care workers to advocate for change. At present there exists only one other structure in South Africa that has a similar agenda, and they operate primarily in Gauteng, North West Province and KwaZulu-Natal. We are working on a cooperative agreement with this group so as to strengthen the voice of community care workers nationally. Community care workers are largely 'invisible' and unorganised. Organised labour has failed, to date, to bring volunteer or stipend workers into the fold. Once the Community Care Workers Forum, through the Changemakers mobilising and organising efforts, reach critical mass, they may mobilise for sectorial determination to get the necessary protection under South African labour laws and join an existing union or form their own. Not only will such a move bring much-needed formal recognition, but it will also enable community care workers to realise the various demands enshrined in the CCW Charter, the document that encapsulates their mandate. This reflects society's general devaluing of care work and, by implication, care workers.

(b) *Maternal health context*

The current context of maternal health in South Africa has seen the increase of home-based care geared directly for women pre- and post-birth. Already in 2002, reports were denouncing the improper health care given to pregnant and women in labour within government hospitals and clinics.[16] Women are turned away from clinics while in labour, ignored by nurses when calling for help, and even refused admittance to health facilities; they are not given adequate pain relief; they are discharged inappropriately, sent home without pain medication or antibiotics, sometimes after Caesarean births; they are left unobserved for long periods of time, subjected to physical and verbal abuse, and even forced to give 'gifts' to some health workers to ensure that maternity services are not delayed or withheld altogether.[17] The list of abuses continues and the Parent Centre has documented a number of abuses suffered by women during the maternity period.

i) General Activities of Care Work

In addition to monitoring and referring women who have faced problems, as described above, carers could potentially also provide much needed support to mothers. The Department of Health has accepted that, 'the early post-natal period is important for mothers and their infants…not only do many maternal and neonatal deaths occur

16 'A study that audited pain relief provided in the labour ward at Mowbray Hospital (Level 2) in the Western Cape found that 35.4% of women received no pain relief in labour, and of these 65.5% did not ask for a method of pain control and 34.5% did ask but did not receive it. When interviewed, all stated that they 'would have liked help'. This was in an environment with a high percentage of women having complicated labours and extra analgesic requirements. The study also found that 60.2% had no birth companion despite the fact that it has been shown that birth companions improve the quality of the birthing experience for women and the practice is officially encouraged in the institution (Fawcus 2002).' See also Penn-Kekana, Loveday and Blaauw, Duane, Final Report: A Rapid Appraisal of Maternal Health Services in South Africa, a Health Systems Approach, Centre for Health Policy, 2002, p. 21 and p. 22 respectively.

17 'Stop Making Excuses': Accountability for Maternal Health Care in South Africa. Human Rights Watch, 2011. Pages 21–30, 33.

in this period, but mothers require support in caring for and breastfeeding their babies.'[18] The Department further recognises that, 'post-natal visits should ideally be home-based, although facility visits may be practical in some settings. These are all services provided by carers as nurses from clinics and hospitals do not attend to homes to provide the care identified. Community Health Workers (CHWs) have a key role to play in improving coverage through conducting structured home visits during this period and the ward-based primary health care outreach teams will play a significant role in ensuring that all mother-baby pairs are visited.'[19]

CASE STUDY: THE PARENT CENTRE'S PARENT-INFANT INTERVENTION HOME VISITING PROGRAMME AS A FIRST LINE OF DEFENSE AGAINST MANY SOCIAL PROBLEMS

Overview of Programme

The Parent Centre's Parent-Infant Intervention Home Visiting Programme is an early intervention programme that aims to enable parents to create a nurturing environment for the healthy long-term development of their children. The programme operates within a systems approach, impacting on the family as a whole as well as the broader community, and could easily be located in an ecological approach.

This programme is implemented through five antenatal visits and fifteen postnatal visits in the comfort of a parent's home until the baby is six-months-old. Home visits are conducted by fourteen home-based visitors in eleven communities in the broader Cape Town metropole. The focus is on supporting vulnerable pregnant women living in non-conducive circumstances/poverty stricken areas and who are at risk of developing postnatal depression, which could be detrimental to the healthy long-term development of their children. When home visitors enter the home of each parent (single mothers in most instances), they do not only provide emotional support, counselling as well as information and skills pertaining to a mother's pregnancy and the development of the baby, they also act as so much more.

The home-based visitor plays a pivotal role in ensuring that mothers form a healthy bond/attachment with their baby.

> 'According to the U.S. Department of Health and Human Services, attachment theory was introduced in the 1950s by psychoanalyst John Bowlby. "Attachment" refers to an emotional bond between an infant and caregiver where the infant seeks the caregiver for closeness and support, especially when feeling upset. In most cultures, infants are primarily attached to the mother. Attachment

18 Strategic Plan for Maternal, Newborn, Child and Women's Health (MNCWH) and Nutrition in South Africa 2012 – 2016 at *http://www.doh.gov.za/docs/stratdocs/2012/MNCWHstratplan.pdf*

19 Ibid.

theory speaks to the emotional bond formed between all human infants and caregivers, the role of the caregiver in nurturing the bond, the anxiety in the separation of the bond, grieving the loss of the attachment, and how either a secure or anxious bond contributes to later relationships in the life of the infant.'[20]

Further Objectives of the Programme are:

- To detect antenatal and postnatal depression and provide the mother with appropriate interventions.
- To detect mothers who are suicidal and provide them with appropriate interventions.
- To encourage exclusive breastfeeding during the first six months through dissemination of information about the benefits of breastfeeding and providing practical and emotional support to the mother.
- To enhance parents' self-esteem and sense of agency, particularly with regard to their infants and children.
- To promote the parents' use of available resources that strengthen their ability to care for their children, such as a community health clinic, local government office, drug rehabilitation centre, food projects, etc.
- To provide support to parents infected with HIV and AIDS through giving them a safe space to talk about their illness and link them with appropriate resources.
- To encourage treatment compliance with parents who are infected with HIV and AIDS and who have children who are infected as well.
- To improve parents' awareness of, and ability to respond to, the needs of their older children.
- Where mothers have returned to work, to home visit the caregiver and promote sensitive and attuned infant care.
- To network with all relevant parties involved in the community in order to continue to provide a viable and appropriate service.

'The most important factor in a child's healthy development is at least one strong relationship (attachment) with a caring adult who values the well-being of the child.' (Engle et al, 1997).

Areas of Operation

The Parent-Infant Intervention Home Visiting Programme is implemented in the following eleven communities in the broader Cape Town area: Khayelitsha, Phillipi, Heideveld, Hanover Park, Retreat, Imizamo Yethu, Hangberg, Mitchells Plain, Gugulethu, Bonteheuwel and Nyanga. These indigent communities (all programmes of the Parent Centre operate in indigent communities) are riddled with crime, high levels of abuse, neglect and abandonment of

20 The Development of an Infant-Mother Attachment at *http://www.ehow.com/about_6699853_development-infant_mother-attachment.html,* [Accessed 3 May 2013].

children, gender-based violence, poverty and generally neglected communities. Cape Town is known as a city where gang violence is rife, often holding residents in communities hostage in their own homes during violent outbreaks. This type of violence often occurs unexpectedly, but quite regularly. Despite these challenges, including the long, wet, windy and very cold winter months, the home-based visitors continue to conduct their work with passion, commitment and dedication, wanting to make a difference in their clients' lives.

Importance of Home Visiting

Research has shown that the importance of home visits acting as a preventative measure against issues such as domestic violence, child abuse and neglect and the healthy development of children cannot be overemphasised. Entering a parent's home enables the home-based visitor to observe the family in their natural environment, which is a great opportunity to impact on the family as a whole (e.g. interaction between mother and baby; mother and other siblings; mother and partner/spouse; mother and extended family; mother and neighbourhood, and mother and broader community). The home visitors are, therefore, able to act as frontline workers in the fight to keep families together by imparting skills and knowledge to parents regarding their parenting style, relationship issues, linking the family to much needed poverty alleviation resources in the community and, importantly, acting as an advocate for the rights of women and children.

Each session comprises of a time to check in with the mother (how she and baby are doing and what is currently happening in her life – mothers usually share quite a lot with the home-based visitor during this time; this is followed by an opportunity by the home-based visitor to provide some specialist input regarding the stage of mother's pregnancy or the development of the baby, if the baby is already born). The session is concluded by making a follow-up appointment and planning for the next visit.

Home-based Visitor

Who is the Home-based Visitor?

The home-based visitors who implement the programme are women living in the same community where home visits are being conducted. Before joining the Parent Centre, the home-based visitor has generally experienced poverty, was unemployed and does not have post-school qualifications. The home-based visitor possesses the aptitude, passion and commitment to make a difference in her community and has a special interest in the attachment and bonding between a mother and infant for the better of the community in which she lives.

Training

The home-based visitor has received 39 weeks of specialised training from the Parent Centre. This 39-week training programme equips these women with the skills they need as a home-based visitor. Each four-hour session includes: practical self-awareness exercises, positive parenting skills, counselling skills, skills to assess infant

behaviour, and observation skills. Specialised workshops during the 39 weeks include: infant massage, antenatal and postnatal depression, child abuse, grief work, infant nutrition, HIV and AIDS, foetal alcohol spectrum disorder (FASD), pregnancy, labour and birth, trauma counselling, and sexuality. It also includes a continuous and rigorous screening process before, during and after the training programme, ensuring that only the best candidates make it onto the programme.

The goal to provide a high-quality intervention programme to vulnerable pregnant women in marginalised communities is further enhanced through regular in-service training sessions, as well as group supervision (once a week for three weeks of the month) and individual supervision (once a month). Home-based visitors are supervised by experienced infant-mental health practitioners comprising both social workers and psychologists.

Payment

As this programme is run by a non-governmental organisation, the home-based visitor is paid a monthly stipend, which is paid from funding raised from private donors. This programme is not funded by the government. As with any private funding, the security and continuation of the programme is based entirely on the availability and provision of these funds. Without secure funding that can perpetually financially secure the programme, there will no continuity and consistency in how care is provided for those already benefiting from the services offered. The closure of the programme would terminate an important early intervention service to families in 11 communities in the greater Cape Town area. Closing this programme will leave vulnerable pregnant women and their babies, once born, at risk of various problems and with no social and emotional support which is so crucial during the first few months of a baby's life.

The programme aims to impact permanently on 'at risk' parents through developing within them mindfulness about their children's wellbeing, an attachment and commitment to their children and a sensitivity and attunement to their children's needs and responses. And in so doing, has ensured that their children will grow up in environments that are nurturing and allows them to develop into resilient, caring, creative members of society.

This hope was affirmed by one of the participants of the programme.

> 'The programme changed my lifestyle. I feel the programme must never end in Hanover Park. I think if everyone here is on the programme, it will make a huge difference in Hanover Park, because parents will learn to give their children love and support. There would be less gangsterism. Many young people are only looking for love and comfort and their parents don't know how to give it to them. Please help everybody in Hanover Park; we will be able to have less crime in our community.'

More significantly is the financial impact the closure of the programme will have on the fourteen home-based visitors. These women have acquired skills and training that they have positively utilised for a number of years.

Additionally, with the little stipend that they have earned, they have been able to financially contribute to their families and to the upbringing of their children. Coming from indigent and marginalised communities, this stipend, though very small, has enabled these home-based visitors to increase their financial standing and afford everyday necessities that they would ordinarily not be able to afford.

As this is an area of interest for these home-based visitors, because it positively advances their own communities and it is something that lies close to their hearts, some of these women may continue doing this work without any form of stipend or support. As these women have made some strides both financially and socially, the closure of this programme, therefore, renders them vulnerable and financially dependent on either their spouses or the government (social grants), which pushes them further into poverty.

Impact of the Work of The Parent Centre

Jacky is a 15 year old mother living on the Cape Flats, Cape Town. The family planning sister at her local Maternity Obstetrics Unit just told her that she is four months pregnant and is worried about her because she is on Tik (Crystal Meth). Jacky is asked if she would like to be visited by the Parent Centre home based visitor; Jacky agrees. She is worried about how she is going to care for her baby. She and her boyfriend have no money, they are living with her boyfriend's parents who cannot work because they are both sick. They also care for two other grandchildren. She does not have a good relationship with her own parents whom she feels have never wanted her. She wants to be a better mother to her baby. Jacky is happy to hear that the Parent Centre home based visitor will be visiting her at home 20 times – five times during her pregnancy and 15 times after her baby is born. She is a bit scared in the beginning, as she does not know what the home based visitor will think of her. Perhaps the home based visitor will not like her because she is so young and will think that she will be a bad mother.

She is surprised to find that the home based visitor is kind, listens to all her worries, makes her feel good about herself and helps her believe that she can be a good mother. The home based visitor gives her information and teaches her new things that make it easier for her to take good care of her baby. When her baby was crying a lot, sometimes she got angry when she didn't know what to do and wanted to hurt her baby. She told the home based visitor who showed her how to calm her baby when she cries. The home based visitor also introduced her to another mother who lives close by and was home visited a year ago. Now, on days when she needs a hand with her baby, she can go to her new friend. The home based visitor also helped to get into a drug rehabilitation programme. She has stopped taking drugs. It was very hard but thinking about her baby has kept her going. She is very happy that she had the home visits. Her baby is happy and growing well and she is proud of herself as a mother. She wishes all pregnant women can be home visited.'

(The Parent Centre 2012 Annual Report, p. 5) (*Name has been changed.)

Jacky's story is characteristic of the 745 parents and infants living in Hanover Park, Khayelitsha, Gugulethu, Nyanga,

Phillipi, Mitchells Plain, Imizamo Yethu, Hangberg, Retreat, Heideveld and Bonteheuwel who participated in the home visiting programme. Each home-based visitor works with an average of 20 mother-infant dyads during a six-month period. A total of 9,012 home visits were conducted by the fourteen home-based visitors and approximately 11,155 parents and caregivers attended Early Parenting talks at the Community Health Clinics given by the home-based visitors during the 2011–2012 periods. Sadly, 26 per cent of the mothers home visited were younger than nineteen years old.

It is evident from the above that home visitors reach a high number of parents/caregivers annually in the comfort of their homes amid very trying circumstances in local communities, making it a very important service that will put vulnerable women (especially teenage mothers) at higher risk should the programme be terminated due to lack of funding.

V IMPACT OF RECOGNITION OF CARE WORK

The South African government has made some attempts, though minor and unsatisfactory, to provide some form of payment and support to home-based care workers. This was done in 2004 through the integration of carers into the government's Comprehensive Care, Management and Treatment Programme guiding ARV roll out. This is obviously only limited to home-based care workers providing care to HIV and AIDS patients. Further attempts can also be noted through the inclusion of home-based HIV caregivers and early childhood development practitioners in the government's Extended Public Works Programme as a bridge to formal employment for informal or unpaid workers in 2004.

This is superficial 'recognition' as it is only geared towards ensuring payment of stipends to these workers. Community health workers receive a stipend but do not become government employees. Instead, they are employed through mostly civil society initiatives as explained above. In this model, government provides grants to CSOs that employ the care workers. It is evident that the government has deliberately avoided absorbing caregivers into the civil service by choosing CSO-led support system for caregivers. 'The result, however, is that NGOs are seen as little more than disbursers of stipends and the caregivers attached to them do not have the same employment rights as other health workers. The stipends paid to home-based caregivers under the Extended Public Works Programme are lower than those paid to men engaged in infrastructure development, essentially formalising the gendered stigmatisation of care work in the context of a government programme.'[21]

Numerous research studies confirm that the burden of care is borne on a voluntary basis by women and girls in private households and community settings, placing considerable added strain on already resource-limited and poor

21 Past due: Remuneration and social protection for caregivers in the context of HIV/AIDS – UK Consortium on AIDS and International development Policy Briefing March 2012 at *http://aidsconsortium.org.uk/wp-content/uploads/2011/11/UK-AIDS-Consoritum-policy-briefing-remuneration-of-caregivers.pdf* [Accessed 13 May 2013] page 11.

households. It is estimated that a staggering 90 per cent of people with HIV and AIDS are cared for at home and 80 per cent of HIV-related deaths occur in the home. Additional statistics from the most recent National Antenatal Sentinel HIV and Syphilis Prevalence Survey in South Africa, 2009, paint a devastating picture.

The severity of the situation cannot be overstated and raises a range of complex questions, such as:

- Who provides the care for the multitudes of children, women and men behind the statistics?
- How are these caregivers equipped to provide what is an essential service to poor communities, where people cannot access private health care and, in many cases, are unable to access even the primary health care services provided by the State?
- What are care and support needs for the carers themselves?
- How are such caregiver needs being provided to such a marginalised and frequently 'invisible' group?
- As many of these caregivers are community-based and working on a voluntary basis, how is their wellbeing ensured and how are their voices heard in the policy development process and political decision-making processes that affect them in the absence of a representative structure?

Here are some of the benefits of formal recognition of home-based care to the rights of women:

(a) *Recognition of the right of women to work*

This right to work is entrenched in the Universal Declaration of Human Rights, Article 23, which states that 'everyone has the right to work'. Further to this, Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that State parties must, 'recognize the right to work which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. This right to work has been entrenched in Section 22 of the South African Constitution, which states that 'every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

The recognition and regulation of home-based care effectively promotes the rights of women who provide this care. It emphasises the right to choose their own occupation/profession. It further protects and respects their ability to make this choice, thereby protecting their dignity and equality as a profession and as women whose work is generally marginalised and undermined. Caregivers experience their work as a source of pride and personal satisfaction, an expression of their faith, their love of and commitment to their families, and their commitment to developing their communities. Therefore, formal recognition of the contribution and the work done by caregivers is an important recognition of personal, social and political value.

(b) *Financial independence of women*

As stated above, most carers perform their function either on a voluntary basis or receive a stipend for the work they do. As mostly women perform this work, it essentially means that most women are, therefore, left with either a very limited source

of income or none at all, which places them in a state of perpetual poverty. Additionally, a number of carers also spend money towards the assistance they provide, such as transport to visit clients and buying supplies to aid their clients.[22]

The recognition of care work could, among other things, include regulation of minimum wages to ensure that women doing home-based care are remunerated adequately and fairly. Additionally, this would support the development and sustainability of the livelihoods of women. Being remunerated would enable these women to live in dignity, not only because their much needed contribution is recognised and supported, but also because they are given the recognition that enables them to access other rights.

(c) *Treatment of carers*

Carers often report that they face discrimination and negative treatment from hospitals and clinics. Though there are other factors for this treatment, it is attributed to the fact that, 'many caregivers are very poor, often living with HIV themselves, and representing key affected populations. Further, the low valuation of caregiving work by formal healthcare workers, and caregivers' constant exposure to illness, death, dying, and HIV stigma, leads to high levels of isolation, burnout, fatigue and a general decline in their health and wellbeing.'[23]

With recognition comes a clear definition and elaboration of the roles that home-based carers can perform, which could potentially improve the treatment and attitude towards this work by other health professionals.

VI CONCLUSION

The participating organisations welcome the decision by the Special Rapporteur to submit a report on the issue of community care workers and the unpaid work that they do. As is clear from our submissions, care workers in South Africa play a critical role in service delivery and in ensuring that the right to health care is enjoyed by the most marginalised in our communities. Theirs is a selfless profession that receives very little, to no, attention and, as a result, they frequently have their rights ignored while they are ensuring that others receive treatment and care in a dignified manner.

22 Past due: Remuneration and social protection for caregivers in the context of HIV/AIDS – UK Consortium on AIDS and International development Policy Briefing March 2012 at *http://aidsconsortium.org.uk/wp-content/uploads/2011/11/UK-AIDS-Consoritum-policy-briefing-remuneration-of-caregivers.pdf* [Accessed 13 May 2013] page 6.

23 Ibid page 6.

CHAPTER 12

THE RIGHT TO WORK: MATERNITY PROTECTION UNDER THE SPOTLIGHT

CHARLENE MAY

I INTRODUCTION

The South African Constitution provides that every citizen has the right to choose his or her trade, occupation or profession freely.[1] For women, the right to work is much more complex than simply choosing a trade, occupation or profession. The working world was not designed to accommodate women and, therefore, reform of laws is needed to ensure equal participation and access to the labour force by women.

The Legal Resources Centre (LRC) has been engaged on the issue of women's right to work at a national, as well as international level. This article explores some of the issues that we have raised while working collaboratively with partners.[2]

II A SUBSTANTIVELY EQUAL WORK ENVIRONMENT

The International Labour Organization (ILO) has recognised that, in order to advance and realise women's access to the labour market, there has to be an emphasis on rights linked to the elimination of discrimination, but also the promotion of women's rights to work safely and securely and with due regard to their reproductive and family responsibilities.[3] The achievement of gender equality is now one of the United Nations Sustainable Development Goals and the workplace is a critical area in which much work will need to be done in order to achieve gender equality.

The Convention on the Elimination of All Forms of Discrimination against Women provides, in Article 11, that:

> 1. State parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

1 Section 22 of the Constitution

2 Partners include the Commission for Gender Equality, the Gender Desk of COSATU, the Programme for Women's Economic Social and Cultural Rights, the ESCR Net's Women's Working Group, and Wellness Foundation Trust

3 ILO Workers with Family Responsibilities Convention, 1981 (no. 156)

(e) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity, and old age and other incapacity to work, as well as the right to paid leave;

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures:

(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

Although South African law provides for paid maternity leave for female employees, women who are self-employed are currently not protected. Traditionally, this category of women has been perceived as falling within a category of greater financial sustainability and, therefore, able to provide for themselves during the time that they are on maternity leave.

The reality is that there is a lack of recognition given to women who are self-employed and who work in the informal labour sector (traders, *spaza* shop operators, care workers). Since the law currently makes no provision for these women to enjoy maternity protection, they have to make the difficult choice between working to provide for themselves or starting a family. There is a clear element of discrimination as there is no difference between women working in the informal or formal sectors during the time of maternity and childbirth. They have the same responsibilities in respect of raising a newborn, the same need to bond with a newborn and, certainly, the same financial burden during this time. The question, therefore, is whether the fact that they are not provided with protection amounts to discrimination between two classes of women?

III INTERNATIONAL STANDARDS

The ILO has adopted three Conventions on maternity protection: (i) The Maternity Protection Convention, 1919 (No. 3), (ii) the Maternity Protection Convention (Revised), 1952 (No. 103), and (iii) the Maternity Protection Convention, 2000 (No. 183). Thirty Member States have ratified Convention No. 3 and Convention No. 103. Convention No. 183[4] entered into force on 7 February 2002 and over 18 countries have ratified it. Sixty-three countries are party to at least one maternity protection Convention. This has influenced the enactment of domestic legislation because almost every country in the world makes some form of provision for maternity protection.

There has been an increase in advocacy[5] to encourage the South African government to ratify Convention 183. Convention 183 is divided into different aspects of maternity protection:

- Health protection
- Maternity leave
- Cash and medical benefits

4 South Africa has not ratified Convention No. 183.

5 Advocacy efforts have been made by COSATU as well as the Commission for Gender Equality, along with the ILO

Our focus in this article is on the protections afforded to self-employed women, and so we will not address issues of health protection, as these would be available to self-employed women through the public health system.[6] Convention 183 is implemented through Recommendation No. 191, which suggests and promotes a higher standard of protection and benefits than required by Convention 183.

(a) *Convention 183*

This Convention applies to all employed women, including those in atypical forms of dependent work.[7] However, each Member that ratifies this Convention may, after consulting the representative organisations of employers and workers concerned, exclude wholly or partly from the scope of the Convention limited categories of workers when its application to these categories would raise social problems of a substantial nature.[8]

Internationally, there have been advances made in respect of the scope of protection and broadened scope in respect of those who qualify for protection. Since Convention No. 3, for instance, coverage has being extended to all women who are employed, including those who are wage earners working from home. Whether or not the women, in practice or implementation, benefit from the protection is dependent, in most cases, on how domestic laws define 'worker' or who is purposefully excluded from labour legislation or social security benefits. Some countries also include criteria for eligibility to qualify for benefits.

i) Workers excluded from maternity leave provisions

Most countries provide maternity protection for employed women in the private as well as public sectors. In many countries various categories of women are excluded from protection because they are excluded from labour or social assistance legislation in the country. Frequently excluded groups in terms of the ILO are:

- Domestic workers, who often qualify for maternity leave but not for cash benefits during that time period;[9]
- Members of an employer's family or women working in family undertakings, who qualify for maternity leave but would not qualify for cash benefits during that time;[10]
- Causal or temporary workers, who qualify for maternity leave but not cash benefits during that time;[11] and

6 This is by no means an endorsement of the functionality and quality of the services that are afforded through the public health system

7 Convention 183 Article 2(1).

8 Convention 183 Article 2(2)

9 Argentina, Bangladesh, Cambodia, Egypt and Honduras.

10 Dominican Republic, Ecuador and Nigeria.

11 Panama and Vietnam.

- Workers earning over a certain ceiling amount, who qualify for maternity leave but not cash benefits during that time.[12]

In its 2008 report, the ILO Committee of Experts on the Application of Conventions and Recommendations expressed concern that some categories of workers are excluded from coverage in several countries that have ratified at least one of the Conventions related to maternity leave. This is especially the case for women working in domestic service, stock raising and agriculture, and permanent or temporary officials working in state administration and public bodies. These industries are also poorly regulated and women working in these professions are particularly at risk of exploitation.

IV MEETING THE STANDARD

Self-employed women within the South African context appear to fall into a particularly vulnerable group of workers. They have taken on the dual role of both employer and employee. The current legal framework appears to focus solely on making provision for women as employees and does not take into account that women can be self-employed. There appears to be a general acceptance that women who are self-employed will attend to their own maternity protection by taking the necessary steps to save money for the period of maternity.

ILO Conventions No. 3 and No. 103 emphasised that employers should not be individually liable for the cost of maternity benefits payable to women employed by them, and that benefits should be provided through social insurance or other public funds. This is of particular importance for self-employed women, as they can only claim benefits from various forms of social insurance. The principle of payment through social insurance or other public funds is important for mitigating against self-employed women, who directly bear the costs of maternity leave. This principle is maintained in Convention No. 183, although this Convention allows employers to be individually liable for maternity benefits in cases where they have given their specific agreement, where this was determined at the national level before the adoption of Convention No. 183 in 2000, or where it is agreed upon at the national level by the government and the social partners.

In recent years we have seen more proactive steps being taken by government to acknowledge not only women's role within the labour force, but also within the family and community. An example of this can be seen in the White Paper on Families in South Africa.[13] The White Paper mandates the Department of Social Development to explore the possibility of calling for the inclusion of paternity leave in the Basic Conditions of Employment Act 75 of 1997 and strengthening the recognition of parenting and support for parents in the workplace.[14] The White Paper further mandates the Department of

12 Dominican Republic and El Salvador.

13 Department of Social Development, Republic of South Africa, White Paper on Families in South Africa October 2012.

14 Ibid 46.

Labour to ensure that labour policies and laws support gender equity at the workplace and to recommend the development and implementation of paternity leave.[15] These provisions acknowledge the unequal burden women carry in respect of unpaid care work within their homes and communities. They do not impact directly on maternity protections, but they are an indication that government is beginning to view matters differently, perhaps even more holistically, and is willing to address gender equality through identifying all relevant areas that would impact on the working life of women.

The South African Law Reform Commission has embarked on an investigation in respect of extending maternity protections offered by the State to self-employed women. The investigation will hopefully address the current predicament faced by self-employed women working in both the formal and informal sectors. We trust that this process will be another positive step towards realising women's rights to equality within the workplace.

15 Ibid 50.

CHAPTER 13

RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK

(Article 7 of the International Covenant on Economic, Social and Cultural Rights)

MANDIVAVARIRA MUDARIKWA AND CHARLENE MAY

I INTRODUCTION

This is a submission made on the Draft General Comment on the right to just and favourable conditions of work as entrenched in Article 7 of the International Covenant on Economic, Social and Cultural Rights. As this draft comment will be instrumental in the realisation of rights of vulnerable persons to access just and favourable working conditions, the submission was made specifically to ensure that the development of any normative content internationally does not exclude any class or group of people. We sought to ensure that the draft general comment is understood and finalised within the context of substantive equality.

II INPUTS ON THE DRAFT GENERAL COMMENT

(a) *Unrecognised professions*

Our engagement with marginalised groups indicates that a number of professions that are not formally recognised often function without any form of regulation. This is true for professions such as paralegals, sex workers and care workers.[1] It is usually in this context that women, disabled persons, LGBTI persons and other vulnerable persons suffer the most discrimination and exploitation. As a result, they are 'an unseen labour force' that largely falls outside of the ambit of the labour protection mechanisms in place because they are not recognised as workers. We would, therefore, like to encourage the Committee to urge State parties to ensure that all professions are recognised and regulated in an effort to realise the rights entrenched in Article 7 of the International Covenant on Economic, Social and Cultural Rights ('Convention'). We believe that this will ensure that this right is made a reality for many people 'working' in unrecognised professions without regulations or protection.

1 These are professions not formally recognised as such in South Africa and many other countries.

(b) *Remuneration*

We welcome the Committee's recommendation in relation to minimum remuneration, which includes benefits such as health insurance, housing and other allowances. However, we are concerned that the Committee does not emphasise the need for State parties to take measures to ensure that all wage earners earn the minimum remuneration in reality. This is a critical issue for those in private sectors, such as domestic workers, and those outside of the recognised and regulated professions. We believe that there must be measures put in place to ensure that workers are able to receive the regulated minimum remuneration without threats to the security of their employment, which is usually what happens when employees attempt to assert their rights to receive remuneration similar to other workers similarly placed. Additionally, in some countries there are regulated sectorial determinations for specific professions, for example Sectorial Determination 7: Domestic Workers, which regulates the, 'employment of domestic workers; which includes housekeepers, gardeners, nannies, domestic drivers…'[2] While this is a commendable step in the recognition of domestic workers' rights, not all professions have such sectorial determinations; in fact, some operate on remunerations regulated by the employers without any accountability or regulation. We, therefore, call upon the Committee to encourage State parties to determine and regulate minimum wages for all professions without unfairly excluding those professions that are not necessarily viewed as formal professions. This again relates to the issue of formal recognition of some professions, as mentioned above.

(c) *Equal opportunities for employment*

While we appreciate the need for equal remuneration for all workers, we wish to point out that, without creating equal opportunities for vulnerable persons to join the workforce, this obligation is meaningless. Often vulnerable people are denied the opportunity to join the workforce because the prospective employer is not willing to put additional measures in place to meet the needs, for example, of a blind or deaf or physically impaired prospective employee. We believe that this undermines the value of the work that can be potentially conducted by persons fitting the previous examples or other similarly placed persons. It is, therefore, imperative for equal opportunity remuneration to be understood as an interwoven element of the obligation to create equal opportunities of employment for men and women, abled bodied and disabled persons, old and young persons, migrant and local persons, just to name a few, and noting that this is not a closed list of examples.

(d) *Bias and discrimination*

While we note that Article 7 of the Convention specifically mentions women as a vulnerable group, we wish to remind the Committee that Article 2(2) emphasises that the rights in the Convention will be exercised without discrimination of any kind as to *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.* This list is non-exhaustive and similar areas of discrimination are also prohibited, including disability, age and sexual

2 *http://www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-7-domestic-workers.*

orientation; among others. We, therefore, note from the wording that, while the obligation to address and eliminate gender discrimination is specifically mentioned, it should not be perceived as the main challenge that Article 7 aims to address. Often you find that a disabled woman of colour, for example, may suffer discrimination as a result of the intersectionality of all her vulnerabilities. It is, therefore, important to clarify the obligation within an intersectional framework to ensure that the right to just and favourable conditions is guaranteed to everyone, especially all vulnerable groups, including women, older persons, sexual minorities, migrant/refugee workers, workers in the informal sector, domestic workers, unpaid care workers, unpaid workers, amongst others, without discrimination. In addition, when the Committee identifies special topics of broad application,[3] it is important to note, in that section, these groups of workers identified are either just examples of how bias/discrimination can be addressed or simply identify some of the steps that State parties and employers have to be cognisant of when dealing with vulnerable and marginalised persons in realising this right, to avoid limiting the understanding of the right within only the named class of persons.

(e) *Safety and healthy working conditions*

We note with appreciation the emphasis by the Committee urging State parties to take legislative and other measures to prevent occupational injuries and disease. We wish to, however, note that in some countries, State parties have indeed put laws in place that are aimed at creating compensation mechanisms for occupational injuries and disease. These laws have not been fruitful because employers fail to register their employees in order to enable them to claim compensation should they be injured or contract a disease related to their employment, which limits the availability of this right. Often there are no accountability measures to ensure that employers register their employees. Consequently, we wish to bring this to the attention of the Committee to consider how to address employers that fail to register their employee, for example with punitive measures; alternatively, to urge State parties to make the compensation for occupational injuries and disease unconditional on pre-registration.

(f) *Reasonable accommodation to ensure safety and healthy working conditions*

We want to emphasise here, again, that in addition to ensuring that the General Comment can be applied to varying situations of bias and discrimination, it is important for the Committee to urge State parties to put measures in place and take additional steps to reasonably accommodate the specific needs of vulnerable persons to reduce risks of occupational injuries and disease. Through the implementation of such measures and reasonable accommodation, discrimination in certain professions, such as extractive and security industries, would be addressed.

3 Page 11 of the Draft General Comment.

(g) *Risk assessment*

It is important for State parties to develop and implement medical surveillance programmes in the form of regular medical check-ups to prevent or diagnose early any work-related illness to avoid deaths and serious irreparable harm to the health and safety of workers. This is of particular importance in some professions where persons work with dangerous equipment, work underground, and work with patients with communicable and fatal diseases, amongst other conditions that create the real possibility of exposure to common and serious illness such as tuberculosis, or could be exposed to violence at work. The risk assessment should also include an assessment of the protective equipment that must be provided at all times to ensure that risk of injuries and diseases are limited.

(h) *Core obligations*

We note that general obligations of State parties in terms of economic, social and cultural rights is to respect, protect and fulfil the rights as entrenched in the Convention. In addition, Article 2(1) of the Convention also obligates State parties 'to take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. It is our submission that the description of the core obligations[4] must speak to these obligations particularly on fulfilling the right to just and favourable working conditions. In most cases rights are merely recorded on paper and, in practice, employers operate as if they do not exist. It is chiefly important in improving the plight of vulnerable and marginalised persons to make sure that State parties respect, protect and fulfil this right within available resources to ensure all its elements described in the draft general comment are a reality; both in law and in practice. We, therefore, urge the Committee to revise the core obligations in the draft comment to ensure that they speak to the obligations articulated above.

4 Page 17 of the Draft General Comment.

CHAPTER 14

THE RIGHT TO WORK IN PEACE – RECOGNISING SEX WORKER RIGHTS AS HUMAN RIGHTS IN SOUTH AFRICA

CHARLENE MAY

I INTRODUCTION

There are a number of laws in South Africa that criminalise various aspects of sex work. Section 20(1) of the Sexual Offences Act of 1957 states that: 'Any person who has unlawful carnal intercourse,[1] or commits an act of indecency,[2] with any other person for reward commits an offence.'

The Sexual Offences Act of 1957 also criminalises a number of acts associated with sex work, such as procurement, brothel keeping, facilitating sex work and living off the earnings of sex work, among others.

Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 1997 states that:

> 'A person (A) who unlawfully and intentionally engages the services of a person 18 years or older (B), for financial or other reward, favour or compensation to B or to a third person (C) –
>
> (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
>
> (b) by committing a sexual act with B,
>
> is guilty of engaging the sexual services of a person 18 years or older.'

A number of municipal bylaws criminalise sex work, an example of which can be found in the Cape Town bylaw in respect of Streets, Public Places and Prevention of Nuisance,[3] which states, among other things, that:

> 'no person shall in a public place, perform any sexual act'
>
> 'no person shall in a public place, solicit or importune any person for the purposes of prostitution or immorality'

1 Sex other than between husband and wife.

2 An act that is considered immoral or offensive to others.

3 Bylaw no. PG6469.

Historically, our laws have addressed aspects of sex work as far back as 1868, when the Cape Colony enacted the Contagious Disease Prevention Act that compelled sex workers to subject themselves to a medical examination for venereal diseases.

The issue to be decided and explored is whether, under our current Constitutional dispensation, which recognizes and seeks to protect basic human rights, we, as a country, can still justify the need for legislation that criminalises sex work.

This report explores the current context of sex work in South Africa. Part A will explore the impact and effect of the current law on sex workers and the profession, and Part B will focus on the current legislative reform process underway with the South African Law Reform Commission and the Commission for Gender Equality. Part C will deal with the different models available internationally and regionally in respect of sex work, and will conclude with a focus on the proposed model most suitable for South Africa, based upon our international, regional and constitutional obligations.

II PART A: THE IMPACT OF THE CURRENT LEGISLATIVE FRAMEWORK

The South African government has always made the conscious choice to combat sex work through criminalisation. It is also worth noting that the profession garners its own share of moral reservation and stereotypes from general society.

The impact of this on sex workers is, therefore, objective as well as subjective, in that sex workers may internalise society's view of them being less than human or less worthy of protection and enforcing their rights. Because sex work is criminalised, society seeks to ostracise sex workers from their communities, and the criminalisation contributes to the notion that sex workers are free to be abused and deserve the scorn of society as they are engaging in an unlawful activity.

All of the above contribute to barriers for sex workers to exercise basic rights.

(a) *Violence against sex workers*

Violence against sex workers should be viewed and assessed in the context of the prevalence of gender-based violence in South African society as a whole. In 2004, a study found that a woman is killed every six hours by an intimate partner. In 2004, 15 per cent of the male respondents participating in a study done by the Medical Research Council[4] admitted to rape or attempted rape of a partner, wife or girlfriend. On average, the Legal Resources Centre's (LRC) Cape Town office screens a minimum of three women per week in respect of domestic violence-related abuse.

A number of factors have been identified as the cause of the high rate of gender-based violence in South Africa and although these are relevant to sex workers as well, there is some indication that sex workers, due to the nature of the work and the working conditions, are more likely to experience gender-based and sexual violence. A Sex Workers Education and Advocacy Taskforce (SWEAT) study conducted in 1998 with 25 participants indicated that 16 of the women interviewed had

4 Mathews, Abrahams, Martin, Vetten, Van der Merwe and Jewkes *Every six hours a woman is killed by her intimate partner: A Study of Female Homicide in South Africa* (2004).

experienced some form of violence at the hands of clients. Eleven of the participants also admitted to being forced into unprotected sex with clients. Violence is not restricted to the outdoor industry and 53 per cent of the women (both indoor as well as outdoor) interviewed for another SWEAT survey conducted in 2007 admitted that they had been physically hurt or verbally abused while working.

(b) *Police harassment*

The South African Police Service (SAPS) has a long history of violence towards the very people they are sworn to protect. During apartheid, the police were used to violate basic human rights and violence was the mechanism used to enforce the apartheid regime. In recent post-apartheid years, the police have remained under fire for the violent methods that they use during protest action; a case in point being the shooting of miners at Marikana, North West province, in 2012. There have also been a number of *delictual* claims against the Minister of Police in instances where members of the SAPS had been found abusing their power and authority to commit acts of rape and assault. In the 2007 SWEAT survey, 41 per cent of the women interviewed reported having experienced physical violence at the hands of members of the SAPS.

In 2010,[5] the Western Cape High Court found that members of the SAPS were indeed unlawfully harassing sex workers. They would arrest and detain sex workers without the intention of bringing them before court to be charged or prosecuted. The judgment in the matter interdicts members of the SAPS from arresting sex workers without having the intention to bring them before court to face prosecution. Through the LRC's engagements with sex workers since the judgment was handed down, all evidence suggests that the members of the police have, since 2010, systematically ignored the interdict. Since the judgment, local municipal law enforcement – through an established vice squad – has been profiling sex workers by recording personal details and information and establishing a register of sex workers within the Cape Town CBD. Local law enforcement also systematically makes use of the municipal bylaws to harass sex workers by issuing fines for loitering and disturbing the peace, among others. In the instances where the LRC has appeared in the Community Court to represent sex workers, these fines are not prosecuted and our clients were all advised that the State declined prosecution. Under these circumstances where sex workers are legally represented, court processes are often swayed, and it remains unclear what the outcome would have been had the LRC's clients not had representation.

Members of the SAPS have also been accused of arresting and then dropping off sex workers kilometres away from where they were arrested or live, often leaving them in remote areas and at risk of serious physical harm. Sex workers report having their genitalia sprayed with pepper spray and police officials extorting money or sexual favours from them in return for their freedom. Sex workers, therefore, either do not report incidents of violence or abuse to the SAPS or they are threatened and intimated with threats of arrest where they do report instances. The police are not viewed by sex workers as individuals who are able to provide them with safety and security.

5 *SWEAT v The Minister of Safety and Security and Others 2009* (6) SA 513 (WC).

(c) *Health and HIV and AIDS*

The illegal status of the work directly influences the health of sex workers. Sex workers are very often viewed as a health risk in society as there is a perception that they carry and transmit sexually transmitted diseases and infections. Due to the physiological factors associated with HIV and AIDS, a woman is seven times more likely to get infected with HIV from a man, than to transmit the virus to him. The majority of sex workers in the industry are female and, therefore, the reality is that they are more at risk of being infected by their male clients.

The overarching factor in respect of sex work and HIV and AIDS is the issue of consent and control. Sex workers, especially outdoor-based sex workers, have very-little-to-no control over the conditions and circumstances in which they perform their services. They have very little time to negotiate terms and conditions before they get into a car and have little control over where they are taken once they have been picked up. The lack of control leaves them open to risk of unprotected sex and HIV and AIDS infection. Many sex workers are alienated or abused when seeking medical treatment once they are identified as sex workers by health care providers. The stigma (the illegal nature of the work, as well as the moral judgement) attached to the work, therefore, becomes a very real barrier when accessing health care services.

III PART B: CURRENT DEVELOPMENTS IN LEGISLATIVE REFORM

In 2002, the Constitutional Court handed down judgment in the case of S v Jordan.[6] The minority judgment penned by Oregan J called for legislative process to address sex work within a Constitutional framework. As a result of the judgment, the South African Law Reform Commission (SALRC) was instructed to investigate the context of sex work and to propose legislative reform.

This has been a long and drawn-out process, which culminated in 2009 in the release of the Discussion Paper 0001/2009 titled "Sexual Offences Adult Prostitution".[7]

(a) *The Discussion Paper on Adult Prostitution*[8]

The primary aim of the Discussion Paper is to consider the need for law reform in relation to adult prostitution and to identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution. A secondary aim is to review the fragmented legislative framework that currently regulates adult prostitution.[9]

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6 S v Jordan and Others (CCT31/01) 2002 ZACC 22.

7 South African Law Reform Commission Discussion Paper 0001/2009 Project 107 ISBN 978-0-621-38498-7.

8 The SALRC purposefully decided not to use the term sex worker in its processes so as to appear unbiased in their approach to the research, its analysis and their recommendations.

9 Summary of the Discussion Paper on Adult Prostitution SALRC.

The Discussion Paper examines the social and legal context of prostitution in South Africa. A comparative analysis looks at how other countries have addressed prostitution in their laws and the paper concludes with alternative models that could be implemented in South Africa to address adult prostitution.

The Discussion Paper was released for public comment and the SALRC presented the Paper in a number of provinces in its efforts to illicit public comment, contribution and submissions. Through the LRC's correspondence with the SALRC, we know that a high volume of submissions were received from individuals, institutions, organisations, as well as religious institutions. Due to the high number of submissions and their varying positions, it took some time for the Commission to prepare its report. Through our engagements with the Commission Secretary, the LRC is also aware that a delay was caused in the submission and discussion of the Report internally, as the SALRC was not quorate for some time. The Report was adopted by the Commissioners and submitted to the Minister of Justice and Constitutional Development. There have been a number of off-the-record confirmations from officials within the Department that the Report has been submitted to Cabinet, but nothing official related to this has been released to the public. Rumours abound, however, that government will adopt a Swedish model for the future criminalisation of sex work based upon the SALRC recommendations. Until this is officially confirmed, we have no way of knowing when the Report and its recommendations will be released or whether the Department is in the process of drafting legislation to give effect to the recommendations.

(b) *The Commission for Gender Equality expresses a view*

In 2013, the Commission for Gender Equality (CGE) released its position paper[10] calling for decriminalisation of sex work in South Africa. The CGE acknowledges that perceptions about sex work are often based solely on religious opinions, thereby casting sex work as a 'sin' and sex workers as 'fallen or sinful'. This in turn casts the workers into a dichotomy of good and bad girls/women, reducing the issue to morals and values.

The CGE's view is important in that it distinguishes sex work from prostitution in acknowledging that sex work is a form of labour, whereas prostitution is viewed as coerced sex work where women have no choice in the matter. They, therefore, acknowledge the views expressed by sex workers with whom the LRC works, in viewing sex work as a right to self-determination and emphasising the freedom of choice of profession.

The CGE comes to the conclusion that criminalisation has, in fact, failed sex workers. It has failed to reduce the offences committed against sex workers, such as physical and sexual violence. Instead, they have found that ongoing criminalisation has led to the harassment and abuse of sex workers at the hands of the SAPS, the very people meant to enforce the law and protect sex workers.

Sex work should, therefore, be discussed in the same vein as frameworks put in place for the adult entertainment industry, adult shops, strip clubs and adult film theatres. The CGE findings are largely based on their own research conducted on the impact of decriminalisation in other jurisdictions, such as New Zealand and parts of the city of Sydney in Australia.

10 *http://www.gov.za/sites/www.gov.za/files/Commission%20for%20gender%20equality%20on%20sex%20work_a.pdf*

They have found that, five years after decriminalisation in New Zealand, the law reform has had positive impacts on sex workers. Sex workers have been empowered against violence and abuse and are equipped to seek interventions from the police. There was no increase in trafficking or commercial sexual exploitation of women and children and no increase in demand for sex. The CGE, therefore, endorses a position that sex work, in principle, should be viewed like any other profession and that it should be regulated like any other profession. The position is one that seeks to affirm the basic human rights that are the foundation of the South African Constitution.

IV PART C: SEX WORK RECOGNITION IN OTHER JURISDICTIONS

South Africa is not unique in having to grapple with the legal framework surrounding sex work. Based upon the discussion in the introductory sections of this paper, it is clear that the debate and legal implications surrounding the industry has been a historic one. As discussed, South Africa currently has a criminalisation model and, in order to evaluate its efficacy as a law reform process, it is critical to evaluate other jurisdictions, the models that they have applied and the impact that these models have had on sex workers.

(a) *Total criminalisation*

Along with South Africa, the United States of America (USA) and Thailand are examples of total criminalisation, as identified by the SALRC.

- The Federal Government of the USA opposes legalised sex work and supports criminalisation based on the justification that prostitution is inherently harmful and dehumanising, and fuels trafficking in persons.[11]
- Despite the official approach of full criminalisation, sex work is significantly popular and socially acceptable in Thailand. The official position, however, is full criminalisation, and this is justified by the Suppression of Prostitution Act of 1996, which seeks to safeguard the welfare of and protect women and children from exploitation.

(b) *Partial criminalisation*

Often referred to as the Swedish model (the model being implemented and conceptualised in Sweden), partial criminalisation is also the model followed in the United Kingdom (UK).

- In Sweden, the clients of the sex worker are criminalised. The justification of the law is to reduce male violence against women and children. The model is based on the presumption that, by criminalising the buyer, you will reduce the demand for commercial sex and the oppression of sex workers.[12]

11 US Department of State *The Link between Prostitution and Sex Trafficking* (2004).

12 De Santis *Sweden's Prostitution Solution* (2004).

- In the UK, brothel keeping, pimping and under-age prostitution are illegal, but not the act of sex work itself. The justification for the legislation is the protection of the public from sexual crimes, while at the same time protecting the rights of adults to a private life. The law also contains mechanisms for routes out of sex work, prevention and obviating the demand for commercial sex.

Partial criminalisation can, therefore, take different forms, from the Swedish model that seeks to reduce the demand for commercial sex, to the UK model that is focused on third party exploitation through commercial sex.

(c) *Non-criminalisation*

Also often referred to as decriminalisation, non-criminalisation is focused on the repealing of existing laws that criminalise sex work, or not having any laws.

- New Zealand has adopted a non-criminalisation model and, in doing so, stated that although government does not endorse or morally sanction sex work, there is a greater need and obligation to safeguard the rights and safety of sex workers and to minimise the harm caused by sex work.[13]

(d) *Regulation*

In certain countries there has been acceptance by government of the age-old practice of commercial sex. To this end, the governments have adopted an approach that seeks to regulate the industry.

- The Netherlands accepts sex work and seeks to regulate the industry in efforts to protect sex workers from exploitation, prevent involuntary sex work and advance the rights of sex workers.[14]
- Germany has opted for regulation in order to remove the stigma attached to sex work and to strengthen the labour rights of sex workers.[15]

The above are mere elements to attempt to bring clarity on the differing models. The SALRC, in their Discussion Paper of 2009, provides a much more comprehensive analysis of the varying models. Different jurisdictions have approached the legislation of sex work in different ways so as to adapt it to the needs, duties and responsibilities of that country.

(e) *Why is decriminalisation the model most appropriate for South Africa to adopt?*

South Africa currently criminalises all aspects related to sex work, as discussed in earlier sections. The LRC, along with other civil society organisations, have been advocating for a decriminalisation model, as we believe, based upon our engagements

13 Section 3 of the Prostitution Reform Act 2003.

14 Article 250a of the Dutch Penal Code.

15 Administrative Court Berlin (Az:35 A 570.99) 1 December 2000.

with sex workers, as well as our research and engagements at the regional and international level, that sex work must be dealt with within a rights-based legal framework.

Only through adopting a legal framework in which we place the rights of the sex worker as the priority obligation, will we be able to meet our Constitutional obligations towards sex workers. The current approach of using the very rights that sex workers have to criminalise their choice of profession is surely a violation of their rights and a false dichotomy?

Criminalisation violates the rights of sex workers and, therefore, through decriminalisation, we will be able to ensure that sex workers enjoy their Constitutional rights through choosing their own profession, and seeking the labour rights that all other employees in the country enjoy and find protection under.

Criminalisation continues to fuel society's negative perceptions and stereotypes about the profession. These negative stereotypes disproportionately affect women, as sex workers are predominantly women. Decriminalising the sex worker industry validates and acknowledges sex work as a profession, which enables the breaking down and eradication of harmful stereotypes.

Criminalisation in its current form increases sex workers' risk of contracting sexually transmitted diseases, especially HIV and AIDS. It contributes to the violation of the right to health and impedes government's efforts towards the eradication of HIV and AIDS. By decriminalising the industry, sex workers will be able to enforce safe sex, make health choices concerning themselves and the profession, and participate in policy formulation that concerns them.

Criminalisation is more often than not justified by stating that it protects sex workers from violence and abuse. It is the means through which government meets their Constitutional imperative to ensure the safety and security of women. Decriminalisation would ensure that sex workers' rights to freedom and security of the person,[16] which includes the right to be free from arbitrary arrest and detention,[17] the right to be free from violence[18] and the right to bodily and psychological integrity,[19] are respected, protected and promoted. Sex workers will be able to access justice by not fearing the very institutions that have been designed to ensure their safety and security.

16 Section 12(1) of the Constitution Act 108 of 1996.

17 Section 12(1)(a)–(b).

18 Section 12(1)(c).

19 Section 12(2).

CHAPTER 15

SUBSTANTIVE GENDER EQUALITY, SEX WORK AND THE ASSUMPTIONS OF *S v JORDAN*

CHARLENE MAY

I INTRODUCTION

In 2002 the Constitutional Court was asked to pronounce on the constitutionality of legislation that criminalised sex work[1] and its associated crimes. The case was *S v Jordan*[2] and, in brief, the facts can be summarised as follows:

Three Appellants had been convicted in a lower court in terms of certain offences under the Sexual Offences Act 23 of 1957. Their arrest was as a result of a police raid at a brothel. The brothel owner, an employee, as well as a sex worker were charged with having contravened the provisions of the Sexual Offences Act. During the hearing in the Constitutional Court, argument was presented by the Appellants that the provisions violated their rights to equality, privacy, human dignity, economic activity to pursue a livelihood, as well as freedom and security of person.

In light of the Legal Resources Centre's (LRC) work done on equality and non-discrimination, this paper seeks to critically assess the *Jordan* judgment from the perspective of substantive equality and how, based on a number of discriminatory assumptions and assertions about women, sex and women's right to decide what they do with their bodies, it led the Constitutional Court to fail in advancing substantive gender equality for women.

(a) *Criminalising sex*

The Sexual Offences Act had its origin in the Immorality Act 5 of 1927. The Immorality Act was introduced at a time when the virtue of European women had to be defended from the virility of the black man. As a result, carnal intercourse between European women and black men were criminalised; even in instances of consensual sexual intercourse. This legislation falls squarely within the parameters of legislation geared towards deciding for a woman what she can and cannot do with her body, and vested control of her sexuality in the hands of white men.

The Sexual Offences Act that Jordan dealt with, and that we still have today, is therefore premised on very real perceptions of immorality; and sexual immorality more specifically. Since the enactment of immorality legislation and up until

1 The constitutionality of sections 2, 3(b), 3(c) and 20(1)(aA) of the Sexual Offences Act 23 of 1957 was under deliberation.

2 *S v Jordan* 2002 (6) SA 642 (CC).

today, the State has made a conscious decision to police sex from a conservative moral perspective.

A further clear example of the moral premise on which the legislation rests can be found in the definition of 'unlawful carnal intercourse' in section 1 of the Act:

> 'carnal intercourse otherwise than between husband and wife'

Additionally, section 20(1)(aA) of the Act provides that:

> 'Any person who – has unlawful carnal intercourse, or commits an act of indecency (undefined), with any other person for reward – shall be guilty of an offence.'

The implications of these sections are that, as long as parties are married to each other, whatever is negotiated between them would be considered legal. Perhaps this is a further reference to men's ability to make demands and exercise control over their wives without fear of committing any offence. Only once the agreed to and negotiated acts fall outside the institution of a sacred marriage, would a crime be committed. This the value system to which the Act clings and which the *Jordan* judgment reinforces.

Once we have established how morally wrong sex outside of marriage is, and that asking for a reward is a further moral blight, the rational conclusion would be that if you derive benefit from sex work, or if you facilitate through running a brothel wherein sex work takes place, you must surely be immoral and subject to criminal prosecution.[3]

(b) *The Judgments*

The Constitutional Court handed down two judgments in the *Jordan* case. The Court was in agreement on the conclusion, but took different paths in order to reach the conclusion. The majority judgment was penned by Ncobo J with whom Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skweyiya AJ concurred. The minority judgment was penned by O Regan J and Sachs J, and Langa DCJ, Ackerman J and Goldstone J concurred.

As stated above, the Court was in agreement that the legislation in question pursued an important and legitimate constitutional purpose in that it sought to outlaw commercial sex[4] and, through this, criminalisation also sought to criminalise brothel keeping.[5] They also agreed that arguments put forward in respect of the violation of the rights to human dignity, freedom of the person, privacy and economic activity all failed.

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3 Section 2 and section 3 of the Sexual Offences Act.

4 Para 15 and 58 of the Judgment.

5 Para 1 and 120 of the Judgment.

(c) *The Assumptions*

(i) Sex work encourages social ills such as violence, leads to drug abuse, exploitation, trafficking of women and children, and spreads sexually transmitted diseases

The majority judgment contains support of the legitimate Constitutional purpose that criminalisation seeks to achieve. This support flows from the assumption that commercial sex breeds and encourages a variety of social ills such as violence, exploitation and trafficking in women and children, drug abuse and the spread of sexually transmitted diseases. These assumptions were considered to be legislative facts by the majority.[6] If we take these legislative facts to their conclusion, it would mean that if we criminalise commercial sex (and through criminalisation, eradicate) we would be able to address (and, by implication, eradicate) crimes of violence, exploitation, trafficking of women and children, drug abuse and the spread of sexually transmitted diseases. This assumption, whether legislative fact or not, is completely irrational. Arguments were presented that shows that many of the crimes or offences associated with commercial sex are, in fact, only present because commercial sex is criminalised. Furthermore, ongoing criminalisation has not reduced levels of violence faced by women, the spread of HIV and AIDS or other sexually transmitted diseases, and we still have no research base to begin unpacking sex trafficking in South Africa. Could it be that the assumption and the legislative fact is based more on moral reasoning and presumptions about those in the sex industry than on actual fact?

(ii) Criminalisation of sex work is not discriminatory towards women – therefore there is no direct discrimination against women

The majority judgment makes an assumption that discrimination is only present if it is stipulated and, therefore, if not implied, or it happens via implementation of legislation, you cannot call it discrimination. Ncobo J finds that the Act is gender neutral (let's disregard all the evidence placed before the Court that the profession is dominated by women) and, therefore, capable of being implemented in such a manner that both the seller, as well as the buyer is criminalised. He took the view that the stipulation requires the payment of a reward and, therefore, serves to confine the offence to unlawful carnal intercourse and acts of indecency of a certain kind. By his analysis, participation is the offence and the section does not single out any one of the participants. He, therefore, found no direct discrimination, even though it was absolutely clear, and it remains clear, that the only person prosecuted under the Act remains the female sex worker. Substantive equality therefore has no role to play in this assumption and analysis in the majority judgment.

We only need to return to the origins of the legislation for its discriminatory nature and implementation double standards to become apparent. The history of the legislation and its moral imperative requires of women to be chaste, while

6 Para 24 of the Judgment.

allowing men to be sexually virile and to show that virility through sexual conquests. The minority judgment notes in para 62 and 63 that:

> 'Historically prostitutes are almost always women, and the unchaste in the behavior of their male clients, being not considered unchaste, was not seen to be deserving of punishment. This crude form of sexist gender discrimination, it is submitted, underlies the provisions of s 20(1)(aA) of the Act'

While the minority is sensitive to the discrimination and the patriarchal foundation of the Act, they go no further to validate the inherent discrimination faced by women sex workers. Although they find that there is indirect discrimination, they feel that such discrimination is valid as part of the whole legislative purpose of the Act.

(iii) It's the woman's fault for being sexually promiscuous

By refusing to acknowledge the gendered nature of commercial sex work and by denying that women are at greater risk of prosecution than their male clients in the implementation of the Act, the Jordan judgment, in effect, reinforces the age-old stereotype against women, their sexuality and the definitions of "promiscuous" and "immoral".

In para 16 of the judgment, Ncobo J makes it clear that the majority is of the view that the stigma associated with the sex trade has everything to do with the sex worker choosing to engage in the profession and has no bearing on gender, as the stigma applies to both male and female sex workers. Through this concession, the majority confirms the view and upholds the assumption that if you know that there are stereotypes within the profession, but you choose to enter it, then you have nothing to complain about as you must surely fit the stereotype. This is probably the worst of the assumptions that the Court makes, as it appears to validate a stereotype about the morality of the women who work in the commercial sex industry.

(iv) A private matter between consenting adult

> 'Privacy recognizes that we all have the right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be breach of our privacy'[7]

The majority judgment in *Jordan* does not accept that criminalisation of commercial sex infringes on the right to equality. Ncobo J, in fact, dismisses the reality that commercial sex relates to the sexuality or sexual expression of the sex worker.[8]

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7 *National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1999 (1) SA 6 (CC) para 32.

8 Para 29 of the Judgment.

The opinion expressed is that, if a crime is committed in private, one cannot claim protection because it took place in private, especially not if it was premised on inviting the public to engage.[9] The assumption that this approach makes in distinguishing itself from the National Coalition case, quoted above, is, therefore, that only if a sexual act is committed in a certain type of relationship setting (read morally approved of), then privacy can be relied upon. In the instance where these acts take place for commercial purposes and without the presence of affection, love and commitment, then surely the same protection cannot be extended? The result of the presumption is that, by entering into the public arena by seeking to gain from something that others give free of charge, you open yourself up to justifiable discrimination.

(v) The dignity of some

> 'Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern.'[10]

The right to dignity has been expressed as the right on which all other rights rest. The right that was cited in *S v Makwanyane*, by the same Constitutional Court, as the right that is intrinsic to the worth of human beings, was found by both the majority, as well as minority judgments, to be irrelevant to the case at hand. It was not dealt with in any substantive manner, and the Court failed to give any meaningful explanation for why the dignity of a woman whose sexuality is criminalised and whose choice in terms of her own body and what she chooses to do as a profession is irrelevant to the proceedings.

The minority had a different approach in that they did not merely dismiss the dignity argument offhand. Because they had dealt with the issue of indirect discrimination, an analysis of dignity had to be dealt with as a result. O Regan and Sachs, however, adopt the peculiar approach that relates the right to dignity to the sexual act that is being committed. In their opinion, the sex worker is not nurturing a relationship and, as a result of the commercial aspect of the sex act itself, sexual intercourse loses its intimacy and, as a result, diminishes its privacy setting. She is, after all, simply making money and, as such, cannot claim or rely on intimacy and privacy in the same way that someone/women in a perceived proper relationship can. Although they don't state that she has no right to privacy, they state that she has chosen to diminish it. This argument is relevant in relation to the right to dignity, as the approach that is then adopted in respect of the right to dignity follows the same basis.

The minority held that sex work constitutes the commodification of one's body and if one chooses to enter a profession where you devalue yourself in the eyes of society and your community, you in effect diminish your own dignity.[11] Their argument seems to flow from a preconceived conclusion that sex work as a profession lacks dignity and, as a result,

9 Para 28 of the Judgment.

10 *S v Makwanyane* 1995 (3) SA 391 (CC) para 144.

11 Para 74 of the Judgment.

women lose their dignity when they enter the profession. It is also based on the assumption that when a woman engages in commercial sex work, she "sells her body". This assumption is not factually accurate as sex workers whom we work with are at pains to explain that the experience of sexual intercourse – the act itself – is the commodity. An assumption that states that a "woman sells her body" is based on a patriarchal view that a woman is not in control of her own sexuality, cannot be allowed to decide or make decisions about that sexuality, cannot decide who she engages in sex with and, as a result, is nothing but an item that can be bought and sold.

11 CONCLUSION

In *Jordan*, case the Court was presented with an overwhelming amount of evidence and argument. The result is a judgment that points to the very real moral conservatism that is surely not envisaged in our Constitution. It would be difficult, if not impossible, to bring another challenge to the constitutionality of the criminalisation of commercial sex. Civil society organisations and sex workers are, therefore, continuing to engage the government and the South African Law Reform Commission to ensure legislative and policy change.

CHAPTER 16

RIGHT TO IDENTITY: THE IMPLEMENTATION OF THE ALTERATION OF SEX DESCRIPTION ACT

MAXINE RUBIN

I INTRODUCTION

The right to identification documents that correctly reflect one's personal details is often not thought to be a concern. This is likely because it seems to be a non-issue: identity documents that are inaccurate can be rectified. Information may become inaccurate due to changes in a person's life, such as marriage. There are a number of provisions in South African law that allow for identity documents to be amended when personal information changes.[1] The Alteration of Sex Description and Sex Status Act49 of 2003 (Act 49) was developed in order to enable individuals to alter the gender that was recorded at their birth. Despite the passage of this Act in 2003, there remain a number of obstacles confronting individuals who have applied to the Department of Home Affairs in order to change their sex description.

The Legal Resources Centre (LRC) has a number of transgender clients who have been struggling to legally change their gender. This chapter is focused on the experiences of transgender persons, primarily. Transgender[2] persons do not identify with the gender assigned to them at birth.[3] Transgender persons feel that there is a mismatch between their gender identity and their biological/physical sex.[4] This consequently means that a transgender person's legal identification documents (including identity document books, passports, driver's licences and birth certificates) misrepresent the gender identity of the individual, since they reflect the gender assigned to them at birth – regardless of whether or not this is the felt experience of the individual. This is a result of the incorrect assumption that gender and/or sex are necessarily derived from

1 The following amendments are listed as possible alterations: forename/s, surname, gender, the rectification of the birth date, gender and/or place of birth on the birth register. More information is available from the Civic Services page on the Department of Home Affairs website, available at *http://www.dha.gov.za/index.php/civic-services/amendments*, accessed on 1 July 2015.

2 Also referred to as 'transsexualism'. 'Trans'* (with the asterisk) is an umbrella term that includes transgender, but also includes other groups such as cross-dressers, gender non-conformist persons, and intersex.

3 Robert Hamblin and Mzikazi Nduna 'Alteration of Sex Description and Sex Status Act and Access to Services for Transgender People in South Africa' (2013) 9, 1&2 *New Voices in Psychology* 50 at 51.

4 Chris Bateman 'Transgender Patients Sidelined by Attitudes and Labelling' (2011) 101, 2 *South African Medical Journal* 91.

and determined by physical sexual organs, and cannot change. While some concerns with regards to intersex persons[5] may be noted, the majority of issues raised are based on our work with our transgender clients.

This chapter seeks to provide a comprehensive understanding of Act 49's procedural requirements, the issues that have emerged with the implementation of the Act, and the possible ways that these issues can be addressed. It will be evident that the implementation issues of the Act amount to unjust administration and violate, inter alia, the right to equality, dignity, privacy and just administration.

II THE ALTERATION OF SEX DESCRIPTION AND SEX STATUS ACT49 OF 2003

The Preamble of Act 49 establishes that its purpose is to, 'provide for the alteration of the sex description of certain individuals in certain circumstances'. Section 2(1) provides:

> 'Any person whose sexual characteristics have been altered by **surgical** or **medical treatment** or **by evolvement through natural development** resulting in gender reassignment, or any person who is **intersexed** may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.' [Emphasis added]

From this provision there are four 'circumstances' that the Act identifies as eligible for a sex description alteration. Firstly, individuals who have had surgical intervention that has changed their 'sexual characteristics' (genitalia at birth, as well as those that develop from hormones over time). Secondly, individuals who receive hormone replacement treatment (i.e. 'medical treatment'). Thirdly, individuals whose sexual characteristics have changed through 'natural development'. This part of the provision is unclear. During the Portfolio Committee for Home Affairs' meeting on 9 September 2003, which included deliberations about Act 49, Committee member Mr Swart raised concern about the lack of clarity with the phrase 'evolvement through natural development'.[6] Ms Cohen, a representative from the South African Human Rights Commission, noted that she had read about a case where a male child appeared female until puberty and only then did he grow a penis and his testes descended.[7] However, it was not certain if this is what the Bill's drafter had intended with the phrase. Similarly, during

5 Intersex persons are born with ambiguous genitalia, chromosomes, or internal reproductive systems. Often intersex individuals are assigned a sex description at birth despite the ambiguous sexual organs because birth registration adheres to a binate definition of people as either a 'female' or 'male'.

6 Parliamentary Monitoring Group 'Alteration of Sex Description and Sex Status Bill: hearings', available at *https://pmg.org.za/committee-meeting/2832/*, accessed on 1 July 2015.

7 Ibid.

the public hearings, Sally Gross,[8] Simone Heradien[9] and the Equality Project[10] each raised concerns with the ambiguity of this phrase. However, no clarity has been provided. The fourth and last 'circumstance' provided for in the Act is an addition made following the public hearings process and was absent from the Bill version.[11] The addition is for 'intersex' persons.

The Act requires that an application is submitted with a birth certificate, as well as a letter from two separate medical practitioners confirming the gender reassignment procedures that have taken place.[12] The Act charges the Director-General of the Department of Home Affairs (the Department) with custody of the decision-making process of the Act 49 applications. Every refused applicant ought to receive a letter from the Director-General explaining the reasons for the rejection.[13] The rejection may be appealed to the Minister of the Department within 14 days following the communication of the rejection the applicant, and the appeal should be accompanied with the rejection letter, as well as the application form, birth certificate and two letters of support.[14] Should the Minister sustain the rejection, the applicant may appeal this decision at their local Magistrate's Court.[15] Similarly, this appeal should include all the application materials, as well as the reasons for the Minister's rejection.[16] However, it does not state in the Act that the Minister is required to furnish written reasons for the rejection to the applicant. The Act allows for the Magistrate to overturn the rejection decisions, and to instruct the Director-General to alter the sex description accordingly.[17]

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8 Sally Gross 'Submission' Submission to the Portfolio Committee on Home Affairs, 9 September 2003, available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030909gross.htm,* accessed on 1 July 2015.

9 Simone Heradien 'Oral Representation' to the Portfolio Committee on Home Affairs, 9 September 2003, available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030909simone.htm,* accessed on 1 July 2015.

10 Lesbian and Gay Equality Project (South Africa) 'The Alteration of Sex Description and Sex Status Bill' Submission to Portfolio Committee on Home Affairs, 9 September 2003, available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030909equality.htm,* accessed on 1 July 2015.

11 Alteration of Sex Description and Sex Status Bill [B37 - 2003], available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030909b37-03.pdf,* accessed on 1 July 2015.

12 Section 2(2) of Act 49.

13 Section 2(3), ibid.

14 Sections 2(4) and (5), ibid.

15 Section 2(6), ibid.

16 Section 2(7), ibid.

17 Section 2(9), ibid.

If an application is successful, the Director-General must alter the sex description in the birth register, in accordance with section 27A of the Births and Deaths Registration Act51 of 1992.[18] The original sex description preceding the alteration is considered void as soon as the alteration has been officially recorded.[19] A new identity number is created for the applicant, since the thirteen-digit number includes what is referred to as a 'gender marker'. The gender marker is made up of the four digits that follow the first six digits that represent one's birth date. The sequence indicates one's gender based on its first number. Numbers zero to and including four indicate that the individual is female. Numbers five to and including nine indicates a male person. The other three digits in the gender marker are random. Given that a new identity number is created, a successful applicant's previous identity number and identification documentation is automatically void once the sex description alteration is official. Successful applicants, therefore, require new identification documentation.

(a) *Problematic implementation and consequences*

There are two broad issues that have emerged with regards to the implementation of Act 49: the unjust delayed and improper processing of applications, and unfair and baseless rejections.

(i) Delayed and improper application processing

One of the key issues that has arisen from the LRC's work with its strategic partners and clients is that there is a trend whereby Act 49 applicants have to wait between one year and seven years for the processing of their application. During this time, many applicants follow up on their application using the Customer Services Centre call line in order to establish what is happening with their application. A number of LRC clients have been informed that their applications have been lost and that they need to resubmit their application. If the client did not retain their original proof of payment, they were required to pay for the reapplication. At least two clients have had to resubmit three applications.

An additional issue that has become apparent is problems processing simultaneous applications for a sex description and forename alteration. There is nothing in the existing legislation that prohibits such simultaneous applications. It is also self-evident that this combination of applications would be submitted since sex description alteration often will mean that the forenames of an individual are incongruent with the gender that they have applied for. Moreover, the combination of sex description and forenames alterations mark a starting point for the applicant whereby their gender identity and official record are aligned.

After long delays with the processing of their Act 49 applications, two of the LRC's clients who have succeeded in securing amended sex descriptions have encountered another hurdle. The issuance of their new identity document reflecting their amended sex description has also been delayed. When one of the clients asked for an explanation as to why their

18 Section 3(1), ibid.

19 Section 3(2), ibid.

original time frame of four to six weeks had suddenly changed to one to six months, she was informed that her application for the new identity document was 'pending investigation'. When she asked what this meant, she was not informed. The delays with issuing the amended identification are exceptionally problematic. As noted earlier, as soon as an applicant's sex description has been officially altered, their old identity number is invalidated since the gender marker has to be altered, and thereby a new identity number is generated. This means that all their previous identification documentation is void. Some applicants are issued with a written letter from the Director-General of the Department that notes that their old identity number has been replaced with a new one. However, many have not received this letter and are rendered vulnerable as a result of having no valid identification. This prohibits their ability to carry out daily chores such as banking.

(ii) Unjust rejections

A number of problematic 'justifications' for the delays have been provided. One of the main reasons has been that applicants have 'failed' to provide evidence of their gender reassignment surgery and have 'failed' to meet the requirements of the Act. It was explained in the previous section that the Act clearly makes allowances for individuals to qualify for a sex description alteration without having had surgical interventions. South Africa's provisions in this regard are fairly progressive in terms of a global context. Many countries that allow for sex description alterations impose other intrusive impositions upon applicants. For instance, most European countries require that an applicant prove that they have been sterilised in order to qualify for a sex description alteration.[20] However, the progressive nature of the Act's provisions is undermined by its improper implementation. The fact that Act 49 does not require surgery is significant given that there are a number of obstacles to individuals accessing gender reassignment surgery. Firstly, the public health sector is unable to meet the demand for gender reassignment surgery since it is under-resourced. There are two public specialist clinics available to transgender people: the Steve Biko Academic Hospital in Pretoria, and the Groote Schuur Hospital in Cape Town. Groote Schuur Hospital offers the most comprehensive care, with a specialist Transgender Clinic.[21] The plastic surgeon, Dr Adams, is allocated with four gender reassignment surgery slots per annum by his hospital chiefs, and he states that he has 30 patients on his waiting list.[22] This means that patients have an average of a 7.5 year wait before they can have the necessary surgeries.

Secondly, the private health sector entails phenomenally high costs because the surgeries required for gender reassignment surgery are intricate and highly technical. Medical aid schemes in South Africa are governed by the Medical Schemes Act 131 of 1998 (Medical Schemes Act). Annexure A to the Regulations of the Medical Schemes Act is an explanatory note establishing a list of diagnoses and concomitant treatments that medical aid schemes are obliged to finance. These are known as Prescribed Minimum Benefits. Absent from this list of diagnoses is 'Gender Identity Disorder'

20 Emine Saner 'Europe's terrible trans rights record: will Denmark's new law spark change?', *The Guardian,* available *http://gu.com/p/4x7e9/stw,* accessed on 2 July 2015.

21 Chris Bateman 'Transgender Patients Sidelined by Attitudes and Labelling' (2011) 101, 2 *South African Medical Journal* 91.

22 Ibid 92.

(the classification used in the Diagnostic and Statistical Manual of Mental Disorders to diagnose transgender persons). Subsequently, the related treatments and surgeries are also not listed. This means that, currently, medical aid schemes are not legally required to fund gender reassignment surgery. Furthermore, it seems that claims (including ex gratia applications) for medical aid coverage have been denied on the grounds that gender reassignment surgery constitutes 'cosmetic surgery' and is not considered 'medically necessary'. Upon investigation, it has become clear that there is no official definition of either 'cosmetic surgery' or 'medically necessary'. It relies on the interpretation of the board members of a medical aid scheme. This is significant because procedures that are not considered to be 'medically necessary' are automatically excluded. Thus, a thorough understanding of being transgender and the related transition process is an important determinant of how the medical aid schemes will classify gender reassignment surgery applications.

The fact that Act 49 does not require surgery is of the utmost importance since most transgender persons in South Africa are unlikely to be able to access gender reassignment surgery in a timely way, if ever, due to the waiting list in the public sector and the high costs of the private health sector. Despite the fact that surgery is not a prerequisite for a sex description alteration in Act 49, officials are treating it as such. A Department office refused to even accept the Act 49 application of a LRC client because the applicant did not have proof of surgery.

Another problematic practice related to the rejections of Act 49 applications is that the applicants are not furnished with the reasons for the rejection in writing from the Director-General, as required by section 2(3) of the Act. This causes a problem for following the subsequent steps in the appeal process, as contemplated in the Act, since it requires that a written letter of explanation be included in the appeal. The failure to provide written reasons for a rejection, as well as rejections on the basis of the applicant not having had surgery, are both blatant violations of the Act's requirements. Rejections on the grounds that there was no evidence of surgery provided by applicants who are on hormone treatment, and who provided evidence thereof, constitutes a ground for judicial review in terms of PAJA because such a reason is an error of law.[23] Furthermore, the failure to issue written reasons for the rejection constitutes a ground for judicial review under section 6(2)(g) of PAJA because 'the action concerned consists of a failure to take a decision'.

III RECOMMENDATIONS

While Act 49 is fairly progressive at face value, it is not international best practice. Denmark and Argentina both allow for the official alteration of one's sex description without any medical expert statements and/or support. The allowance for self-identification is significant for a number of reasons; perhaps most important of which is that it does not impose prerequisites on transgender persons that may not be consistent with how they wish to manage their transition process. For instance, many countries require evidence of gender reassignment surgery. In fact, most of Europe requires that transgender

23 Section 6(2)(d) of PAJA.

persons are sterilised before they can apply for a gender marker change.[24] South Africa requires, at least, that an applicant has had hormone treatment. However, even this is an imposition. It imposes what is considered a threshold to 'qualify' as transgender. However, one's gender identity should not be determined by a government institution, or anyone other than oneself. Moreover, access to hormone treatment and surgery may be a barrier due to limited resources. Requiring either or both as a prerequisite for a gender marker change precludes transgender people who cannot afford these services, are not physically fit to undergo them, and/or do not wish to incorporate these procedures in their transition process. Ideally, South Africa would follow Denmark and Argentina's precedent in order to ensure that we do not discriminate against individuals who fall into one or more of these categories. Removing the prerequisites would enable more genuinely equal access to this service and align South Africa to the international best standard of practice.

In lieu of aligning the South African legislation with international best practice, it is imperative that the Department circulate directives that address the shortfalls identified with the implementation of Act 49. The directives ought to clarify what is meant by the phrase 'evolvement through natural development'. Significantly, the directives need to re-emphasise that Act 49 does not require evidence of surgery as a prerequisite for a sex description alteration, and that evidence of hormone treatment is sufficient.

The delays with the processing of the applications suggests the need for the directives to clearly provide time frames in which the applications can be expected to be processed, as well as the appropriate timelines related to the appeal processes. It was noted earlier that new identification documentation is necessary as a result of a sex description alteration since an applicant's previous identity number is automatically rendered void with the alteration. It is therefore sensible that amended identification documentation is automatically issued with a successful Act 49 application, given the significance of having accurate identification documentation.

Lastly, the directives should provide for the ongoing training of Department officials in order to ensure that the shortfalls with the implementation of the Act are addressed, and that officials are held accountable.

IV CONCLUSION

The purpose of this chapter was to illustrate the major shortfalls with the implementation of Act 49. One of the key issues is the major delays with the processing of applications and the subsequent delays with the issuance of the amended identification documentation. Additionally, the Department has been rejecting applications on the grounds that no evidence of surgery has been provided, despite the fact that the Act clearly provides for hormone treatment as a sufficient ground to qualify for a gender marker alteration. Furthermore, written reasons for the rejections have not been issued to the applicants,

24 Emine Saner 'Europe's terrible trans rights record: will Denmark's new law spark change?', *The Guardian*, available at *http://www.theguardian.com/society/shortcuts/2014/sep/01/europe-terrible-trans-rights-record-denmark-new-law,* accessed on 23 June 2015.

which jeopardises their ability to follow the appeal process set out in the Act. Both of these shortfalls are violations of PAJA and qualify for judicial review. The LRC recommends that directives are issued that directly address these shortcomings.

As the saying attributed to Mahatma Gandhi goes: '[t]he true measure of any society can be found in how it treats its most vulnerable members'. This suggests the imperative to ensure that the constitutional values to uphold the equality and dignity of *everyone* in South Africa is of the greatest significance if we are to judge our progress as a democracy. This includes the need to protect the rights of minorities such as transgender persons. A good starting place would be to ensure that the avoidable bureaucratic blunders outlined above are eliminated.

CHAPTER 17

HOMOSEXUALITY AS GROUNDS FOR ASYLUM: THE DEPLORABLE EXPERIENCES OF LESBIAN, GAY AND TRANSGENDER REFUGEES SEEKING ASYLUM IN SOUTH AFRICA

MANDIVAVARIRA MUDARIKWA

I INTRODUCTION

Homosexuality, or any associated act, is a criminal offence in approximately 78[1] countries, 35 of which are in Africa.[2] As a result of its constitutional democracy, South Africa is one of only 19 countries in Africa that does not criminalise homosexuality and any associated behaviour and activities. For this reason, South Africa receives a significant number of asylum seekers who have fled their country of origin because of persecution suffered as a result of their sexual orientation.

This chapter[3] argues that, while South Africa's refugee law framework is progressive on paper, in practice there are systemic problems and inefficiencies that result in the treatment of lesbian, gay and transgender (LGT) asylum seekers in a way that is inconsistent with both the UN Convention, as well as the constitutional values of dignity, equality and freedom as enshrined in South Africa's Bill of Rights.[4] The chapter aims to provide a snapshot of the experiences of LGT asylum seekers, hoping that the issues raised here are brought to the attention of various stakeholders who could provide assistance to LGT asylum seekers in South Africa.

1 The number varies depending on if one takes into account provinces within federal countries that have outlawed homophobia, and which laws have been used to determine that homosexuality has been outlawed.

2 76crimes '78 Countries where Homosexuality is Illegal', available at *http://76crimes.com/76-countries-where-homosexuality-is-illegal/*, accessed on 16 April 2015.

3 This is a summary of research and a research report that is currently being drafted by the LRC Equality and Non-Discrimination project, which will be released in 2016.

4 Section 1 of the Constitution.

II GENERAL OBJECTIVE ANALYSIS OF A FEW AFRICAN COUNTRIES THAT CRIMINALISE HOMOSEXUALITY

Perhaps before providing an analysis of a few African countries, it is important to note that anti-homosexuality laws and attitudes are not limited to the African continent. This chapter's focus on the continent is only because of the countries of origin of asylum seekers who have approached the Legal Resources Centre (LRC) for assistance. It is also equally important to state that there have been some positive developments in Africa regarding the decriminalisation of sodomy/homosexuality and associated acts; notably in Mozambique, which decriminalised sodomy in July 2015.[5]

LGT asylum seekers are individuals who flee their country of origin because of a well-founded fear of persecution due to their sexual orientation and/or gender identity. The persecution (or threat of persecution) to which they are subjected can manifest in different forms. These range from general societal attitudes – influenced by religion and traditional values – to rejection by friends and family. These attitudes often culminate in threats of physical violence, discrimination and, for some, even death.

Prominent African leaders have publicly denounced homosexuality and any association with lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. The current prejudicial views toward homosexuality cannot be divorced from the impact of colonialism and Judeo-Christianity on the development of law in Africa. Early colonial attitudes pathologising homosexuality are evident in the harsh laws promulgated at the time.[6] These laws are often couched in religious language against sodomy or unnatural lust.[7] As a result of syncretism and this history, homophobic beliefs have gradually become internalised as indigenous cultural values.[8] It has been argued that the internalisation of homophobic values, to the extent that it is considered to be 'common sense', has resulted in sexual discipline being policed more by self-repression or peer pressure than church or state.[9] Realistically, it is likely a combination of self- and external policing. Significantly, the resistance to repealing anti-homosexuality laws is often justified as a stance against neo-colonialism and the import of 'western' values. Ironically, this fails to appreciate the colonial roots of anti-homosexuality values.

Beyond the hardships and brutal attacks that arise at a broader level, LGBTI persons also experience the unparalleled psychological pain of rejection and alienation by family and friends. The attitudes displayed by these close relations are often reflective of the broader societal stance. Enormous emotional stress is caused by trying to reconcile one's identity

5 *http://mg.co.za/article/2015-06-29-mozambique-scraps-colonial-era-homosexuality-and-abortion-bans*

6 Marc Epprecht *Hungochani: The History Of A Dissident Sexuality In Southern Africa* 1st ed, McGill-Queen's Press, 2005: 254.

7 Epprecht 2005: 254.

8 Epprecht 2005: 254.

9 Epprecht 2004: 254.

as a LGBTI person with other possibly conflicting aspects of their identity, such as religion. This personal conflict is likely to spill over into interpersonal relationships. For instance, cultural expectations – such as marriage – are difficult to fulfil because they present a difficult choice: conform to the cultural traditions and conceal a significant aspect of one's identity, or refuse the cultural tradition and risk ostracism. Choosing the latter is often met with violence.

With regards to homophobia, there is a complex relationship between the pervasive attitudes of the public and the official institutional stance in the same country. The very fact that anti-homosexuality laws exist in countries, frequently leads to abusive behaviour by the public and/or police.[10] This makes acknowledging one's sexual orientation and/or gender identity a terrifying consideration. Even in countries where there is no formal law prohibiting homosexuality, the attitudes of the community and religious groups have been sufficient to lead to arrests of LGBTI people. Some of those interviewed by the Legal Resources Centre were harassed and others arrested in their home countries because of their sexual orientation and/or gender identity. Not only do LGBTI Africans experience resistance from police in acknowledging their plight, but, more importantly, there is a dearth of non-governmental organisations (NGOs) addressing these issues – often because of societal attitudes and State laws.

III SEEKING ASYLUM WITHIN THE SOUTH AFRICAN LAW CONTEXT

The 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees ('the Convention' and 'the Protocol' respectively) are the key international legislative instruments intended to promote and protect the rights of refugees and asylum seekers. Regionally, South Africa has ratified the 1969 Organisation of African Unity[11] Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) that governs the rights of refugees and asylum seekers in Africa. The Refugee Act 130 of 1998 (Refugees Act) is the key national legislation domesticating the 1951 Convention, 1967 Protocol and the OAU Convention. The Refugees Act is the statement of commitment by the government of South Africa to honour both their regional and international obligations.

Section 3 of the Refugees Act states that a person qualifies for refugee status if that person:

> 'owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and

10 Amnesty International 'Rising levels of homophobia in sub-Saharan Africa are dangerous and must be tackled' 24 June 2013, available at *http://www.amnestyusa.org/news/news-item/rising-levels-of-homophobia-in-sub-saharan-africa-are-dangerous-and-must-be-tackled,* accessed on 22 April 2015.

11 Now African Union.

being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it.'[12] [Emphasis added]

The United Nations High Commissioner for Refugees (UNHCR) has recognised that LGBTI persons each constitute a 'particular social group'.[13] A 'social group' refers to a group of people who share a definitive characteristic other than persecution, or a collective that is considered to be a group by society.[14] LGBTI persons constitute a 'social group' because one's sexual orientation and/or gender identity is a fundamental and essential component of one's identity.[15] Individuals who have fled their country due to a well-founded fear of persecution on the basis of their sexual orientation, therefore, qualify for refugee status in accordance with the UN Convention definition of a refugee.

The term 'particular social group' is defined in section 1(xxi) of the Refugees Act 130 of 1998 as follows:

(b) [S]ocial group' includes, among others, a group of persons of particular gender, **sexual orientation**, class or caste. [Emphasis added]

The term, 'particular social group' has also been interpreted in foreign jurisprudence. It is widely accepted that, in order to qualify as being part of a 'particular social group', one must be part of a group of individuals 'who share a common, immutable characteristic'.[16] In other words, a 'particular social group' shares characteristics that cannot be altered by choice. Sexual orientation and gender identity are fundamental components of an individual's identity. They cannot be altered by choice.

Further, in 2012, the UN issued guidelines in order to provide Refugee Status Determination Officers (RSDOs) with clear directives about asylum claims made on the basis of sexual orientation and/or gender identity: 'The Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (the UNHCR Guidelines).[17] The UNHCR Guidelines unequivocally provide for LGBTI persons within the definition of, 'membership of a particular social group'.[18]

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12 The wording of section 3(a) is similar to the wording in Article 1(A)(2) of the 1951 Convention. The wording in section 3(b) is similar to the wording in the OAU Convention.

13 See the UNHCR 'Guidelines on International Protection No. 9' HCR/GIP/12/09, 23 October 2012, available at *http://www.unhcr.org/509136ca9.pdf*, accessed on 15 April 2015.

14 Ibid para 44.

15 Ibid para 47.

16 Khan and Schreier 72, Ward, Acosta.

17 The full text of the UNHCR Guidelines is available at *http://www.unhcr.org/509136ca9.pdf,* accessed on 25 May 2015.

18 Sections 44–49 of the UNHCR Guidelines.

The UNHCR Guidelines adopts the definition of 'sexual orientation' and 'gender identity' as established in the Yogyakarta Principles. The Yogyakarta Principles were developed in order to provide an international standard for the application of international human rights law to sexual orientation and/or gender identity matters.[19] 'Sexual orientation' has been defined as: 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender.'[20] 'Gender identity' has been defined as: 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms.'[21]

(a) *Well-founded fear*

The UNHCR Handbook describes the definition of a 'well-founded fear' as the key component of the definition of a 'refugee'.[22] The Handbook notes that 'fear' is subjective. It therefore suggests that the individual circumstances of the applicant be considered when determining the applicant's refugee status.[23] It also notes that the applicant's statements take precedent above the country situation when making a status decision.[24] The assessment of the applicant's statements must be made with due regard for the particular applicant's personality, '…since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions.'[25]

The 'well-founded' component has an objective element requiring the applicant's frame of mind to be supported by extraneous evidence.[26] The additional information required by paragraph 41 of the UNHCR Handbook – such as family background, social identity group, and so on – serve as an 'objective' means for assessing if the claim of fear presented by the applicant appears to be reasonable. Further international and regional jurisprudence and legal doctrine affirm that when discrimination on account of a person's sexual orientation is prohibited, such discrimination, individually or cumulatively, lead to consequences that are substantially prejudicial to the nature of the person involved.[27]

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19 Text available at *http://www.yogyakartaprinciples.org/principles_en.htm,* accessed on 4 May 2015.

20 Para 8 of the UNHCR Guidelines, and Preamble of the Yogykarta Principles.

21 Ibid.

22 Para 37 of UNHCR 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status' United Nations, available at *http://www.unhcr.org/3d58e13b4.html,* accessed on 4 May 2015.

23 Ibid.

24 Ibid.

25 Id. at Part 1 Chap II B (2)(a) par 40

26 Id. at Part 1 Chap II B (2)(a) 38.

27 Para 19 of UN Guidelines.

(b) *Persecution*

International and regional jurisprudence and legal doctrine affirm that discrimination on account of a person's sexual orientation is prohibited. Discriminatory measures may be enforced through law and/or through societal practice, and could have a range of harmful outcomes. Discrimination may amount to persecution where such measures, individually or cumulatively, lead to consequences that are substantially prejudicial to the nature of the person involved.[28]

With respect to persecution, it is essential to note that past persecution is not a necessary requirement for recognition as a refugee; a fear of persecution is sufficient. With regard to the meaning of 'persecution', no single definition has been established under refugee law. A prominent academic in the field of refugee law, Grahl Madsen, takes the view that the term 'persecution', which is critical to refugee status determination, was deliberately left undefined in order to leave room for interpretation. He states:

> 'The term 'persecution' has nowhere been defined and this is probably deliberate… It seems as if the drafters wanted to introduce a flexible concept which might be applied to circumstances as they arise; in other words they capitulated before the inventiveness of humanity to think up ways of persecuting fellow men.'[29]

Academics are widely in agreement that for persecution to have occurred, there must be a violation of basic human rights and that it must be evident that the State has failed to protect the asylum seeker.[30] An applicant claiming a fear of being persecuted on account of their sexual orientation need not show that the authorities knew about their sexual orientation before they left their country of origin.[31] Moreover, lack of persecution does not prevent him or her from having a well-founded fear of being persecuted.[32]

(c) *Grounds of persecution*

As with claims based on political opinion, an applicant claiming a fear of being persecuted on account of his or her sexual orientation need not show that the authorities knew about his or her sexual orientation before he or she left the country of origin. The well-foundedness of the fear will, in such cases, be based on the assessment of the consequences that an applicant with a certain sexual orientation would have to face if he or she returned. Moreover, the fact that a LGBTI applicant has

28 Para 19 of UN Guidelines.

29 Grahl-Madsen *The Status of Refugees in International Law* 193.

30 F Khan and T Schreier (eds) *Refugee Law in South Africa* 51.

31 Para 18, UN Guidelines.

32 UNHCR Guide relating to sexual orientation and gender identity page 12.

never actually been prosecuted for his or her homosexual conduct does not prevent him or her from having a well-founded fear of being persecuted.[33]

The UNHCR Guidelines explicitly provide that an LGBTI applicant cannot be denied refugee status on the basis that they could avoid persecution if they conceal their sexual orientation or gender identity, as this infringes on their freedom of expression and association.[34] It would be unreasonable and unjust to expect that someone has to hide an aspect of their identity for fear of being punished, hurt or killed.

(d) *Unwilling/Unable*

A further requirement to be recognised as a refugee is that the applicant must be unable or unwilling to approach their government for protection. The UNHCR Guidelines provide that persecution may come from State-, as well as non-State actors.[35] It is explained that State persecution is apparent from laws that prohibit any form of LGBTI-related activities[36] – echoing the principle that discrimination amounts to persecution. Additionally, any harm carried out by individual State agents, even if it is considered to be 'rogue' behaviour, is considered to be State persecution.[37] 'Non-State actors' is broadly defined, and includes family members and communities. Persecution may constitute many forms, varying from verbal intimidation to physical assault, to vigilante groups targeting LGBTI persons.[38]

The availability of State protection must be assessed on the basis of country-specific information. The existence of anti-LGBTI laws is *de facto* evidence that the State is unwilling to protect LGBTI asylum applicants.[39] The provision of protection has to be both available and effective. Thus State protection cannot be considered to be effective if State agents, such as the police, are unresponsive to requests for protection.[40] Furthermore, the UNHCR Guidelines provides that the very existence of anti-homosexuality laws, even if irregularly or not at all enforced, constitutes as legitimate cause to feel persecuted on the grounds of sexual orientation.[41]

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33 UNHCR Guide relating to sexual orientation and gender identity page 12.

34 UNHCR Guidelines para 31.

35 UNHCR Guidelines paras 34–37.

36 Ibid para 34.

37 Ibid.

38 Ibid para 35.

39 Ibid para 36.

40 Ibid.

41 UNHCR Guidelines para 27.

Additionally, even if a State has recently begun to repeal its anti-homosexuality laws, the claim for asylum remains legitimate because the fear of persecution remains valid.[42] The revision of a law does not alter prevailing homophobic and other discriminatory attitudes. This means that the existence of discriminatory law alone is not the only threshold requirement when considering the legitimacy of a persecution claim. Country-specific context analysis is important. When the Department of Home Affairs (DHA) or RSDO considers LGBTI applications for refugee status, they must consider laws and attitudes against homosexuality as a type of persecution, leading to a well-founded fear of being persecuted, even if the individual has not been personally attacked.[43]

(e) *Burden of proof*

The correct application of the burden of proof is essential to a correct outcome in any decision. In the context of refugee status decisions, placing the burden of proof incorrectly can lead to unfortunate outcomes. It is a factual reality that when an individual is fleeing his/her country, he/she will not have left in ideal circumstances, without opportunity to carry documentary (or other) evidence with him/her to prove the situation. This is explicitly recognised in the UNHCR Guidelines.[44] RSDOs often quote an extract of a paragraph provided in the UNHCR Handbook. The extract is problematically applied, and should be read in its full context.[45] Consequently, the misrepresentation of the UNHCR Handbook means that the RSDO incorrectly understands the burden of proof on the asylum seeker, as well as their own. While the asylum seeker should try his/her best to place as much evidence before the RSDO in order to support his/her claim, it is, more than often, not possible in the circumstances to do so. One can only assume that the RSDO decides the case in question without discharging their burden if the RSDO's decision employs this inaccurate rigorous standard of proof. This is suggested by this isolated quotation in the RSDO letters. This is prejudicial to the asylum seekers.

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42 Ibid para 37.

43 See the case *Nicholas Toonen v Australia,* leading to universal decriminalisation of homosexuality, 1994.

44 UNHCR Guidelines para 27.

45 '196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. **Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.** Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the "benefit of the doubt".' [Emphasis added]

THE SHORTFALLS IN ADJUDICATING LGBTI ASYLUM APPLICATIONS

The purpose of this section is to highlight the challenges that have arisen with the determination of refugee status for LGBTI applicants in South Africa. There have been reports that LGBTI asylum seekers have not submitted that the reason that they fled their home country was due to discrimination based on their sexual orientation and/or gender identity persecution.[46] This omission is said to be as a result of perceptions of prejudices held by the DHA officials.[47] These factors may include genuine experiences of homophobic remarks made by DHA officials – as seen by the extracts taken from a sample RSDO letter.

One example of poor treatment of LGBTI claims within the RSD system is the handling of the claim of an asylum applicant from the Democratic Republic of Congo (DRC) who was represented by the LRC before the Refugee Appeal Board (RAB). The applicant, henceforth referred to as 'M', fled the DRC because he had a secret same-sex relationship with a man for seven years. He was caught having sex with his partner and he started receiving threats of violence from the persons who caught them. One of the persons who caught them, tried to kill both M and his partner with a knife, but M managed to escape and he went to the police station in order to report the incident. The police dismissed his case once M disclosed his sexual orientation to them, and stated that he 'deserved death' for his actions. M subsequently went into hiding at a friend's house.

The RSDO's rejection letter, however, noted the facts set out above and concluded under 'Reason for Decision':

> '…Looking at all that was communicated, there was no persecution by your government, so no external protection is required. You also revealed that you you [sic] went back to your country in 2009 when you[r] father was sick and you stayed there for [a] couple of months. You said things got bad with the family and that is when you decided to leave your country again and come to RSA. Lastely [sic], you said you don't want to go back to your country because your relatives and the community will kill you. There are organizations that defends [sic] the rights of lesbian, gay, bisexual, transgender and intersex [persons] in your country, and you failed to approach them. Homosexual activity is not prohibited by law in the Democratic Republic of the Congo (DRC)…'

In his submission to the Standing Committee for Refugee Affairs (SCRA), M provided clarity about why he had a well-founded fear of persecution on the grounds of his sexual orientation in the DRC. As noted earlier, M went into hiding following the aforementioned incident when he was caught having sexual intercourse with his partner. While in hiding, M's salon was

46 Organisation for Refuge, Asylum and Migration 'Blind Alleys Part II Country Findings: South Africa' February 2013, available at *http://www.oraminternational.org/images/stories/PDFs/blindalleys/20130226%20oram_ba_southafrica.pdf,* accessed on 22 December 2014.

47 Ibid.

vandalised and he was physically attacked at a bar outside of Lubumbashi. News began to spread across the university campus about M's sexual orientation. His family members also physically and verbally attacked him for his sexual orientation, stating that it brought 'shame' to the family, and that he was a 'devil'. His uncle physically and verbally assaulted M. It became apparent that it would not be possible to remain in the DRC due these assaults, and consequently M sought asylum in South Africa. The SCRA also rejected M's claim as they confirmed it to be manifestly unfounded. This case had to be brought to the High Court for judicial review before the DHA could give any credence to M's claims.

The LRC also represented a client in a case that demonstrates another challenge that arises for LGBTI claimants, namely that a claimant may be afraid to disclose their sexual identity to the RSDO, or to the interpreter present during their interview, for fear of discrimination. In the case of *Makumba v The Minister of Home Affairs and Others*[48] Salie-Samuels AJ set aside the RSDO's decision to find an asylum application as 'manifestly unfounded', and SCRA's confirmation.[49]

The *Makumba* case is demonstrative of how judicial review can be used to challenge decisions made by the DHA with regards to asylum applications. The applicant in the matter, represented by the LRC, submitted that she had not been advised that she had 14 days in which to make written submissions to SCRA and therefore did not. The SCRA made its decision despite this fact, and the RSDO did not inform her of the possible grounds upon which she could claim asylum, which include discrimination on the basis of sexual orientation.[50]

The discrimination and outright failure of RSDOs to give effect to both international and domestic legal obligations in respect of LGBTI persons is glaring. Ironically, LGBTI asylum seekers from other African countries come to South Africa for protection, but a large number of their applications are rejected as 'unfounded'.

The analysis of the shortfalls with the RSDO decisions also includes:

(a) *Capturing the claim*

The discrimination against LGBTI asylum seekers begins with the way in which the RSDOs capture the claims of the asylum seekers. In five different letters[51] the RSDO uses an article before the word 'gay': 'you are a gay'. This implies a categorisation of the person as if his/her nature was different. As a professional, the interviewer should be very conscious of the sensitivity of this subject. The use of the article and of 'gay' as a noun rather than as an adjective is discriminatory and offensive. It has the imminent risk of falling into discriminatory and prejudiced behaviour. It is obviously showing a lack of familiarity with

48 *Makumba v Minister of Home Affairs and Others* (6183/14) [2014] ZAWCHC 183 (3 December 2014), available at http://www.saflii.org/za/cases/ZAWCHC/2014/183.pdf, accessed on 17 June 2015.

49 *Makumba v Minister of Home Affairs and Others* (6183/14) [2014] ZAWCHC 183 (3 December 2014), available at http://www.saflii.org/za/cases/ZAWCHC/2014/183.pdf, accessed on 17 June 2015.

50 Ibid para 2.

51 From Zimbabwe and Uganda.

the topic of sexual orientation and/or gender identity. An optimistic view of the situation may suggest that the insensitive language use is a result of writing in one's second or third language. Even if this is the case, the concern remains that these officials should have been trained about how to behave professionally. Training ought to continue on an ongoing basis – especially when documents, such as the UNHCR Guidelines, are released.

The personal and intimate aspect of sexual identity should be especially considered by the interviewers. The focus of the RSDO ought to be on whether or not there is legitimate cause to fear persecution on the grounds of sexual orientation and gender identity (SOGI). It should not be based only on experienced persecution, or a lack thereof.[52] The assessment of the claim must consider the subjective claims, together with context information. It seems that the RSDOs do not necessarily treat each case and letter individually, and rely on a 'copy-paste' approach. This suggests that RSDOs are not properly applying their mind to the case at hand.

(b) *Failure to ascertain country information at all and failure to consider section 3(a) claims in context*

The UNHCR Guidelines expressly emphasise the importance of considering claims in context. Paragraph 42 of the UNHRC Handbook provides that 'the Applicant's statements cannot… be considered in the abstract and must be viewed in the context of the relevant background situation. Knowledge of the conditions in the Applicant's country of origin – while not a primary objective – is an important element is assessing the Applicant's credibility.' This clearly demonstrates that claims for refugee status under section 3(a) must be considered in context. In practice, however, objective country information is either omitted entirely or selectively, and even erroneously, cited in rejection letters.

The failure to take accurate country information into account may result in unfair refusal decisions. For example, RSDOs often stated that sexual orientation and gender identity was not criminalised, or that the law in the country seemed not to be enforced. The countries under consideration were Uganda, Zimbabwe and Cameroon. The governments of these countries openly run 'anti-homosexuality' politics. Laws criminalising same-sex relations are normally a sign that protection of LGBTI individuals is not available. It is unreasonable to expect that the applicant will first seek the State's protection against harm based on what is, in the view of the law, a criminal act. It should be assumed, in the absence of evidence to the contrary, that the country concerned is unable or unwilling to protect the applicant.

(c) *Application of the incorrect burden of proof*

It was noted earlier that the UNHCR recognises the practical difficulties of meeting the burden of proof when an individual is genuinely fleeing his/her country of origin. Thus, it provides for a more liberal and understanding approach to the burden of proof, and also imposes a 'benefit of the doubt' approach. However, it is apparent from the RSDO decisions, that the DHA has completely overlooked this practical approach to the burden of proof.

52 UNHCR Guidelines para 28.

It is very common in rejection letters analysed to note an identical 'cut and paste' section under the burden of proof section. Each letter quotes a sentence from paragraph 196 of the UNHCR Handbook: 'it is a general legal principle that the burden of proof lies on the person submitting a claim'. While this sentence is quoted accurately, it misrepresents the intention of that exact passage when read in full. The intention of paragraph 196 is to demonstrate that in asylum claims there is a shared duty on the applicant and the examiner to ascertain and evaluate all the relevant facts. Furthermore, in some circumstances, it may be the *examiner alone* who has to produce all the necessary evidence in support of the application. The misrepresentation of the UNHCR Handbook means that the RSDO incorrectly understands the burden of proof. The misrepresentation means that an inappropriately strict standard of proof is applied on LGT applicants. This approach will undoubtedly have prejudicial consequences for LGT applicants who could find their asylum applications rejected, with possibility of deportation.

(d) *Flawed interpretation of the requirement of a 'well-founded fear of persecution' in the LGBTI context*

In order to make a proper assessment of whether there is a well-founded fear of persecution in a given case, the UNHCR Guidelines state that '[a]ssessing whether the cumulative effect of such discrimination rises to the level of persecution is to be made by reference to reliable, relevant and up-to-date country of origin information'.[53] However, as seen above, there seems to be an almost absolute absence of reference to reliable, relevant and up-to-date country of origin information. Firstly, when considering whether or not the precondition of 'well-founded fear of persecution' is present, one must consider discrimination as a form of persecution. Secondly, it was explained that the burden of proof principle includes a duty on those considering asylum applications to investigate, on a case-to-case basis, the country context from which the applicant has fled.

Furthermore, a lot of the rejections have been made on the basis that the individual has not experienced/proven past experiences of persecution. However, this is in direct contradiction to the UNHCR Guidelines, which states explicitly that '[p]ast persecution is not a prerequisite to refugee status and in fact, the well-foundedness of the fear of persecution is to be based on the assessment of the predicament that the applicant would have to face if returned to the country of origin'.[54] Despite this provision, in four of the sample cases, the reason of 'not having suffered any harm in the past' is clearly stated as an argument for rejecting the asylum seeker's application.[55]

A particularly disturbing concern is the formulaic response that appears frequently in the RSDO decisions. In several different letters, the RSDOs have cited, word-for-word, the Refugee Law expert James Hathaway.[56] Hathaway describes

53 UNHCR Guidelines para 17.

54 UNHCR Guidelines para 18.

55 (U10, U12, CA18, Z14).

56 Hathaway, James C. *The Law of Refugee Status,* Osgood Hall Law School York University Butterworths Canada Ltd. (1991) p. 101.

persecution as the sustained and systematic violation of basic human rights resulting from failure of state protection.[57] This is an incorrect statement of the law, as well as an inaccurate application of the law, bearing in mind the aforementioned provision in the UNHCR Guidelines that persecution need not have been directly experienced by the applicant. RSDOs regularly required that threats actually be carried out before an applicant would qualify for refugee status.[58] Thereby, they excessively rely upon a single element of Hathaway's discussion, and '[r]ather than assessing the prospects for future persecution, they mistakenly created a threshold of cumulative past harassment.'[59]

Another concern is the failure of RSDOs to recognise that non-State actors can engage in persecution. This is clear failure in the application of the definition of refugees as entrenched by both the Refugees Act, the 1951 UNHCR Convention and the OAU Convention. The interpretation of non-State actors is broad, and may include members of one's family, as well as one's broader community. This failure is evidenced in RSDO decisions where the RSDO states that because the person has not been threatened by the official authorities, there has been no persecution.[60] Many RSDOs automatically rejected applications where asylum seekers were persecuted by non-State actors. They did not account for whether or not these applicants could have sought the protection of their own State government when persecuted by non-State actors.

In many cases, RSDOs consider fear to be well-founded only in regards to direct and immediate violence. They do not take into account fear as an intangible state and the pervasive effects fear can take on one's quality of life. In many instances, LGBTI refugees live in constant fear of physical, verbal, mental and emotional attack, both on an intimate and a structural level. As homosexual activity is illegal in most African countries, an atmosphere of *potential* violence persists, often engulfing LGBTI refugees in such anxiety that they cannot walk down the street, socialise with friends, open businesses, or have a relationship comfortably, freely or safely. This impinges on their ability to partake in basic human rights and contribute to society. Furthermore, this anxiety produces stress that itself often becomes life threatening. Therefore, the emphasis on violent persecution is not only unjustified, but also goes against the UNHCR Guidelines' provisions for what constitutes as persecution and grounds of persecution.

(e) *The tendency to state that LGBTI individuals should simply keep their sexual orientation a secret in their country of origin to avoid persecution*

Another error of law that the LRC has encountered has been for LGBTI refugee claimants to be rejected on the basis that they should simply return to their home country and keep their sexual orientation a secret. In one case, a homosexual man fled from Kenya following being imprisoned for two weeks after being arrested while at a restaurant with his boyfriend. In

57 (U5, U9, U10).

58 FMSP Report April 2010, p. 26. This mistake affects six of the cases we study here (U7, U8, U10, U12, CA18, Z14).

59 FMSP Report April 2010, p. 27.

60 This was done for applicants who came from Uganda and Cameroon.

rejecting the applicant's claim for refugee status, the RSDOs, in some cases, will reject the claim because no-one knew of the applicant's sexual orientation and/or that the applicant was only persecuted because they informed others of his/her sexual orientation.

(f) *A failure to recognise LGBTI individuals as a particular social group within the UN Convention definition of a refugee*

As already stated, it has been accepted domestically and internationally that LGBTI persons are a particular social group for the purposes of the definition of a refugee. In spite of this clear legal position, RSDOs frequently decline to recognise this and reject the claims of individuals who have fled their country due to persecution on the grounds of their sexual orientation as manifestly unfounded.

For example, the LRC was approached by a homosexual man from Cameroon who had fled after having been ostracised and threatened by community members because of this sexuality. This ultimately culminated in the murder of his partner. In his decision, the RSDO captured the details of the claim correctly, but issued a rejection in any case, stating that the reasons advanced for applying for asylum fall outside the ambit of the Refugees Act. Clearly this demonstrates the failure by RSDOs to understand and capture LGT asylum claims.

(g) *Denouncing credibility of applicant*

Credibility is often easily established between the two interviews at DHA. This assessment finds the RSDO's question into credibility to be justified. Though justified, there are not enough grounds for a decision of rejection solely on credibility.

Often there are circumstances, such as not properly capturing a claim, that create space for credibility to be questioned. In the case of certain clients, such as those from Cameroon, language may have been an issue. If an interpreter was chosen for them, the client may not feel comfortable sharing such sensitive information with that person present. Additionally, it is important to investigate how issues are being handled procedurally. In the UNHCR Guidelines there is a full list of guidelines of how LGBTI asylum seekers should be handled.[61] Based on the rejections letters, as well as casework with clients, it is difficult to believe that DHA is following these guidelines.

These guidelines must be followed for additional reasons but, most respectfully, RSDOs must follow these guidelines to ensure safety. Every single person coming into South Africa for asylum because of their sexual orientation and/or gender identity is afraid. They are afraid they cannot go home. They are afraid of a new country. Most of all, they are afraid of further persecution by any person they come across in this unknown environment. When they first file for asylum, they may give a different reason for seeking asylum until they are interviewed. It is completely plausible that the two stories would not correlate. That is why it is necessary for the RSDO to take every step necessary to ensure an LGBTI refugee feels

61 UNHCR no. 9 paras 58–61.

comfortable. The list identified in the UNHCR Guidelines ensures credibility issues are dealt with immediately.

Murphy J, in *Tantoush v Refugee Appeal Board and Others*[62], also discusses concerns related to how the RAB and RSDO each used the credibility consideration to reject the applicant's claim for asylum. The applicant's version of why he had fled to South Africa had not altered substantially in the accounts he put forward before the RSDO and RAB. The RAB argued that the credibility of the applicant had been marred because, by the applicant's own account, he had lied, paid bribes and acted fraudulently at various times since he fled Libya, until he arrived in South Africa.[63] Murphy J asserted that it is unlawful to preclude the applicant from consideration for asylum on the basis that he had honestly (and consistently) testified that he had been deceitful in his past, and it is inappropriate to dismiss his testimony on the basis that he has been untruthful in the past.[64] Murphy J added that it seemed that the RAB had not considered country context information sufficiently in light of their overemphasis on the issue of credibility.[65] Murphy J argued that the RAB had failed to explain to the applicant that his past dishonesty would be prejudicial to his case.[66] He also dismissed the RAB's argument that the applicant's 'failure' to request refugee status in previous stages of his past outside of his home country meant that he was not a credible applicant.[67] Lastly, the assessment of credibility upon the applicant's account alone was insufficient grounds for such an assessment, evidenced by the apparent failure to cross-examine the applicant in order to verify that this account was consistent.[68]

IV CONCLUSION

This observation is pertinent when confronting discrimination on the grounds of sexual orientation and/or gender identity. Many of these prejudices are deep-rooted and conveyed as cultural or traditional truisms – conventions that often fail to consider how these values were influenced by the spread of certain religious values under colonialism. It is essential that we move away from labelling sexual orientation and/or gender identity as 'African' or 'un-African'. Such labels fail to recognise the innate and universal human elements of one's sexual orientation and/or gender identity. It is our hope that this paper, and our work as a human rights law clinic, will help to bring light to the injustices that are being experienced by LGBTI asylum seekers and refugees in South Africa.

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62 2008 (1) SA 232 (T).

63 Para 101, *Tantoush v Refugee Appeal Board and Others*.

64 Para 102, ibid.

65 Para 104, ibid.

66 Ibid.

67 Ibid.

68 Ibid.

CHAPTER 18

DETERMINING MEDICAL NECESSITY – THE RIGHT TO ACCESSIBLE MEDICAL HEALTH CARE FOR TRANSGENDER PERSONS IN SOUTH AFRICAN LAW

BUSISIWE DEYI

I INTRODUCTION

With the recognition[1] of same-sex marriages and the liberalisation of adoption[2], pension benefits[3] and morality laws, which had previously threatened same-sex couples engaged in consensual sexual acts with criminalisation,[4] the struggles of other minority groups also require constitutional-changing attention.

The strategic legal reform essentialism that characterised the legal reform movement of the lesbian and gay movements, although successful in many respects, did not result in the attainment of substantive equality for gender non-normative and differently sexed minorities. Academics[5] have critiqued the judgments that resulted in same-sex marriage legal reform. Instead of creating liberatory conceptions of South Africa's conception of marriage, the reform adopted an assimilationist understanding of marriage. Rather than accepting that human relations were complex creations, the case-law elevated a heteronormative and cisgendered conception of companionship.[6] The fundamentally heterosexist and cissexist conceptions of marriage were kept in place.

1 *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005), available at *http://www.saflii.org/za/cases/ZACC/2005/19.html,* accessed June 2016

2 *Du Toit and Another v Minister of Welfare and Population Development and Others* (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) (10 September 2002), available at *http://www.saflii.org/za/cases/ZACC/2002/20.html,* accessed June 2016

3 *Satchwell v President of Republic of South Africa and Another* (CCT45/01) [2002] ZACC 18; 2002 (6) SA 1; 2002 (9) BCLR 986 (25 July 2002), available at *http://www.saflii.org/za/cases/ZACC/2002/18.html,* accessed on June 2016

4 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998), available at *http://www.saflii.org/za/cases/ZACC/1998/15.html,* accessed June 2016

5 See Pierre de Vos 'The "inevitability" of same-sex marriage in South Africa's Post-Apartheid state' (2007) *South African Journal on Human Rights* 23 432.

6 Ibid.

The intersex and transgender communities have been left behind and continue to be marginalised by the very legal reforms which were intended to be liberating for the entire Lesbian, Gay, Bisexual, Transgender, Intersex and Asexual (LGBTIA) community. Egregiously, even state-sponsored legislative reform intended to facilitate and encompass their gender transition has resulted in their further marginalisation and exclusion.[7].

The continued human rights violations of transgender and intersex minority rights in accessing health care in South Africa is supported by the cisgendered understandings of health care by both the public and private health care systems. The lack of a health system inclusive of non-normative gender and sexed identities has resulted in other rights violations, including the right to dignity, equal protection and benefit of the law, education and safety and security.[8]

The South African public and private health care systems have neglected transgender health care needs.[9] Currently only three hospitals provide medical health care – Groote Schuur (Cape Town, Western Cape), Chris Hani Baragwanath Hospital (Johannesburg, Gauteng) and Steve Biko Academic Hospital (Pretoria, Gauteng). With few options available, those who can afford it have resorted to seeking medical health care through private medical health institutions. Unfortunately private health care insurers in South Africa, with few exceptions, exclude gender reassignment surgery (GRS) on the basis that it is not medically necessary or is of a cosmetic nature.

Underpinning this is an understanding of GRS as primarily cosmetic and therefore elective medical treatment. Without expanding on the criteria used in determining what is or is not medically necessary, it has been difficult to assess whether the exclusion of GRS is reasonable and/or constitutionally compliant.

The exclusion of GRS and other transgender affirming treatments by both private and public medical care providers is prevalent within the medical field. This practice persists even in the face of growing medical research[10] affirming the medical necessity of transgender-specific health care. Globally, access to gender affirming health care is low, and where it is available through legislative mechanisms, transgender persons have found medical health care providers to be ignorant of their health care needs.

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7 See Legal Resources Centre and Gender DynamiX 'Briefing Paper: Alteration of Sex Description and Sex Status Act No.49 of 2003' (2015), available at *http://genderdynamix.org.za/wp-content/uploads/LRC-act49-2015-web.pdf,* accessed June 2016

8 D Wilson, A Marais, A de Villiers, R Addinall, MM Campbell, The Transgender Unit 'Transgender issues in South Africa, with particular reference to the Groote Schuur Hospital Transgender Unit', transgender patients at this unit face a 15–20 year waiting list for surgical reassignment surgery. Available at *http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742014000600030,* accessed April 2016

9 Ibid

10 Friedemann Pfafflin, Astrid Junge *Sex Reassignment. Thirty Years of International Follow-up Studies After Sex Reassignment Surgery: A Comprehensive Review, 1961–1991 (Translated from German into American English by* Roberta B Jacobson and Alf B Meier) (1997) Symposium publishing Dusseldorf, available at *http://web.archive.org/web/20061213210356/http://www.symposion.com/ijt/ijtright.htm,* accessed April 2016

II GENDER DYSPHORIA/TRANSSEXUALISM

Gender dysphoria, as diagnosed by the American diagnostic system through its *Diagnostic and Statistical Manual of Mental Disorder (Fifth Edition)*, is characterised by 'a marked difference between the individual's expressed/experienced gender and the gender others would assign to him or her, and it must continue for at least six months.[11] The *International Classification of Diseases* lists diagnostic criteria for gender dysphoria as characterised by 'recurrent sexual urges, fantasies, or behaviours in a heterosexual male involving cross-dressing, disorder characterised by recurrent, intense sexually arousing fantasies, sexual urges, or behaviours involving cross-dressing in a heterosexual male. The fantasies, urges, or behaviours cause clinically significant distress or impairment in social, occupational or other areas of functioning. Severe dysphoria, coupled with a persistent desire for the physical characteristics and social roles that connote the opposite biological sex; the act of dressing like and adopting the behaviour of the opposite sex, often for sexual gratification; and the urge to belong to the opposite sex that may include surgical procedures to modify the sex organs in order to appear as the opposite sex.[12]

The diagnostic definition makes it clear that a diagnosis of the condition requires subsequent medical intervention in the form of hormonal treatment and/or surgery. The DSM-5 recently changed Gender Identity Disorder (GID) to gender dysphoria. The American Medical Association states that a 'critical element of gender dysphoria is the presence of clinically significant distress associated with the condition.'[13] Additionally, treatment options for the 'condition include counselling, cross-sex hormones, gender reassignment surgery, and social and legal transition to the desired gender.'[14]

In both medical diagnostic manuals, medical interventions – both hormonal and surgical –are seen as a necessary aspect of treating and alleviating GID. Further, in all European countries, in order for transgender persons to access medical care – both hormonal and surgical – a GID diagnosis or its equivalent is critical.[15]

The World Professional Association for Transgender Health (WPATH), an international body founded in 1979, comprising over 300 professionals engaged in research and/or clinical practices affecting the lives of transgender and transsexual

11 American Psychiatric Association 'Gender Dysphoria' *American Psychiatric Publishing,* available at *http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf,* accessed June 2016

12 World Health Organization 'International Classification of Disease (ICD)', available at *http://www.who.int/classifications/icd/en/,* accessed June 2016

13 American Psychiatric Association 'Gender Dysphoria', available at *http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf,* accessed April 2016

14 Ibid

15 TGEU Transgender Europe 'Depathologisation', available at *http://tgeu.org/issues/health_and_depathologisation/depathologisation-health_and_depathologisation/,* accessed April 2016

people,[16] published *Standards of Care (SOC) for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SOC 7).[17] The SOC 7 specifies the administration of both hormonal and surgical medical interventions in the treatment and management of GID. Hormone treatment involves the 'administration of exogenous endocrine agents to induce feminizing or masculinizing changes'. According to the SOC 7, hormone treatment is a medically necessary intervention for transgender and gender non-conforming persons experiencing gender dysphoria.[18]

The above stipulations, for hormonal and surgical treatment, are the result of more than 40 years of clinical observation and treatment of transgender patients. There is nearly universal agreement, both within the medical field and the jurisprudence of various courts – from various foreign jurisdictions – that both hormonal and surgical interventions are a medical necessity and therefore not merely cosmetic.

The above clarification of the process of diagnosis and treatment illustrates the evident medical necessity of transgender-affirming medical treatment for transgender persons' need to have access to health benefits. However, increasingly, the Legal Resources Centre (LRC) has been approached by transgender clients claiming they have been excluded by their medical aid schemes from accessing medical benefits. Through its work with various transgender individuals and non-profit transgender organisations, the LRC has identified the sources of exclusion: one is based in exclusionary legislative provisions and the other is based in the exclusionary categorisation by medical aid schemes of transgender-related medical treatment as 'cosmetic' and not 'medically necessary'.

III LACK OF ACCESS TO HEALTH BENEFITS

Jade,[19] a transgender woman, went through her transitioning process – she was evaluated and diagnosed with gender dysphoria in terms of the *DSM-V* and transsexualism and, in terms of the ICD-10, her diagnosis was confirmed by a clinical psychologist. She began her hormonal treatment, taking a feminising oestrogen hormone in accordance with the recommended clinical treatment protocols stipulated by SOC 7.

Her treating physician discussed and recommended GRS, however, as a result of the long waiting periods within the public sector, it was decided that Jade's best option of receiving her GRS treatment was through the private medical health

16 WPATH ' WPATH Clarification on Medical necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.', available at *http://www.wpath.org/uploaded_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf* , accessed April 2016.

17 SOC-7 2012, available at *http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=3926,* accessed April 2016.

18 Ibid page 33.

19 In order to protect the identity of our clients and their privacy, I have changed the names.

sector. Upon this recommendation, she enquired with her medical aid scheme as to whether they provided medical health benefits in line with her GRS treatment. She was informed by her medical aid scheme that her treatments where excluded by the medical aid scheme through its general exclusionary clause.

She then approached the LRC to assist her to make an *ex gratia* application to the medical aid scheme. In her application, she included both her subjective opinion as to why the GRS procedure was necessary, as well as objective opinion from medical experts specialising in transgender-affirming health care.

Her medical aid scheme responded and stated:

> 'The Scheme does make provision for funding of treatment and related costs associated with the psychological effects and associated treatments for suffering from Transsexualism, however, paragraph C.1.3 of the Exclusion list of the Scheme state that:
>
> 'Operations, treatment and procedures for cosmetic purposes' are excluded.
>
> Members 'may apply to the Board for benefits relating to operations, treatment or procedures for cosmetic purposes on medical grounds' and the application was therefore considered by the committee on its own merits and grounds with careful consideration and review of the application and motivations received.
>
> During its deliberations in considering ex gratia applications, the committee is guided by a mandate approved by the Board of trustees of the Scheme, and a view on medical necessity is taken 'having obtained input and recommendations from the Administrator's (name of scheme redacted) Medical and Dental Advisors (as may be applicable), as well as any input and/or information provided by the treating medical practitioner.'
>
> An Ex Gratia Committee meeting held on [redacted], the committee therefore considered the application together with the supporting documentation received under letter dated [redacted], and although the operation and procedures was found clinically appropriate it is <u>not considered medically necessary</u>.' (mistakes and emphasis in original).

Two different clients also approached the LRC for assistance in their applications and they both received responses in the same terms as above from medical aid schemes. After a reading of all the responses from the medical aid schemes, two mutually enforcing and discriminatory classifications emerged. The first was that the medical aid schemes regarded GRS and other transgender-affirming procedures as 'cosmetic'. Secondly, as a result of the categorical classification, transgender medical treatment is automatically 'not medically necessary'.

The classification of transgender-affirming health care as cosmetic is undergirded by a biological determinist understanding of gender and sexed bodies which permeate both the legal and medical professions. A biological determinist

understanding of gender is rooted in the idea that sex – a person's biological sex – is inextricably linked and gives rise to a person's gender.[20] Therefore, persons born male will grow into men with a masculine gender expression and persons born female will grow into women with feminine gender expressions. In a world framed in this manner, transgender persons – with no evidence of an intersex[21] condition – are considered physiologically healthy and do not need medical intervention or treatment. In other words, there is no pathological source necessitating medical treatment. Additionally, a biological determinist understanding of gender means that gender and sex are fixed from birth.

This conception of gender as inextricably linked to sex within the legal field is evidenced by the case of *W v W.*[22] The case involved the determination of whether a valid marriage could be entered into between a male person and the plaintiff who was identified as having gone through a 'sex-change operation'.[23] Nestadt J administered the Ormrod test,[24] a test for 'true gender/sex, based on the congruency of a person's chromosomes, gonads, and genitalia at the time of his/her birth.'[25] In essence, through the test, the court held that gender was determined at birth – determined through a factual investigation of various biological aspects of a person – and was unchangeable whether through hormonal treatment or surgical treatment. Through this, we see that gender was established as a fixed idea and thus any medical intervention would 'not be medically necessary' and thus 'cosmetic'.

Increasingly, this conception of gender as fixed at birth and determined through a factual establishment of biological congruency has been eroded and accepted as a medical fallacy – at least in relation to transgender and intersex persons. Various foreign and international courts have taken decisions which affirm the medical necessity of transgender-affirming medical treatment, including GRS.

IV INTERNATIONAL AND FOREIGN COMPARATIVE JURISPRUDENCE

The linchpin of contentions against the classification of GRS and other transgender-affirming medical care treatments revolve around the idea that transgender health care is not medically necessary and thus it is a choice and cosmetic. Various regional[26] international courts and foreign courts have rejected this argument. However, for the purposes of this article, only

20 See Shannon Weber 'What's wrong with be(com)ing queer? Biological determinism as discursive queer hegemony' (2012) *Sexualities*

21 'A term used for people who are born with external genitalia, chromosomes, or internal reproductive systems that are not traditionally associated with either a "standard" male or female.', available at *http://genderdynamix.org.za/documents/terminology/*, accessed June 2016

22 *W v W* 1976 (2) SA 308 (WLD)

23 Ibid

24 Developed in *Corbett v Corbett (otherwise known as Ashley)*

25 Amanda Swarr *Sex in Transition: Remaking Gender & Race in South Africa* (2012) SUNY Press, page 62

26 See European Court cases *L v Lithuania, Goodwin v United Kingdom, Van Kuck v Germany and Schlumpf v Switzerland*

two countries have been chosen as they provide crystallised principles that can be used effectively within the South African context.

(a) *United States of America*

Prior to the Affordable Care Act, the provision of medical treatment and care for low-income persons was done through two primary Acts, namely the Medicare program[27] and the Medicaid program.[28] Therefore, challenges to exclusion of transgender-specific surgery were brought under these Acts. However, the ushering of the Affordable Care Act has presented an opportunity for challenging the discriminatory practices and clauses excluding transgender-specific health care coverage.[29] The opportunity to challenge transgender-specific exclusions – which would have broad federal changes rather than state-by-state developments – comes as a result of the explicit inclusion by the Affordable Care Act of federal non-discrimination clauses which bar discrimination by an entity receiving federal funding on the basis of sex, gender identity and disability.[30]

In determining whether exclusion is arbitrary, the courts have employed a reasonableness standard. Consequently, courts have interpreted 'medical necessity' of a procedure as the '[standard] for the determination of the reasonableness of criterion set by State Medicaid plans.'[31] In other words, where a medical treatment or procedure has been determined as medically necessary by a treating physician, a state department's refusal to cover said medical treatment would likely be held to be arbitrary and in violation of the objects of Medicaid.[32] However, exclusion of unnecessary or experimental medical treatment by Medicaid plans is not arbitrary.[33] This is in line with the Supreme Court's decision in Beal v Doe where the court held:

> 'Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a State to refuse to fund unnecessary though perhaps desirable medical services.'[34]

27 Enacted through the Social Security Act 42 U.S.C §§1396

28 See Kellan Baker and Andrew Cray 'Ensuring Benefits Parity and Gender identity Nondiscrimination in Essential Health Benefits' *Center For American Progress* (2012)

29 Ibid

30 Ibid

31 *Meyers v Reagan*, 776 F.2d 241 (8th Cir.1985), see also *Beal v Doe,* 432 U.S. 438 (1977)

32 Ibid

33 Ibid *Beal v Doe*

34 Ibid

Thus, in the case of *Doe v State of Minnesota Department of Public Welfare*,[35] the court held that the absolute prohibition by the state of surgical reassignment surgery fell afoul of the objects of the federal law. The court reasoned that the absolute prohibition of surgical reassignment was arbitrary and unreasonable and that the medical necessity of each applicant must be determined individually, on a case-by-case basis. Additionally, the court held the state could not impose a higher standard of proof for medical necessity for transsexual surgery than for other, non-transsexual surgeries.[36]

It is clear from the above decisions that the medical necessity of a procedure or treatment is determined by the applicant's treating physician, primarily. Where a state seeks to challenge a physician's judgement, it cannot rely on clerical personnel or government officials but must seek other medical judgements.[37]

The judgments above crystallise important principles, namely that i) medical necessity is determined on a case-by-case basis, thus an irrefutable presumption that surgical reassignment surgery is cosmetic is irrational and unreasonable; ii) in determining whether a particular individual's surgery is medically necessary, the prescribing physician's recommendations take precedence; however, where there is a denial of medical treatment, such determination cannot be made by clerical personnel but must be substantiated through expert opinion; iii) lastly, determinations of medical necessity must be obtained through sound medical evidence and cannot be left to administrative clerks with no medical knowledge or information.

(b) *Canada*

Josef v Ontario (undecided)

Born in 1953 with the biological characteristics of a boy, Michelle Josef suffered depression for years as a result of her gender dysphoria. However, after an attempted suicide at the age of 44, she decided to undergo gender transition. Following the decision to transition, Michelle received the necessary hormonal treatment and various other procedures, including electrolysis to remove facial hair, hair transplants to correct male-pattern receding hairline, surgical breast augmentation and facial reconstruction to further feminise her appearance, at the Centre for Addiction and Mental Health (CAMH).

After completion of the CAMH's two-year Real Life Experience – which included full disclosure of her gender identity to her family, friends and co-workers – and obtaining a recommendation for sex reassignment surgery (SRS) from the CAMH, Michelle was unable to undergo SRS as it had been cut from OHIP funding by Regulation 528/98. Michelle then sought to challenge the Regulation as violating the right to equality contained in section 15 of the Charter of Rights and Freedoms and, further, that the Regulation was not a reasonable limit that could be justified under section 1 of the Charter.

35 *Doe v State of Minesota* 257N.W.2d 816 (1977)

36 Ibid

37 *Doe v State of Minnesota* op cite note 35 above, *see also Pinneke v Priesser* 623 F.2d 548 n.2 (8th Cir.1980)

However, the case never got to the hearing stage before the Canadian Supreme Court as the Province of Ontario rescinded the Regulation. The arguments that were to be made by the applicant provide key insights to the determination of whether SRS is a medical necessity as per the law or not.

(i) SRS as an effective treatment for GID

With supporting expert evidence, counsel for Michelle first made the argument that SRS is an effective treatment for GID, thereby making it a 'medically necessary' treatment for transsexual and transgender persons. In research studies done with 300 patients who had undergone SRS, only 2% of patients who expressed regret or ambivalence with regards to having undergone SRS (about seven patients from the research sample). Further, Dr Dickey, an expert providing testimony in support of Michelle, stated that SRS was effective because 'it removes the primary impediment to optimal psychological functioning in transsexuals, namely the acute and chronic sense of discord between their physical sex and their gender identity, thereby treating, and often curing, their accompanying co-morbid disorders.'[38]

Further, testimony was given on the effects of SRS through a review of available literature, which included alleviation of psychiatric symptomology[39] (anxiety and depression), lessening of severe emotional distress and improved mental stability, socio-economic functioning, interpersonal and family relationships, and romantic and sexual experiences.[40] Expert evidence further revealed that suicide among post-operative transgender persons was rare. The therapeutic effectiveness of SRS is undisputed when provided in accordance with the minimum treatment criteria set out by SOC 7[41].

(ii) SRS is the only effective treatment for GID

Arguments against the categorisation of SRS as 'medically necessary' place great emphasis on the fact that psychological interventions are effective in the treatment of GID. Countering this point, counsel for Michelle brought in expert testimony to the effect that, although psychological interventions can alleviate symptoms of GID, employing the triadic approach set out within the international SOC, which includes SRS as the final aspect of treatment, is the only known effective treatment for GID. No study has found that psychotherapy alone is sufficient in the treatment of severe GID.

Additionally, although psychiatric and hormonal treatments might work for some transgender patients, to use this standard to then determine what transgender persons as a whole would require for transitioning is severely limiting to those trans* persons who need SRS as an essential part of their treatment.

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38 *Josef v Ontario* Factum para 51

39 Ibid, para 54

40 Ibid

41 SOC 7 op cite note 17 above

(iii) SRS is a 'medical necessity'

Often arguments on whether SRS is a medical necessity fail to draw the distinction between medical interventions which are a 'medical urgency' and those which are a 'medical necessity'. Medically urgent procedures are those procedures which, if not performed, would result in the death of or severe complications for the patient. Medically necessary procedures, according to the expert evidence adduced on behalf of Michelle, are those procedures which 'effectively improve the health and well-being by removing impediments to optimal functioning, not just if the [procedure] saves lives. For instance, treatments for schizophrenics are universally considered to be medically necessary because they tend to remove psychiatric impediments to optimal functioning. [SRS too has been] demonstratively proven to improve the well-being of individuals with severe GID by reducing or eliminating the most fundamental barrier to optimal health, namely gender dysphoria.'

First, to use an 'impending death of the patient' yardstick in the assessment of whether a treatment is a medical necessity sets too high a standard for trans* persons to achieve, and second, if that standard were to be applied to other medical health care benefits already provided, the list of benefits within South Africa's Prescribed Minimum Benefits (PMB) list would be drastically reduced. The PMB list is a set of defined benefits to ensure that all medical scheme members have access to certain minimum health services, regardless of the benefit option they have selected. Third, should the 'impending death of the patient' be used as a yardstick to measure medical necessity, this standard unequally differentiates between those psychiatric conditions categorised as chronic under the PMB list.

Conclusion

Drawing from the arguments in *Josef,* medical necessity could be defined and argued in one of two ways. First, the determination must be done by the treating physician (as per the American model). Thus, only the treating physician can make a competent determination as to the medical necessity of SRS treatment for a particular patient. This model centres the needs of the patient, as determined by the treating physician, through a careful consideration of international or domestic trans* health guidelines. The translation of the physician-centred model into medical aid scheme reimbursement policy would have to take into consideration the full scope of potential medical treatments, including SRS, in formulating its medical treatments guidelines.

Where there is disagreement, the treating physician's recommendations must be assessed and judged by an equally qualified specialist physician, according to clear policy guidelines, after review of all necessary medical documentation of the patient.

However, a contestation must be limited only to fiscal and qualitative grounds, i.e. where there is a cheaper and/or more effective alternative treatment in line with reasonableness considerations, accessing the alternative cannot impose an undue burden on the patient or require the patient to expand themselves financially to their detriment.

The above determination of 'medical necessity' has its limitations. As it is physician-centred it might have a negative impact on the patient's ability to determine his or her own transitioning journey and stage of readiness. Transgender

persons are not homogenous; some patients might be ready for surgical intervention sooner than others. Additionally, because of the societal stigma, some transgender persons might have underlying mental health problems which might need intervention prior to hormonal treatment. Should the treating physician not be aware of the complexities which might be present, they might end up pushing or hindering a transgender patient's progress.

Second, an alternative to the physician-centred model is a graduated determination of whether SRS for a particular patient is a medical necessity. This would require the determination of 'medical necessity' through a definition of medical necessity being a gradient-of-need existing between those medical procedures which are urgent (i.e. life or death procedures) and those that are cosmetic (i.e. superficial and serves to alter appearance). An example of how this would work would be in the context of breast reconstruction in cancer patients. Whereas non-cancer patients seeking breast augmentation would be categorised as cosmetic, patients who are cancer patients seeking breast reconstruction – in whatever form – would fall under the medical necessity spectrum; similarly with transgender patients.

This model has the potential to be pathologising to transgender patients as it can morph into something similar to the European approach where, in order for a patient to qualify for hormonal and/or surgical treatment, they would have to produce a diagnosis. The presence and severity of a person's GID should not be used as a yardstick to measure the necessity of medical intervention and necessity of treatment as transgender persons' medical needs are different. Some might be satisfied with hormonal treatment alone and others might want to take it further and undergo surgical intervention.

Through either of these understandings of 'medical necessity', it is clear that SRS is necessary, although non-emergent – timing of the procedure can be controlled and it is not an 'elective' procedure like cosmetic surgeries are.

V CONCLUSION – A SOUTH AFRICAN APPROACH TO MEDICAL NECESSITY

The right to health contained in the South African Constitution is informed by the rights to equality and non-discrimination.[42] From this view, the right to health care and the concomitant legislation and policies giving operational effect to the right must do so in a manner that provides appropriate and equitable access to health care for everyone.

Section 27(1)(a) gives effect to the right to access to health care and provides:

'[e]veryone has the right to have access to health care services, including reproductive health care.'

The section contains a clear equality threshold[43] contained in the determination that 'everyone' is entitled to access health care services and reproductive health care. 'In this sense, section 27(1)(a) supplements the right to equality, by embodying

42 M Pietrese 'Indirect Horizontal Application Of The Right To Have Access To Health Care Services' (2007) 23 *SAJHR,* 165, and 172

43 Ibid

an entitlement against arbitrary or unfair exclusion from the ambit of policies, laws and programmes which confer health-related benefits and by forbidding the inequitable provision of health care services.'[44]

The equality dimension of the right to access health care is equally enforceable against private health care service providers and institutions. Within the context of GRS, it means that private health care providers cannot refuse to provide GRS on a discriminatory basis in terms of section 9(3) read together with 9(4). Thus the determination of what is 'cosmetic' surgery versus 'medically necessary' should not have an unfair discriminatory impact on transgender persons.

By designating transgender-related surgery as cosmetic, medical aid schemes have created an irrefutable presumption that such surgery could never be medically necessary. This results in a practice which discriminates unfairly against transgender persons on the basis of their gender or sex.

Further, the designation is not supported by the medical developments in relation to the provision of transgender health care. Both the ICD-10 and the DMV-5 manual recognise GID and provide diagnostic criteria, with the DMV-5 prescribing surgery as a treatment option.

Thus the determination of what is 'medically necessary', in the absence of clear guidelines or criteria, must be informed by the equality and non-discrimination threshold which is inherent in the right to access health care.

Two potential models emerge from a reading of the available case law on the issue. First, the determination must be done by the treating physician (as per the American Medicaid model). Thus, only the treating physician can make a competent determination. Where there is disagreement, an assessment must be done by an equally qualified specialist physician after review of all necessary medical documentation.

However, contestations must be limited only to fiscal and qualitative grounds, i.e. where there is a cheaper and/or more effective alternative treatment. However, accessing the alternative cannot impose an undue burden on the patient or require the patient to expand themselves financially to their detriment.

The second manner to determine 'medical necessity' would be through a definition of medical necessity being a gradient of need which exists between those medical procedures which are urgent (i.e. life or death procedures) and those that are cosmetic (i.e. superficial and serves to alter appearance).

Through either of these understandings of 'medical necessity', it is clear that SRS, must be understood as a necessary part of the treatment of GID and, therefore, should be provided for within the PMBs or through the self-regulated provision of medical aids.

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44 M Pietrese *Can Rights Cure? The impact of human rights litigation on South Africa's health system* (2014) PULP, page 20

The determination of 'medical necessity' must be reasonable and must promote and respect the rights to equitable access to the right to health care. The current determination goes against the objectives of the Medical Schemes Act.[45]

An understanding of 'medical necessity' can be gleaned from the Medical Schemes Act which, although not defining the terms, does define 'relevant health service' as:

> '… any health care treatment of any person by a person registered in terms of any law, which treatment has as its object –
>
> (a) the physical or mental examination of that person;
>
> (b) the diagnosis, treatment or prevention of any physical or mental defect, illness or deficiency;
>
> (c) the giving of advice in relation to any defect, illness or deficiency;
>
> (d) the giving of advice relating to, or treatment of, any condition arising out of a pregnancy, including the termination thereof;
>
> (e) the prescribing or supplying of any medicine, appliance or apparatus in relation to any defect, illness or deficiency or pregnancy, including the termination thereof; or
>
> (f) nursing or midwifery.

Read together with section 24(2)(e) of the Act, which stipulates that 'No medical scheme shall be registered under this section unless the Council is satisfied that…the medical scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including race, age, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health....' The Act emphasises equality in the provision of services by medical aid schemes.

The Act continues the equality threshold present in section 27(1)(a) of the Constitution and further underpins this through a direct stipulation that the administration and the rules of a medical aid scheme may not directly or indirectly discriminate on any person on the basis of analogous grounds. It can, therefore, be argued that, where a medical aid scheme creates procedures and processes in attempts to expand access to health care services to their members – such as *ex gratia* application processes – these must give effect to a parity of benefits. Categorical exclusions are inimical to the value of equality. The current definition designation of SRS as 'cosmetic' is not only arbitrary, and not based on any coherent medical evidence, but also has a disproportionately unfair discriminatory impact on transgender persons.

45 Medical Schemes Act 131 of 1998

CHAPTER 19

ACCESS TO TOILETS: A RIGHT DENIED

CHARLENE MAY, [1] BIANCA VALENTINE AND GENDERDYNAMIX

I INTRODUCTION

Gender equality is one of the basic rights guaranteed under the Constitution of South Africa. The enjoyment of the right to equality is further enforced through legislation, policy and codes of good conduct through which the State seeks to eliminate unfair discrimination.

Section 9(2) of the Constitution states that:

> 's9(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'

Section 9(3) goes further to say that:

> 's9(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.'

Section 9(4) extends the prohibition against discrimination to private actors and compels the State to enact legislation to prevent or prohibit discrimination based on any of the listed grounds in s9(3) of the Constitution.

Although South Africa has made great strides in addressing inequality through the enactment of legislation, we have yet to address the enjoyment of the right in a real and substantive manner for rights holders. This critical issue is apparent when one engages members of the transgender or gender non-conforming community in South Africa. A key rights' violation they continue to face concerns access to toilets in public and work spaces, where toilets are gendered.

This article seeks to uncover some of the problems that transgender and gender non-conforming persons experience

1 Article is produced based on work undertaken with Gender Dynamix and based on research conducted with gender non-conforming persons nationally.

in accessing toilets, their rights under the Constitution and why gender-neutral toilets should be made available in public and work spaces to ensure safe, non-discriminatory toilet usage for all South Africans.

II GENDERED TOILETS

The concept of gendered toilets is a relatively modern concept that finds it roots in the early nineteenth century in western nations such as the United States of America and the United Kingdom.[2] In the developing world, the concept of shared toilets has remained the norm.[3] Gender segregation was, of course, rooted in the notion that women were more vulnerable within society than men and, as a consequence, should be separated from men in public spaces or spaces where intimate or private acts are to take place.[4] In the early 1800s, the absence of women's toilets in public spaces restricted a woman's movements outside of her home. It restricted the time she spent outside in public and her ability to navigate where she went, and so she spent more time within her home, or within the homes of others, where facilities were at hand. The restrictions of toilet access in public spaces, therefore, contributed to and maintained women's 'appropriate role and place within society'.[5]

Within the workplace, the issue of access was compounded, as workplace and sanitation facilities were not designed for women in the workplace. Workplaces did not make provision for toilet facilities for women, particularly in male-driven industries such as fire and rescue services and the taxi industry.[6] The comparison between the restrictions placed on women, and the control over their movements and behaviour, draws strong parallels between the same arguments made by transgender, intersex and gender non-conforming individuals today. The question is whether we still live in a society where such social controls are needed or warranted within society?

Proponents of gendered toilets are concerned about the safety of vulnerable groups within society, such as women and children, and argue that gender-neutral toilets would increase opportunities for sexual predators to locate, isolate and attack potential victims.[7]

Proponents of gender-neutral toilets argue that these facilities may actually make toilet access easier and more comfortable for the most vulnerable members of society. The approach, for instance, benefits a larger grouping within

2 Rutgers L Rev. 409 2008–2009 'Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection' C J Griffin p. 414.

3 Olga Gershenson and Barbara Penner *Ladies and Gents: Public Toilets and Gender* (2009) Temple University Press p. 5.

4 Kogan, TS *Sex Separation in Public Restrooms* (2007) p. 25.

5 Kogan TS *Sex Separation in Public Restrooms* (2007) p. 55.

6 Olga Gershenson and Barbara Penner *Ladies and Gents: Public Toilets and Gender* (2009) Temple University Press p. 5.

7 Christine Overall *Public Toilets: Sex Segregation Revisited* (2007) p. 82.

society, such as children and the elderly, who might find themselves accompanied by a care worker/care giver of the opposite sex. It also avoids the possible embarrassment that may go along with accidently choosing to enter the incorrect toilet in a public space.[8]

(a) *The impact of gendered toilets*

Participants in the Gender Dynamix and Legal Resources Centre's (LRC) study (the Study) on toilet usage in 2013/14 gave the following feedback in respect of a question around how they felt when they have been denied access to a toilet:

> 'Embarrassed, small, uncomfortable, disrespected, annoyed, confused, insulted, offended, invalidated, sick, angry, disappointed, horrible, irritated, inhuman, discriminated against, and less of a human being'

Safety concerns factored significantly in the decisions for many of the participants, particularly women. Transgender women or gender non-conforming women who appeared androgynous, or what is considered traditionally masculine, reported the most difficulty in accessing public toilets due to safety concerns. 'It is difficult entering a female toilet looking like a man, I would rather be stared at than risk being raped.'[9] Another participant indicated that because she was a transgender woman and not necessarily recognisable physically as a woman, she simply does not use public toilets due to fear of being confronted in public or hurt. Another participant shared how she was asked to expose her genitals in order to prove her gender before she was allowed to use the bathroom of her choice in a public setting.

Many of the Study's participants confirmed that they had been denied the use of a toilet in a public space because of their gender identity at least once. Individuals who have been denied access to toilet facilities include cleaning staff, security guards and even other toilet users. Participants expressed that they simply avoid using public toilets as a result of the abuse, embarrassment, hostility and violence they have encountered. Many will simply train themselves to wait until they are home in order to use a bathroom, or relieve themselves outside where no-one can see them. In addition to safety fears, there is also the expressed need to belong, to be recognised for their lived gender, and so they simply avoid situations where they would not present as 'expected' or the 'norm' and, of course, avoid the discomfort and embarrassment of having to publicly explain your gender identity to a total stranger.

These situations are not only present in public toilet facilities, such as shopping malls, but participants expressed experiencing difficulties in education settings – schools, universities, residences and campus toilets are mostly gendered and, therefore, exclude many who are not able to make use of them. Workplace discrimination was reported, but again participants expressed the deep need to be recognised for their lived gender, not wanting to draw attention to themselves, and simply being accepted. They have, therefore, managed to find ways of behaving in a manner that brings comfort to others in the workplace, while at the same time enduring the discrimination.

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8 Christine Overall *Public Toilets: Sex Segregation Revisited* (2007) p. 85.

9 Response from a transgender woman.

III A CONSTITUTIONAL ARGUMENT

In South Africa the foundational values of dignity, equality and freedom are enshrined in the Constitution. Therefore, in as much as these are rights that one can assert, they are also values that are instructive in respect of the value system to which we, as South Africans, should aspire. The intersection between rights and values are key to transformation, but also key to recognition and realisation of rights.

(a) *Dignity*

'Everyone has inherent dignity and the right to have their dignity respected and protected.'[10]

Human dignity can at best be described as the right from which all other rights flow, and underpins the rationale that all persons are worthy of equal treatment and equal respect. Chaskalson CJ said that, 'Dignity is the recognition of the inherent worth and value of every human being.'[11]

In its 2014 Report on Water and Sanitation, the South African Human Rights Commission (SAHRC) equated sanitation to dignity. The use of bathroom facilities is undoubtedly one of the most private 'public' functions associated with being a human being. When one assesses the language used by the participants in our survey, it is apparent that the language used is that associated with instances of humiliation and degradation. This is a particular indictment on South Africa, where respect for human dignity implies a tolerance and acceptance for all persons based foremost on their humanity.

(b) *Privacy*

Both our Constitution, as well as our common law, regulates the right to privacy. The Constitution defines the right to privacy as:

> 'Section 14 Everyone has the right to privacy, which includes the right not to have
>
> (a) Their person or home searched;
>
> (b) Their property searched;
>
> (c) Their possessions seized;
>
> (d) The privacy of their communication infringed'

10 Section 10 of the Constitution.

11 Arthur Chaskalson CJ *Dignity As A Constitutional Value: A South African Perspective*

Section 14 therefore guarantees a general right to privacy, as well as protects the right holder against infringement of the right. The Common law recognises the right to privacy as an independent personality right that forms part of an individual's *dignitas* and, therefore, a violation would amount to an injury to the personality of the person.

Through the stories they shared, participants have indicated an almost daily infringement of their right to privacy when accessing toilet facilities within public spaces. This is a direct infringement of the individual's dignity under our Common law and, as such, is recognised as being an injury to the person. Yet this almost daily infringement is neither frowned upon nor addressed, and has become normalised through a day-to-day gendered toilet system that refuses to recognise the needs of our gender non-conforming community.

(c) *Freedom and security of the person*

As discussed, many of the arguments for the need to have gendered toilet facilities relate to the identification of a vulnerable group within society and the need to ensure that this group of persons is safe and secure. The freedom and security of the person[12] argument, which finds application under section 12(1)(c) of the Constitution, has led to the enactment of numerous laws and policies geared towards protecting women and children from violence in our country.

We could so easily make the same arguments in favour of policy and legislative action in order to protect an equally vulnerable group within our society, namely gender non-conforming persons. The very real fear that they have expressed, as well as those tasked with providing security in public settings, surely warrants that steps be taken to protect them. The Constitution does not require that a vulnerability be established before such active steps can be taken or to invoke the right. The right is guaranteed to everyone and so gender non-conforming persons are entitled to protection, but also freedom of their person, to be able to utilise whichever toilet they choose, and to be able to exercise that right free from violence.

IV RECOMMENDATIONS

There is an overwhelming need to educate the South African public on the principles, rights and values enshrined in our Constitution. It is simply not enough to have rights on paper without everyone enjoying their rights in a substantive and equal manner.

The majority of the participants indicated that a solution to their problems would be the introduction of gender-neutral toilets, much like the family-designated toilets that are present in shopping malls. This concept will allow for us all to transition to a situation where gender is no longer a precursor or qualifier to use a particular toilet. It would not isolate transgender or gender non-conforming persons in the same way that a 'special toilet' would. What is clear from the information

12 Section 12(1)(c) Everyone has the right to freedom and security of the person, which includes the right – to be free from all forms of violence from either public or private sources.

provided by the participants, is that they want to remove the stigma of being 'different' or 'other' and having to explain their gender identity to a complete stranger. The introduction of gender-neutral toilets in public and work spaces would be one step closer to gender non-conforming persons being able to access facilities without fear of harm.

Many entertainment places, such as restaurants and pubs, which often have limited space, have adopted the approach of a gender-neutral toilet. They have been put in place probably out of convenience, but are far more inclusive as a result. A number of hotel chains have also introduced the concept without any reported incidents of violence against women or children. The University of Cape Town also announced in 2014 that they would be embarking on a process of introducing gender-neutral toilets. Initiatives such as these should be receiving more attention so that the methodology can be duplicated and shared as widely as possible. As with the introduction of most social practices, the more people are exposed to doing things differently, the more they will become accustomed thereto. We all have the obligation to be more inclusive, accepting and tolerant. The rights and values of dignity and equality should, after all, be enjoyed by us all.

CHAPTER 20

EVALUATING THE EXTENT TO WHICH THE CIVIL AVIATION REGULATIONS ACCOMMODATE PERSONS WITH MENTAL DISABILITIES

MANDIVAVARIRA MUDARIKWA

I INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) explains the concept of reasonable accommodation and unequivocally links it to the realisation of all human rights of persons with disabilities. The CRPD is the first binding international law treaty where reasonable accommodation has been defined.[1] The CRPD frames reasonable accommodation within the equality and non-discrimination context and, in doing so, some have argued that 'the CRPD animates both theoretical as well as practical discussions about rendering all rights meaningful for some 650 million persons with disabilities worldwide.'[2]

Within this context, the article discusses the concept of reasonable accommodation as entrenched in the CRPD and evaluates the extent to which it can be reconciled with the provisions of the South African Civil Aviation Association (SACAA) Civil Aviation Regulations (2011): Carriage of Passengers with Disability (henceforth 'the SACAA Regulations'). It will be argued that the current SACAA regulations are failing to reasonably accommodate persons with disabilities as it unduly and disproportionally burdens persons with disabilities seeking to travel by air.

II REASONABLE ACCOMMODATION AND EQUALITY WITHIN THE CONTEXT OF THE CRPD

The CRPD enshrines the principle of reasonable accommodation, defining it as a 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.[3]

1 Lord, Janet and Brown 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities' (2010), available at SSRN: *http://dx.doi.org/10.2139/ssrn.1618903.*

2 Ibid.

3 2007 UN Convention on the Rights of Persons with Disabilities, Definitions.

Thus, on the basis of the principle of reasonable accommodation, positive measures should be implemented in order to limit any systemic discrimination against persons with disabilities.[4] The duty to reasonably accommodate persons with disabilities applies to both State and non-State actors, specifically airlines for the purpose of this article. Airlines are, therefore, required to reasonably adjust and modify their services, policies and practices in order to ensure that any obstacles that impede the inclusion and use of air travel by persons with disabilities are addressed in order to ensure that there is substantive equality in accessing air travel.

Additionally, Article 5 of the CRPD explains the equality and non-discrimination context of reasonable accommodation. Article 5 mandates all State parties to 'take all appropriate steps to ensure that reasonable accommodation is provided' in order to 'promote equality and eliminate discrimination'.[5] Reasonable accommodation, therefore, plays a pivotal role in bridging and unifying all human rights in order to advance equality of persons with disabilities.[6]

Perhaps it is useful for the context of this article to note that Article 2 of CRPD defines disability discrimination as:

> 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.'

It can thus be argued that the amalgamation of reasonable accommodation within non-discrimination in Article 2 of the CRPD mandates the realisation of fundamental civil and political rights to include positive measures in order to address ongoing systemic discrimination against persons with disabilities.[7] Additionally, the amalgamation of reasonable accommodation and equality creates an immediate obligation to reasonably accommodate persons with disability. As the obligation to reasonably accommodate the needs of persons with disabilities is an obligation within the general application section of the CRPD, the immediate obligation is, therefore, applicable to both civil and political rights, as well as economic, social and cultural rights. More importantly, within the context of all these rights, the failure to reasonably accommodate the needs of persons with disabilities amounts to unfair discrimination.

4 Lord et al supra note 1 page 4.

5 Article 5 (3) of 2007 UN Convention on the Rights of the Persons with Disabilities.

6 Lord et al supra note 1 page 4.

7 Lord et al supra note 1 Page 5.

III SUBSTANTIVE EQUALITY IN SOUTH AFRICA

The Constitution of the Republic of South Africa explains that equality includes the full and equal enjoyment of all rights and freedoms and, to promote equality, legislative and other measures may be put in place to protect and/or advance the rights of persons or groups of persons disadvantaged by unfair discrimination.[8] Equality is one of the democratic values of South Africa[9] and its centrality as both a right and a value has been underscored by the numerous references to it in provisions of the Constitution and in many judgments of the Constitutional Court.[10]

The Constitutional Court in *Bhe v Magistrate, Khayelitsha*[11] stated that the achievement of equality is one of the founding values of the Constitution and section 9 of the Constitution also guarantees equality 'to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past. Thus section 9(3) of the Constitution prohibits unfair discrimination by the State "directly or indirectly against anyone" on grounds which include race, gender and sex.'[12]

Depending on the nature and extent of disability, special actions may have to be taken in order to ensure that the needs of persons with disabilities are taken into account and any barriers to their participation and inclusion in varying contexts are removed.[13] Further, in the context of enjoying equality within our differences and the ability to enjoy equality for those who are considered 'different' or 'the other', the Constitutional Court in the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[14] states that:

> 'The desire for equality is not a hope for the elimination of all differences. The experience of subordination – of personal subordination, above all – lies behind the vision of equality. To understand "the other" one must try, as far as is humanly possible, to place oneself in the position of "the other". It is easy to say that everyone who is just like "us" is entitled to equality. Everyone finds it more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any … group

8 Section 9(2) of the Constitution of the Republic South Africa.

9 Sections 1 and 7 of the Constitution of the Republic South Africa.

10 Sections 1, 3, 7, 8, 9, 36 and 39 of the Constitution of the Republic of South Africa. See also *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 20; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at paras 41–53; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999(1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 17; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 32.

11 2005 (1) BCLR 1 (CC).

12 Ibid para 50.

13 Currie and De Waal *The Bill of Rights Handbook* (2015) Juta, pages 234–235.

14 998 (12) BCLR 1517.

> is less deserving and unworthy of equal protection and benefit of the law all minorities and all of … society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.'[15]

The South African equality jurisprudence draws a distinction between formal and substantive equality, with the latter being the preferred form of equality in South Africa. Substantive equality is aimed at ensuring equality of outcome and opportunity and can tolerate disparities in treatment of persons in order to achieve this aim.[16] Further, it has been argued that a purposive approach to the Constitution and the Bill of Rights mandates an understanding of the equality clause in section 9 that is grounded in the substantive understanding of equality.[17]

Moreover, the formulation of disability discrimination in the CRPD above is consistent with the understanding of differentiation and discrimination within the context of South Africa. The equality conceptualisation in South Africa makes a distinction between mere differentiation and differentiation on illegitimate grounds of differentiation as listed in the Constitution.[18] It is also important to note that, within this context, the Constitution does not prohibit discrimination; it prohibits unfair discrimination.[19] The Constitutional Court has stated that what makes discrimination unfair is the impact of the discrimination on those who are being differentiated.[20] It has been found that unfair discrimination 'principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.'[21] Thus, the value of dignity in understanding unfair discrimination cannot be overlooked.

IV EVALUATING THE SACAA REGULATIONS WITHIN THE CONTEXT OF EQUALITY AND REASONABLE ACCOMMODATION

The Civil Aviation Act[22] does not provide any information or guidance on the transportation of persons with disabilities by airlines. However, section 155 of the Civil Aviation Act enables the Minister of Transport to enact regulations on the

15 Ibid para 22.

16 Currie and De Waal *The Bill of Rights Handbook* (2015) Juta, page 213.

17 Ibid page 2014.

18 Section 9(3) of the Constitution of the Republic of South Africa. Currie and De Waal *The Bill of Rights Handbook* (2015) Juta, page 213.

19 Ibid page 223.

20 *Harksen* (note 10) paras 50–51.

21 *Prinsloo* (note 10) para 31.

22 13 of 2009.

implementation of the Civil Aviation Act. Accordingly, the SACAA Regulations were enacted.[23] Regulation 120.07.34 provides the legal framework on the carriage of persons with a disability and Regulation 120.07.35 provides the framework for the limitations of carriage of children and persons with disabilities.

Regulation 120.07.34 authorises an air service operator to establish procedures for carriage of passengers with disabilities.[24] For the purposes of this article, I have focused on the regulation that specifically focuses on passengers with mental disability. The SACAA states as follows:

> A person with a mental disability shall not be carried in the aeroplane unless
>
> (a) he or she is **accompanied by an able-bodied assistant;** and
>
> (b) a medical certificate has been issued by a medical practitioner certifying that the person with the mental disability is suitable for carriage by air and **confirming that there is no risk of violence from such person.**[25] [Emphasis added]

The language of the regulation above is very clear that without an able-bodied assistant and note from a medical practitioner stating that the intending passenger with a mental disability is not violent, he/she cannot travel by air. This is a blanket requirement for all passengers with disability, without any consideration of the person's previous flying history, the nature and detail of their disability and history of any related violence, if any.

This section of the Regulation highlighted above not only amounts to unfair discrimination directly against persons with disabilities seeking to travel by air, it also unduly burdens persons with mental disabilities as it requires all persons with mental disabilities to have an able-bodied assistant fly with them all the time. The Regulation does not specify who pays for the costs of the additional ticket for the able-bodied assistant and who actually qualifies as an able-bodied assistant. From our work at the Legal Resources Centre (LRC), we have learnt that airlines generally require passengers with mental disabilities to pay for the able-bodied assistants; essentially every time a person with a mental disability has to fly they must buy two tickets, without exception. The requirement for an able-bodied assistant has, in practice, not been limited to only persons with mental disabilities, as the LRC has received complaints where persons with physical disabilities were not allowed to travel because they did not have an able-bodied assistant.

To understand the nature of the failure to reasonably accommodate, which amounts to unfair discrimination against persons with mental disabilities (physical included too in terms of the practice of the airlines), I have compared the

23 Applicable Regulations: GNR.425 of 1 June 2012: Civil Aviation Regulations, 2011, available at *http://209.203.9.244/LexisNexis/Lnb.asp* (Government Gazette No. 35398).

24 Regulation 120.07.34(1).

25 Regulation 120.07.34(4).

SACAA Regulation to the European Union Interpretative Guidelines on the European Union Regulation (henceforth 'the EU Regulation') concerning the rights of disabled persons with reduced mobility when travelling by air.[26] This comparison should not be seen as endorsing the EU Regulation as the model standard for accommodation, but simply to provide a comparison on how persons with disabilities are understood and accommodated in air travel in a different jurisdiction.

The European Commission issued the European Commission Interpretative Guidelines as it found that disabled passengers continue to face several obstacles when travelling by air, especially unjustified restrictions based on unclear safety purposes.[27] The EU Interpretative Guideline emphasises that 'the general rule is that disabled persons and persons with reduced mobility can travel alone as any other passenger.'[28] The requirement of an able-bodied assistant is thus an exception to the general principle of non-discrimination, equality and inherent dignity that restrains air carriers from imposing special conditions on a disabled person seeking to travel by air. Thus, it is recognised that the requirement of an able-bodied assistant is discriminatory and must be applied only for safety reasons and in specific cases.[29] In the constitutional context, these exceptions must therefore be applied only in a manner that does not unfairly discriminate against persons with disabilities, i.e. must not treat persons with disabilities as if they are inherently unequal in dignity when compared to persons without mental disabilities and disabilities generally. The EU Interpretative Guideline also emphasises that, when an air carrier requires a passenger to be accompanied, it must motivate its decision and provide a clear explanation, quoting the relevant legislation.[30]

Indeed, the EU Interpretative Guidelines provide that the air carrier may require a disabled person to be accompanied *only when the person is not self-reliant* and could represent a risk to safety.[31] Additionally, the EU Interpretative Guidelines provide that carriers may ask questions related to safety rules to disabled persons seeking to travel by air in order to determine whether they need to travel with an able-bodied assistant or not.[32] It is therefore possible to identify such persons, instead of applying a blanket exclusion policy that fails to appropriately differentiate between different types and degrees of disabilities. Also, it is clearly stated that air carriers can only ask a passenger with mental disability to provide medical proof about his or her condition when there is *reasonable doubt* that the passenger can travel without assistance

26 Regulation (EC) No 1107/2006 of the European Parliament and the Council of 5 July 2006.

27 European Commission Press release: http://europa.eu/rapid/press-release_IP-12-602_en.htm.

28 EU Interpretative Guidelines, page 8.

29 EU Interpretative Guidelines, page 8.

30 Article 4(4) of the Regulation.

31 EU Interpretative Guidelines, page 8.

32 EU Interpretative Guidelines, page 8.

during the flight.[33] In addition, the EU Interpretative Guidelines address the issue of paying for two seats and state that the assistant's seat should be offered by the air carrier for free or at a significantly lower rate.[34]

Thus, the nature of the disability and the degree of limitation of each person are taken into account by the EU Regulation when applying restrictions to disabled air travellers for the purpose of safety. On the contrary, the SACAA Regulation requirement of an able-bodied assistant, and a medical note that a passenger with a disability is not violent, is blanketly applied and fails to appropriately differentiate between varying and degrees of disabilities. By requiring every passenger with a mental disability to fly with an able-bodied assistant at their own cost, air carriers are carrying out a discriminatory demand on the basis of disability, which is contrary to the obligation to reasonably accommodate persons with disability in service provision. Given the unfair impact and undue burden this requirement places on persons with mental disabilities, it amounts to unfair discrimination in terms of section 9 of the Constitution of South Africa.[35]

More worryingly, the SACAA Regulations' departure point is very different from the EU Regulations. The SACAA Regulations depart from an understanding of mental disability as a disability that incapacitates such individual from travelling alone and causes violent behaviour that will threaten the safety of passengers. This departure point provides important insight into how persons with mental disabilities are perceived and, given the wide application of this requirement, about how all persons with disabilities are perceived. By requiring a confirmation letter from a doctor stating that the person concerned is not violent, the SACAA Regulation assumes that all persons with mental disabilities are violent and therefore a threat to airlines and their passengers. This departure, when placed within the context of both the CRPD and Constitution of South Africa, fails to serve the transformative purpose of both instruments, as well as the reasonable accommodation requirement within the equality context.

To understand the nature of the failure to conform to the transformative purpose of reasonable accommodation and equality in CRPD and the Constitution, an example of the implementation of the SACAA Regulations is provided. Relying on this section of the Regulation, an airline operating in South Africa has drafted its own questionnaire in order to 'assess whether the passenger qualifies to travel without a self-supplied able-bodied assistant'.[36] A medical practitioner is meant to complete Part C of the form, titled 'Medical Assessment'. It is important to note that some of the questions addressed to the medical practitioner are problematic and can be considered as treating persons with disabilities as if their human rights are not important when travelling by air. For instance, question 1 of this questionnaire asks the following question: 'Would

33 EU Interpretative Guidelines, page 4.

34 EU Interpretative Guidelines, page 8.

35 1996 Constitution of the Republic of South Africa.

36 See COMAIR Questionnaire at *www.ba.com*.

the physical and/or mental condition of the patient be likely to cause distress or discomfort to other passengers?'[37] Again, I refer to the EU Interpretative Guidelines to understand the extent to which comfort of other passengers may be taken into consideration when the needs of a person with a disability are being considered for air travel. The Guideline states that 'comfort is not in itself sufficient grounds to deny carriage or require disabled persons and persons with reduced mobility to be accompanied.'[38]

The belief that mental disability is synonymous with violent behaviour is flawed and baseless. Indeed, there are some persons with mental disability who have been violent in some cases, but this is not the norm for all persons with mental disabilities. This belief is contrary to article 8 of the CRPD, which states that States should adopt appropriate measures in order 'to raise awareness throughout society … regarding persons with disabilities, to foster respect for the rights and dignity of persons with disabilities'[39] and 'to combat stereotypes, prejudices and harmful practices relating to persons with disabilities…'.[40]

It is fair to argue that the extent of the failure to reasonably accommodate persons with mental disabilities by the SACAA Regulations can also be ascertained by how much the SACAA Regulation expects of the airlines in assisting persons with mental disabilities seeking to fly. Regulation 120.07.35 provides some insight on this as it states that:

> '(2) At least one able-bodied assistant shall be carried for every group of five passengers with a disability or unaccompanied minors, or a part or combination thereof, and such assistant shall be assigned with the responsibility for the safety of such passengers or minors: Provided that the passengers with a disability can assist themselves.
>
> (3) In addition to the provisions of sub-regulation (2), for each one passenger with a disability who cannot assist himself or herself, an able-bodied assistant shall be assigned to solely assist such passenger.'

There are a number of shortcomings with these provisions that ultimately leaves the airline without any positive or negative obligations. It is unclear whether the able-bodied assistant for persons with disabilities envisaged in both scenarios above is at the expense of the airline or the passengers involved. As already stated, the LRC has received a number of complaints where persons with mental and other disabilities are required to fly with an attendant at all times at their own cost. The implications of this have already been discussed. Additionally, the qualification of 'can(not) assist themselves' is not defined in either the Act or the SACAA Regulations, leaving the airlines to decide what this term entails for disabled persons in their policies.

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37 Ibid.

38 Interpretative Guidelines, page 4.

39 2007 UN Convention on the Rights of Persons with Disabilities, article 8(b).

40 2007 UN Convention on the Rights of Persons with Disabilities, article 8(a) .

This falls short in the realm of reasonable accommodation when compared to the EU Guidelines. Article 11 of the EU Regulation states that air carriers and airport employees must be trained to meet the needs of persons with disabilities. The EU Regulation clearly provides that 'in order to give disabled persons opportunities for air travel comparable to those of other citizens, assistance to meet their particular needs should be provided at the airport, as well as on board aircraft, by employing the necessary staff and equipment'.[41]

V CONCLUSION

It is submitted that the rights of persons with disabilities and safety requirements/concerns could be reconciled in a more accommodating manner that will enable persons with mental disabilities and disabilities generally to fly without undue burden in South Africa. By making the requirement of an able-bodied assistant a general rule, instead of an exception, the SACAA Regulation is unfairly discriminating against disabled persons, consequently failing to reasonably accommodate the needs of persons with disabilities seeking to fly. Equally important is the additional context in which disability is understood, i.e. that all persons with mental disabilities are violent in nature, which at all time places the safety of the airlines, the employees and passengers in danger. As argued in the article, this unfairly impacts on the equal worth and dignity of persons with disabilities seeking to travel.

> 'Undoubtedly, denial of the equality and human dignity of people with disabilities is a palpable, deep-seated injustice. It should not be allowed to persist unchallenged, including in the African region. In the age of human rights, 'rights' are an essential currency for challenging the pervasive denial of the equal citizenship of people with disabilities across the whole gamut of our socioeconomic sectors.'[42]

The airlines operating in South Africa, therefore, ought to do more and do better to reasonably accommodate persons with disabilities seeking to travel by air, with the result that they will comply with their constitutional obligations.

41 Recital (4) of the EU Regulation.

42 *Changing the landscape: Core Curriculum on Disability Rights for Undergraduate Law Students in Africa* (2015) PULP, page 3.

CHAPTER 21

THE RIGHT OF PERSONS WITH DISABILITIES TO SOCIAL PROTECTION

MANDIVAVARIRA MUDARIKWA ASSISTED BY MARINA BERNABEU

I INTRODUCTION

This article is a submission made by the Legal Resources Centre (LRC) to the Special Rapporteur on the Rights of Persons with Disabilities to provide input on a questionnaire developed to ascertain the status of the right of persons with disabilities to social protection. This information was required to understand the extent to which States are taking steps to ensure that persons with disabilities have access to a wide range of social assistance that impacts positively on their enjoyment of rights. Given the number of persons with disabilities in South Africa, the LRC saw fit to participate in this submission to ensure that the lived realities of persons with disabilties are taken into consideration by the Special Rapporteur in her report to the Human Rights Council.

II RESPONSES TO THE QUESTIONNAIRE ON THE RIGHT OF PERSONS WITH DISABILITIES TO SOCIAL PROTECTION

(a) *Question 1*

Please provide information in relation to the existence, in your country or context of work, of legislation and policies concerning mainstream and/or specific social protection programmes with regard to persons with disabilities, including:

- Institutional framework in charge of its implementation;
- Legislative, administrative, judiciary and/or other measures aiming to ensure access of persons with disabilities to mainstream social protection programmes (e.g. poverty reduction, social insurance, health care, public work, housing);
- Creation of disability-specific programmes (such as disability pensions, mobility grants or others);
- Fiscal adjustments or other similar measures.

In South Africa, there is no Cabinet Ministry that is singularly and exclusively responsible for people with disabilities. In 2009, the South African government established the Department of Women, Children and Persons with Disabilities. This

Department was 'established to emphasize the need for equity and access to development opportunities for vulnerable groups in South African society.'[1] In 2014, following national elections, the focus of this Department was changed and no explanation was given for the re-assignment of the portfolios. In terms of the Cabinet announcement, '[t]he functions related to support for people with disabilities and children, [were to] be transferred to the Department of Social Development.'[2] Indeed, policies relating to social assistance with regard to persons with disabilities are regulated by the Department of Social Development. Linked to this is the role of the Department of Health in the process of assessing, diagnosing and treating disabilities. Also, the Department of Labour is mandated to coordinate and monitor commitments to inclusive employment practices. These three Departments have separate Cabinet Ministers exercising executive authority. Significantly, their portfolios are dedicated to the mainstream subject matter: for example, the Minister for Health is entrusted with all government work that impacts on health matters. This approach means that disability does not receive a primary focus. In terms of this model, disability issues are therefore fragmented.

The fragmented nature of the services and policies available to persons with disabilities was also noted by the South African government in their Baseline Country Report to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).[3] The report specifically acknowledges that 'weaknesses in the governance machinery of the State, and capacity constraints and lack of co-ordination within the disability sector, have detracted from a systematic approach to the implementation of the UNCRPD. The continued vulnerability of persons with disabilities, particularly children with disabilities as well as persons with psychosocial disabilities, residing in rural villages, requires more vigorous and better co-ordinated and targeted intervention.'

There is no national legislation in South Africa that details the protections available to persons with disabilities. Rather, there are various policies that detail government's guidelines concerning the rights of persons with disabilities, including social protection. Notably, the Integrated National Disability Strategy (1997) attempts to address the multidimensional inequalities that persons with disabilities suffer and is aimed at mainstreaming disability and stopping marginalisation on the ground of disability. The White Paper on Social Welfare (1997) highlights the needs of both government and non-governmental organisations to create equal opportunities for persons with disabilities and develop relevant programmes to enhance their independence and integration into the mainstream of society.

South Africa recognises that the intersection of disability and poverty has had and continues to have a serious negative impact on persons with disabilities. The existing relationship between high incidences of disability and poverty are highlighted in the National Development Plan (2012). People with disabilities face several discriminatory barriers and

1 See *https://pmg.org.za/committee-meeting/16573/,* accessed on 19 March 2015.

2 See *http://www.thepresidency.gov.za/pebble.asp?relid=17453,* accessed on 19 March 2015.

3 Initial country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities 2008–2012, page 80.

cumulative disadvantages that contribute to their marginalisation from social and economic activities. There is a higher proportion of disabled people among the very poor and an increase of families living at poverty-level as a result of disability. They are therefore recognised as a more vulnerable group at greater risk, and disability as a cross-cutting issue that needs to be integrated and mainstreamed across social development practices and into existing departmental policies, strategies, and programmes.

More recently the Department of Social Development published a White Paper on the mainstreaming of the right of persons with disabilities to equality and dignity.[4] Once approved, the Department of Social Development envisages that this policy 'will update the White Paper on an Integrated National Disability Strategy (INDS), and will integrate the obligations contained in the UN Convention on the Rights of Persons with Disabilities (UNCRPD) as well as the provisions of the Continental Plan of Action for the African Decade of Persons with Disabilities with South African legislation and policy frameworks and the National Development Plan 2030.'

The Department of Social Development has also classified this draft policy as 'the first cross-cutting step towards domesticating the UNCRPD and will inform a major legislative and policy review across all government departments and municipalities, as well as the development of transversal disability rights legislation.' What this policy will achieve remains to be seen as it is in the primary stages of development.

Section 27 of the Constitution of South Africa (1996) recognises social security as a basic right, stating that 'everyone has the right … to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.' Section 27(2) specifies that the State must take reasonable measures, within its available resources, to achieve the progressive realisation of the right of access to social security and social assistance. Section 9(3) recognises disability as one of the protected categories in the entrenchment of the right to equality. Flowing from this entrenchment in a supreme Constitution, South Africa has laws that provide separately for disability rights protection, for example Employment Equity Act 55 of 1998, Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.

The national Department of Social Development Policy on Disability is meant to guide and inform the mainstreaming of disability in the development and implementation of all policies' strategies and the integrated service delivery programme of the Department throughout the country. According to the Policy, disability must be mainstreamed into the following three programmes of the Department of Social Development: social security programme (with the provision of financial grants to the poor and vulnerable, such as people with disabilities), social welfare programme (through the implementation of activities in partnership with other role players for the provision of developmental social welfare services that support people with disabilities in a manner that reduces poverty and vulnerability), and community development programme (though the implementation of activities that enhance and increase the capacity of communities to respond to their own needs).

4 General Notice 129 of 2015, Government Gazette no. 38471, 16 February 2015.

Social protection in South Africa focuses on providing cash transfer to vulnerable groups to ensure equal opportunities and the respect of human dignity. People with disabilities are most likely to be unemployed, which means that grants are often the main source of income in their households. The National Development Plan (2012) recognises the need for social protection measures to 'support those most in need, including children, people with disabilities and the elderly and promote active participation in the economy and society for those who are unemployed and under-employed through labour market activation measures, employment services, income support programmes and other services to sustain and improve quality of life.'

(i) Social assistance

Persons with disabilities qualify for a disability grant. In terms of the Social Assistance Act 13 of 2004, a person is eligible for a disability grant if, because of his or her disability, he or she is 'unable to enter the open labour market or to support himself or herself in light of his or her skills and ability to work'. The person must be unable to attend work for at least six months. The grant will become permanent if the disability continues for more than a year and can rise to a maximum of R1,410 per month. The grant is administrated by the South Africa Social Security Agency.

In terms of the Social Assistance Act 13 of 2004, biological or foster parents and primary caregivers who look after children (under the age of eighteen) who are disabled and who require and receive permanent care or support services are eligible for a Care Dependency Grant. The Care Dependency Grant amounts to R1,260 per month. In terms of the same Act, people with disabilities qualify for other social assistance grants, such as child support grants, grants-in-aid (persons who require regular attendance by other persons), foster care grants, war veterans grants, social relief and distress and older persons grants.

The Compensation for Occupational Injuries and Diseases Act of 1993 regulates the rights of workers with occupation-related injuries or diseases to compensation. This Act provides for compensation for occupational-related injuries, from temporary disability up to varying degrees of permanent disability.

According to the National Development Plan (2012), six per cent of the working-age population receives disability grants. However, it highlights that exclusion errors affect mainly the poorest, and more particularly persons with disabilities living on farms, remote rural areas and informal settlements with poor access. It is, therefore, essential to ensure access to social protection to all the persons with disabilities who qualify.

(ii) Adequate housing

Persons with disabilities with an income less than R3,500 and satisfying other relevant criteria indicated in the National Housing Code are eligible for government subsidies. The subsidies aim to help persons with disabilities with specific needs related to the impairment and the barriers experienced. It is recognised that inequalities between rural and urban areas persist and that persons with disabilities living in informal settlements face numerous disadvantages as they do not have access to other basic services, including water and sanitation. According to the initial country report on the implementation on

the Convention on the Rights of Persons with Disabilities, a total of 25,361 individuals with disabilities applied and qualified for the housing subsidy between 2008 and 2012. Nevertheless, only 203 beneficiaries obtained the subsidy in 2008–2009 and 299 in 2011–2012.

(iii) Health care

The right of every individual to access health care systems is enshrined in Section 27 of the Constitution. All health care services at the primary level of care are free. Persons with disabilities who meet nationally determined criteria for eligibility based on household income, are able to access free health care and rehabilitation services at a hospital level in the public sector. Government-funded hospitals provide assistive devices for persons with disabilities.

The National Health Act 2003, the Mental Health Care Act 2002, the Sterilisation Act 1998, the Medical Schemes Act 1998 and related policies and protocols regulate health care in South Africa. Subsection 2(c)(iv) of the National Act 2003 identifies persons with disabilities as a specific group whose constitutional right of access to health care must be protected, respected and fulfilled. Moreover, subsection 70(1) requires that research give priority to needs of persons with disabilities and subsection 73(2)(a) that the latter contribute to the prevention of disability.

Section 24(2)(e) of the Medical Schemes Act 1998, which provides for the registration, control and protection of medical schemes, rules out unfair discrimination on the grounds of disability.

(iv) Inclusive employment practices

Inclusive employment practices are coordinated by the Department of Labour and stipulated in a number of legislation and policies, including the Employment Equity Act (1999), Black Empowerment Act (2003), Labour Relations Act of 1995 (LRA), National Development Plan (2012) and Public Service Act of 1996. The legislation aims for the attainment of a two per cent target for persons with disabilities in the public service and stipulates that employers must develop and submit annual employment equity plans and reports reflecting self-determined targets for employment of persons with disabilities. However, it is recognised that a divide exists between the terms of the policies and its implementation due to the lack of access to the built environment and public transport, the interrelatedness between poverty and disability, as well as persistent attitudinal and communication barriers. Indicators measuring access to employment by persons with disabilities confirm this lack of progress. Indeed, the initial country report on the implementation on the Convention on the Rights of Persons with Disabilities highlights that in the public sector in March 2012, only 4,830 persons with disabilities, out of a total workforce of 1,316,564, were employed. This amounts to 0.3 per cent of the total workforce, far below the two per cent aimed at by the legislation. The lack of reasonable accommodation, misconception and stigma about capabilities of persons with disabilities to carry out certain jobs remain key obstacles to employment opportunities.

Three organisations for persons with disabilities received subsidies from the Department of Labour to support the placement of persons with disabilities in the open labour market between 2008 and 2011 (viz NCPPDSA, DeafSA and the SANCB).

The Expanded Public Works Programme (EPWP) aims to provide poverty and income relief through temporary work for the unemployed to carry out socially-useful activities. The Community Work Programme (CWP) gives participants a minimum regular days of work (two days a week or eight days a month) providing an employment safety net. The EPWP and the CWP have set an employment target of two per cent of beneficiaries with disabilities, which amounts to a total of 110,000 persons for 2009–2014. However, both programmes have constantly failed to achieve the target mentioned, with 0.45 per cent employment rates for the period of 2010–2011, and 0.18 per cent for 2011–2012.

(v) Tax benefits and deductions

For people with disabilities or with disabled dependants, as well as older people, all medical scheme contributions and out-of-pocket medical expenses are tax deductible. Also, the South African Revenue Services (SARS) Tax Guide on the deduction of medical, physical impairment and disability expenses lists several expenses related to disability that can be claimed (like travel and other related expenses, technology to enable persons with disabilities to perform daily activities, service animals and so on).

Qualifying expenditure in this context is described as any expenditure that is prescribed by the Commissioner (other than expenditure recoverable by the taxpayer or his or her spouse) necessarily incurred and paid by the taxpayer in consequence of any *physical impairment or disability* suffered by the taxpayer, his or her spouse or child, or any dependant of the taxpayer. To qualify, this expenditure must be in consequence of a physical impairment suffered by the taxpayer, his or her spouse, his or her child, the child of his or her spouse or any of his or her dependants. The expense will only qualify if it was necessarily incurred and paid by the taxpayer.

Section 18(d) of the Income Tax Act 58 of 1962 does not define the term 'physical impairment'. However, the guide on disability and tax describes it in the context of section 18(1)(d) as a disability that is less restraining than a 'disability'.[5] Some of the examples of physical impairments include poor eyesight, hearing problems, paralysis of a portion of the body, and brain dysfunctions such as dyslexia, hyperactivity or lack of concentration.

(b) *Question 2*

Please provide information on how persons with disabilities are consulted and actively involved in the design, implementation and monitoring of social protection programmes in your country or context of work.

In the process of law making, draft laws are released to the public for comment. Non-governmental organisations (NGOs) representing the interests of persons with disabilities have the opportunity to give input on draft laws in this process. Organisations that provide services to people with disabilities often raise the concern that government's programmes are

5 Guide on the Determination of Medical Tax Credits and Allowances (Issue 5) at *http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G07%20-%20Guide%20on%20Deduction%20of%20Medical%20Physical%20Impairment%20and%20Disability%20Expenses%20-%20External%20Guide.pdf.*

not holistic in that not all organisations are consulted to provide input. The perception is that some sectors feel marginalised in the process of making a contribution to formulation of government policies.

(c) *Question 3*

Please provide information in relation to difficulties and good practices on the design, implementation and monitoring of mainstream and/or specific social protection programmes with regard to persons with disabilities, including: conditions of accessibility and the provision of reasonable accommodation.

We address accessibility and reasonable accommodation in the workplace. Both government and private sector employers are still working towards creating an accessible environment (physical access and providing other interventions to ensure accessible technology aids). The same applies with reasonable accommodation in the workplace. While we have laws that address the principles applicable to reasonable accommodation, employers, in practice, are not always making provision for reasonable accommodation. For example, a state employed police officer lost vision in both her eyes following an illness. At no stage was she consulted about re-skilling and alternative job placement. Processes were followed to have her medically boarded off. After her termination of employment, she received information about an NGO providing services to blind people and she made contact. It was only at this late stage that she received orientation and mobility training. She also subsequently enrolled at a college run by the NGO and undertook courses towards re-skilling her for employment. She bore the costs of the training out of her own pocket.

(i) Difficulties experienced by persons with disabilities and their families in fulfilling requirements and/or conditions for accessing social protection programmes

People with physical disability often have difficulties accessing local government offices at which disability grant applications are processed. The offices are often situated far away from rural villages and the lack of suitable transport is a problem. People with disabilities who live in rural areas have to carry the costs of private transport to meet their needs to access the social development offices. We have received reports that government provides mobile offices in some areas, but there are still people with disability who struggle to get to the social welfare offices.

In many rural areas there is still no running water. We are aware of a situation, reported to us by a partner organisation, in which poor, blind people in rural areas were paying neighbours to fetch water for them from the well. The NGO intervened and provided training to the people who were blind and, in time, they were able to independently go to the well to draw the water.

(ii) Existence of complaint or appeal mechanisms

In terms of Section 18 of the Social Assistance Act 13 of 2004, an applicant can, within 90 days, appeal the decision made by the South Africa Social Security Agency regarding the provision of a grant. He has to justify why the Minister should change its decision.

(d) *Question 4*

Please provide any information or data available in your country or context of work, disaggregated by impairment, sex, age or ethnic origin if possible, in relation to:

(i) Coverage of social protection programmes by persons with disabilities

The lack of adequate, relevant and recent data on disability in the country remains a challenge. The last national census was conducted in 2011 by Statistics South Africa (StatsSA).[6] This report is the most comprehensive report available regarding data in relation to persons with disabilities in South Africa.

According to the 2011 Census, 2,870,130 persons were disabled in South Africa in 2011, which leads to a national disability prevalence rate of 7.5 per cent. From the latter, 1.2 million persons were beneficiaries of the disability grant, 114,993 received care dependency grants, and 536,747 persons accessed a grant-in-aid between 2011 and 2012. The number of allocations of the disability grant decreased by 218,079 compared to the 1,416,210 allocated in 2008–2009. However, care dependency grants were allocated to 7,928 persons more in 2011–2012 compared to 2008–2009. Finally, it should be noted that the grant-in-aid increased its numbers of recipients by 490,678 from one period to the other.

Regarding housing subsidies, a total of 25,361 people with disabilities applied and qualified between 2008 and 2012. However, only 203 beneficiaries obtained the additional amount to cover reasonable accommodation measures in 2010–2011, and 299 in 2011–2012.

(ii) Rates of poverty among persons with disabilities

The 2011 Census shows that persons with disabilities earn a lower income than people without disabilities. Also, persons with mild disabilities earn a higher income than persons with severe disabilities. For instance, somebody who has severe difficulty in walking or climbing stairs will earn an average income of R22,526 a year, whereas a person without a disability will earn R36,742. Thus, disparities regarding incomes persist.

It is worth noting that, according to the same report, a higher number of households headed by people with disabilities had no access to piped water (13.4 per cent) compared to those headed by persons without disabilities (8.2 per cent) and the national average (8.8 per cent). It is recognised that this is a challenge for people with disabilities to access water from other sources, particularly if the water source is far from their house.

While the national disability prevalence rate amounts to 7.5 per cent, persons with disabilities accounted for approximately 0.8 per cent of the total workforce during the period of 2011–2012. Moreover, more than 60 per cent of employees with disabilities occupied semi-skilled, unskilled or temporary positions during the same period. It is a well-known fact that unemployment and underemployment rates are higher among persons with disabilities than persons without disabilities.

6 Census 2011, Profile of persons with disabilities in South Africa: *http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf.*

(iii) Additional costs or expenses related to disability

There are no statistics available concerning additional costs or expenses related to disability. However, it is recognised that persons with disabilities have to bear important additional expenses, particularly regarding assistive devices.

(e) *Question 5*

Please provide information in relation to the eligibility criteria used, in your country or context of work, for accessing mainstream and/or specific social protection programmes with regard to persons with disabilities, including:

(i) Definition of disability and disability assessments used for eligibility determination

There are different definitions for disability, which makes the production of statistics difficult. For instance, for the realisation of the 2011 Census report, disability was defined as 'difficulties encountered in functioning due to body impairments or activity limitation, with or without assistive devices'.

For eligibility purposes regarding social grants, in terms of section 9 of the Social Assistance Act 13 of 2004, a person is disabled and eligible for a disability grant if the person is 'owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance'.

For the purposes of SARS, a disabled person is a person with a 'moderate to severe limitation of a person's ability to function or perform daily activities as a result of a physical, sensory, communication, intellectual or mental impairment, if the limitation (a) has lasted or has a prognosis of lasting more than a year; and (b) is diagnosed by a duly registered medical practitioner in accordance with criteria prescribed by the Commissioner.'[7]

For employment purposes, disability is defined as 'people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'.

(ii) Consistency of the eligibility criteria among different social protection programmes

Refugees were not eligible to receive social grants, and LRC had to litigate in *Hassan and Others v Minister of Social Development and Others* to change legislation. Refugees are now eligible to receive disability and other social grants.

(iii) Use of income and/or poverty thresholds

Levels of income of the beneficiaries and poverty thresholds are used to determine the value of a social grant to persons with disabilities. In terms of the Social Assistance Act 13 of 2004 (Annexure A), the formula for the determination of the

7 Section 18(d) of the Income Tax Act.

amount of a disability grant to be paid to the beneficiary is the following:

D = 1,6A – 0,4B

Where A corresponds to the maximum social grant payable per annum as approved by the Minister, B to the annual income of the applicant and D to the annual social grant amount payable, which must not exceed the amount equal to A.

In terms of the Social Assistance Act 13 of 2004 (Annexure D), a care dependency grant is not payable if the income of the applicant exceeds the following income threshold:

A = B x 10

Where A corresponds to the annual income threshold and B to the annual value of the care dependency grant determined by the Minister.

In terms of the National Housing Code, persons with disabilities with an income inferior to R3,500 are eligible for government subsidies in order to access adequate housing.

CHAPTER 22

THE RIGHT TO EDUCATION FOR ALL: DISABLED CHILDREN IN SOUTH AFRICA'S SCHOOL SYSTEM

SHONA GAZIDIS

I INTRODUCTION

The right to education for everyone, including people with disabilities, is protected by Section 29 of the South African Constitution.[1] The Constitution also states that no-one may be unfairly discriminated against on the grounds of their disability.[2] The Schools Act 1996 states that schools must admit children without 'discriminating in any way'.[3] The government must implement 'all reasonable measures to ensure that the physical facilities at public schools are accessible to disabled persons.[4] South Africa was one of the first countries to ratify the United Nations Convention on the Rights of Persons with Disabilities in 2007, as well as being party to five international treaties and two African treaties protecting and guaranteeing children's rights.

In 2006, the *Education White Paper 6: Special Needs Education* was introduced, which set out the government's strategy for inclusive education, with a goal of 500 mainstream schools being transformed to accommodate disabled learners within 20 years. However, the obligations set out in *White Paper 6* are far from being fulfilled.

Despite the rights of disabled learners being protected in the Constitution, legislation and international law, there are still an estimated 50,000 children with disabilities excluded from education in South Africa today.[5]

The Legal Resources Centre (LRC) has undertaken litigation that has exposed downfalls in the provision of education of disabled learners. These cases, and their significance for disabled learners, are set out in detail below.

1 The Constitution of South Africa, section 29.

2 Ibid, section 9(3).

3 South African Schools Act 1996, s3(1).

4 Ibid, s12(5).

5 E Martinez *Complicit in Exclusion: South Africa's failure to guarantee an inclusive education for children with disabilities* (Human Rights Watch, 18th August 2015).

(a) *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa, Government of the Province of the Western Cape*[6]

This case was perhaps the most significant ruling in respect of disabled learners. In 2010, the LRC represented the Western Cape Forum for Intellectual Disability (WCFID), a support network representing 150 schools, centres and non-governmental organisations (NGOs) that cared for 1,200 severely and profoundly intellectually disabled children. The state had established schools for children who were classified as having 'moderate to mild intellectual disabilities'. It had establised some provisions in mainstream schools for disabled learners without an intellectual disability, but had failed to provide for those with 'severe and profound intellectual disabilities'.

An application was made to the Western Cape High Court to challenge the constitutionality of the decision not to make provisions at schools, and to secure government funding for these vulnerable children. The government argued that education for severely intellectually disabled learners was not beneficial,[7] and that it suffered budgetary constraints that prevented it from providing education for these children.

In a landmark judgment on 11 November 2010, the Judge dismissed both these arguments, firstly on the grounds that funding for education was a legitimate expense, and secondly that it was internationally accepted that disabled learners benefited from education and training. The High Court ordered that the government take reasonable steps to ensure the constitutional right to a basic education for these children.[8] Importantly, in reaching its decision, the High Court took into account that the State had an obligation to these children not only in domestic, but also international law. Considering these obligations, the High Court could not agree with the State's policy to provide lesser funding to these vulnerable children on the basis that they were 'uneducable'.[9]

(b) *Amasango Career School, Grahamstown*

Despite being a fully recognised special needs public school, Amasango Career School in Grahamstown, Eastern Cape, had never been provided with permanent buildings. The school operated out of shipping containers and later abandoned railway buildings, and was in desperate need of permanent structures. The LRC assisted the school in compelling the Department

6 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC)) [2010] ZAWCHC 544; 18678/2007 (11 November 2010).

7 *Ready to Learn?; A Legal Resource for realising the right to Education*, prepared by the Legal Resources Centre, 2013, page 101.

8 Ibid.

9 Ngwena C *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education (Chapter 7)* [2013] ADRY 7, (The African Disability Rights yearbook, 2013).

of Education to build a permanent structure with proper facilities that would foster a positive learning environment for the children.[10]

In 2012, following the initiation of contempt proceedings and negotiations with the Department of Education, five new classrooms, toilets and a library were built. Although this was a vast improvement, the school still requires permanent structures, and the LRC continues to work to compel the Department to construct permanent facilities.[11] However, the improved conditions at the school have enabled it to reach out to a greater number of vulnerable learners in the community.

(c) *Kyle Springate and South African Sign Language*

In 2008, the LRC represented a deaf learner in an application to compel the Department of Education to allow him to be examined in his National Senior Certificate examinations in South African Sign Language (SASL) as a recognised school subject. Additionally, a constitutional challenge was mounted to have SASL recognised under section 6 of the South African Schools Act and under sections 6(5)(a)(iii), 9(3), 28, 29, 30, 31 of the Constitution as an official language for the purposes of learning at a public school. The Department of Education originally opposed the matter, but eventually settled the case, and it was agreed that a syllabus document would be identified. The roll-out of teaching of SASL was planned in pilot phases for a few selected grades in 2015. NGO clients are pleased that SASL will be taught in schools. However, in 2014, DeafSA approached the LRC expressing concerns about the envisaged process of teaching SASL. Their main concerns revolved around the training of the SASL teachers, and the implementation of that teaching. The LRC is therefore currently assisting clients to monitor the implementation and the effectiveness of the training provided to the SASL teachers and the 'teaching aids'.

(d) *Mason Lincoln Special School*

The Mason Lincoln Special School situated in Umlazi near Durban, KwaZulu-Natal, accepts learners who have physical and mental disabilities from grade R to grade 12. The school is, however, faced with numerous challenges, which causes perpetual discrimination against the learners' right of access to education.

Some of these challenges include the following:

1. The school is surrounded by informal settlements on all sides. The Department of Public Works has placed a perimeter fence around the school, but this has offered little protection from criminal activity.
2. The school is a frequent target of theft and the safety of teachers and learners are perpetually compromised.
3. The occupiers of the informal settlements have illegally connected water and electricity cables to the school supply, creating exorbitant fees for which the school is liable.

10 Ready to Learn?; A Legal Resource for realising the right to Education, prepared by the Legal Resources Centre, 2013, page 101.

11 Ibid.

4. The unplanned developments have caused instability of the land and sink holes have appeared (this places visually impaired or wheelchair-bound learners in particular danger).
5. There are an inadequate number of classrooms for the number of learners and multiple grades are forced to learn in one classroom.
6. There is no feeding scheme provided by the Department of Education, despite several applications made by the school. The school has to rely on donors and its own funding to secure meals for learners.
7. The residential facilities are inadequate to address the special needs of the learners; there are an insufficient number of beds and inadequate ramps and rails to allow mobility for children in wheelchairs.
8. There is a major lack of support staff. There are three teacher-aids for the entire school and no official school nurse. During the day, a nurse volunteers her services, but at night there is no nurse at all.

The LRC is currently representing the School Governing Body (SGB) of the school, and is undertaking investigations to formulate the best possible relief to the school, which would ideally be twofold. Firstly, interim relief regarding the lack of support structures to the school and enhanced safety of the learners. Secondly, the relocation of the school to a safer environment with adequate facilities and support staff to meet the needs of the learners.

(e) *The Doug Whitehead School*

The Doug Whitehead School, a public special needs school in Johannesburg, Gauteng, provides a basic education to 171 learners with mild to severe cognitive and mental disabilities. It offers the opportunity to many vulnerable children to realise their right to an education, when they otherwise may not have had access. However, since its inception, although a public school, it is situated on private land. A legal battle ensued to determine the school's occupation of the property. The private landowner brought an application to evict the school. The landowner agreed to withdraw the application following successful litigation by the Department of Education and the LRC. Although the litigation was a success, the private landowner has renewed threats to attempt to evict the school, and therefore the LRC continues to work closely with the school.

(f) *Vukahambe Special School*

The LRC has, since 2015, represented the School Governing Body (SGB) of Vukahambe Special School, a school for children with physical disabilities. Learners at the school alleged that employees of the Eastern Cape Department of Education subjected them to physical, verbal and emotional abuse. Parents from the SGB approached the court to ask for a curator *ad litem* to be appointed to investigate and make recommendations to the court for the appropriate protection of the learners' rights.

On 18 November 2015, a curator *ad litem* was appointed by the Grahamstown High Court to represent children at the school and to investigate the allegations that had been reported to the Department of Education, but who had not taken any action.

The allegations of abuse were made against Department staff working at the school as 'youth care workers' or 'non-educators' and were documented by social workers from the Department of Social Development and from the NGO, Masithethe Counselling Services.

There are also reports that ongoing labour disputes at the school over the past few years have resulted in learners in the hostel repeatedly being abandoned without care for lengthy periods of time, leading to physical and emotional trauma for the learners. The school's hostel is currently being administered and learners cared for by a skeleton staff, assisted by parents and volunteers.

The curator was ordered to file a report with the court by 29 January 2016, setting out her findings, as well as recommendations for further action to protect the rights and interests of the learners.

The LRC welcomes this order and will monitor the implementation of any recommendations made by the curator.

11 CONCLUSION

Although the South African government, in 2016, proclaimed that it had fulfilled the Millenium Development Goal of enrolling all children in primary school by 2015, a recent report completed by Human Rights Watch[12] reveals that this is not the case for many disabled children in South Africa.

The litigation undertaken by the LRC has highlighted the fact that there are special schools in a very poor condition, and that the government does not allocate sufficient funding to children with disabilities, particularly those it views as 'uneducable'. The courts have dismissed the government's arguments, emphasising that the right to education as set down in the Constitution and international law includes all children, including those with all levels of disability.

The litigation is just one step in ensuring that disabled children receive the education they need. The government needs to comply with existing laws, allocate resources, implement safeguards, increase accountability and adopt stronger policies and laws to protect this right to education for children with disabilities.

12 E Martinez, *Complicit in Exclusion: South Africa's failure to guarantee an inclusive education for children with disabilities* (Human Rights Watch, 18 August 2015).

CHAPTER 23

SOUTH AFRICA'S OBLIGATION TOWARDS PROTECTING UNACCOMPANIED AND SEPARATED FOREIGN CHILDREN

ELGENE ROOS

I INTRODUCTION

'Usually more than half of any refugee population are children. Refugee children are children first and foremost, and as children, they need special attention.'[1] Refugee children are part of the most vulnerable group of people in the world and prone to suffer more prejudice than any other. 'In the aftermath of emergencies and in the search for solutions, the separation of families and familiar structures continue to adversely affect refugee children of all ages. Thus, helping refugee children to meet their physical and social needs often means providing support to their families and communities.'[2] By signing treaties such as the UN Convention on the Rights of the Child (CRC) and the African Convention on the Rights and Welfare of the Child (which will be discussed below), South Africa has bound itself to put in place supportive and protective mechanisms to ensure the protection of the children forced into these vulnerable situations.

Among refugee children, unaccompanied and separated children require particular attention among other vulnerable children because of their particular need. The Refugees Act No. 130 of 1998 (Refugees Act) was promulgated to give effect to international legal instruments, principles and standards relating to refugees. However, the Refugees Act does not specifically define who an unaccompanied or separated child is. Internationally, one of the definitions ascribed to an unaccompanied child is a person who has been separated from both parents and who is not being cared for by an adult who, by law or custom, is responsible to do so. A separated minor refers to a child who is accompanied by an adult relative other than a parent, legal guardian or customary care giver.[3]

When a child arrives in a country with both his or her parents, or in some instances only with one parent, generally the child will be conferred with the parent's status. However, when the child is with an uncle, cousin or any other relative, a State has the discretion to not consider these relatives to be a 'family' member and might therefore require each person,

1 UN High Commissioner for Refugees (UNHCR) ***Refugee Children: Guidelines on Protection and Care*** (1994).

2 Ibid.

3 UN High Commissioner for Refugees (UNHCR) ***Refugee Children: Guidelines on Protection and Care*** (1994) at 121.

including the child, to make an individual claim.[4] A minor who has been abandoned or separated from his or her parents and who appears to qualify for refugee status and is a child in need of care, must be brought before the Children's Court.5

For the purpose of this article, a child is a person under the age of eighteen, as described in section 28(3) of the Constitution of South Africa.

This article will look at the international and domestic legislative framework which governs unaccompanied and separated minors in South Africa. It further examines the challenges unaccompanied and separated refugee children are faced with when entering and legally remaining in South Africa. Two challenges will be discussed: first, the difficulty in obtaining valid documentation which legalises their stay in the country and second, statelessness (or risk thereof) and how it infringes on their right to identity.

II WHY FOCUS ON UNACCOMPANIED MINORS AND SEPARATED CHILDREN?

By signing international conventions and enacting domestic legislation to protect the rights of children, South Africa has committed itself to treat all children equally, regardless of their nationality.

Furthermore, where parents and guardians have failed to protect children the State is obligated to take over that role and ensure that the best interest of the child is always taken into account. Failure by the State to afford children in vulnerable situations this protection leaves them open and vulnerable to dangerous situations and abuse.

III ANALYSIS OF INTERNATIONAL AND DOMESTIC LEGISLATIVE FRAMEWORK

(a) *International legislative framework*

In its efforts to protect children, regardless of their nationality and documentation status, South Africa has become signatory to various international conventions to ensure that children are always protected. One such convention is the CRC. 'The right of children to seek asylum and be assisted when applying for asylum is set out clearly in the CRC.'[6] Article 22 provides that:

> 'State Parties should take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with the applicable law shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the present Convention and in other international human rights or humanitarian instruments to which the States are Parties.'

4 UN High Commissioner for Refugees (UNHCR) *Refugee Children: Guidelines on Protection and Care* (1994) at 99.

5 Refugees Act 130 of 1998, section 32.

6 F. Khan and T. Schreier *Refugee Law in South Africa* (2014) at 149.

It goes further and provides that efforts should be made to trace the family of the child and if such attempts fail, it is up to the State to provide the child with the necessary protection.

South Africa is also a signatory to the African Convention on the Rights and Welfare of the Child (ACRWC). This treaty functions as a guideline for African countries on how to ensure that every child is afforded the necessary protection and is able to access their rights. 'The migrant child should be accorded the same protection as any other child who is permanently or temporarily deprived of their family environment.'

To adhere to its international obligations, South Africa has incorporated these treaties into its national law. But on a practical level the systems put in place to afford children the necessary protection, which is found in South Africa's domestic law, sometimes fail children as the processes needed to be followed can sometimes take years.

(b) *Domestic legislative framework*

The South African Constitution[7] (Constitution) provides that all children in South Africa have the right to family, or to appropriate alternative care when removed from their family environment. Practically, the Children's Act applies equally to all children in South Africa. There is no distinction between local and foreign children because child protection should be approached in the same manner for all children.

The Refugees Act[8] provides limited guidance on the specific procedures involved and what the responsibilities of all the role players are in assisting unaccompanied foreign children to make asylum applications.[9] In South Africa, a minor child who enters the country with a parent would qualify for asylum in terms of section 3(c) of the Refugees Act.[10] The Refugees Act defines a 'dependant' to include the unmarried, dependant child of the asylum applicant.[11] This provision has previously not been interpreted to include separated children. The strict interpretation of 'dependant' has resulted in litigation. In a recent case[12] brought before the North Gauteng High Court (*Mubake case*), the court ruled that the definition of 'dependant' should be interpreted to include children who have been separated from their parents and who are currently in the care of a relative. The Court further ordered the respondents to inform all Refugee Reception offices to issue the relevant permits to separated children as dependants of their care givers.

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7 The Constitution of the Republic of South Africa, 1996.

8 130 of 1998.

9 F. Khan and T. Schreier *Refugee Law in South Africa* (2014) at 150.

10 '…, a person qualifies for refugee status for the purposes of this Act if that person – is a dependent of a person…'.

11 Refugees Act No. 130 of 1998, section 1.

12 *Bulambo Biakomboka Mubake v Minister of Home Affairs and Others*, Gauteng Division of the High Court, Case No. 72342/2012 (Unreported judgment).

Section 32 of the Refugees Act provides for unaccompanied children in South Africa. It provides that an unaccompanied minor, who appears to have a claim for refugee status, must be brought before the Children's Court. The Children's Court may make an order which provides for the protection, care and financial assistance to the child. It is important to note that a court order from the Children's Court does not guarantee refugee status, as the Department of Home Affairs still has the discretion to grant asylum to the child or not.

The process of bringing a child before the Children's Court in order for the child to become documented is riddled with problems, with the biggest problem being the time that it takes for the Court to finalise each child's matter. This matter was discussed in the *Mubake Case*.[13] Before a child can be joined as a dependant of an existing refugee or asylum seeker, an investigation must be conducted by the Department of Social Development. The Applicants argued that the first step to be taken prior to the investigation should be to document the child and issue the child with a permit to legalise their stay in the country. The Respondents were of the view that the Children's Court processes should take place prior to the issue of such permit. The Court held that the risk of not documenting a child is greater than the risks associated with documenting separated children as 'dependants' without any investigation. The Court further held that granting a child a temporary permit has the advantage of legalising and regulating their stay in the country and that the investigation conducted by the Department of Social Development can be considered before a permanent permit is being considered. 'In other words, there is no reason why the processes of immigration status and that of the interests of the child in the Children's Court cannot run parallel. One does not have to exclude the other.'[14]

(c) *Analysis of legislative framework*

Despite South Africa incorporating international law domestically, the bureaucratic process of documenting a minor who is separated or unaccompanied can become a hurdle instead of an enabling mechanism to afford children the necessary protection. As expressed above, children can sometimes remain undocumented for long periods of time because of the processes that must be followed, thus denying them their constitutional rights and access to basic services.

In the CRC committee's 2016 concluding observations on the second periodic report of South Africa[15], the committee expressed concern that access to social security benefits are hampered by administrative barriers and that these barriers need to be removed to afford these children with the necessary protection.

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13 Gauteng Division of the High Court, Case No. 72342/2012 (Unreported judgment), paras 10–17.

14 *Bulambo Biakomboka Mubake v Minister of Home Affairs and Others*, Gauteng Division of the High Court, Case No. 72342/2012 (Unreported judgment), para 16.

15 UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: South Africa, 30 September 2016, CRC/C/ZAF/CO/2 available at: *http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/CRC_C_ZAF_CO_2_25463_E.pdf* [accessed 17 October 2016]

The current legislative framework fails to adequately provide separated and unaccompanied children with a stable, quick and durable solution. The legislation further fails to practically equip all the relevant stakeholders with the necessary capacity to deal with separated and unaccompanied minors in order to adhere to the best interest of the child principle entrenched in the Constitution. Children in this vulnerable situation will continue to be at risk of destitution, exploitation, violence and abuse.

IV THE CHALLENGES FACED BY UNACCOMPANIED AND SEPARATED MINORS

The consequences of a minor not being documented are far reaching. The child will inevitably face difficulty in accessing his or her rights to basic health care services, education and a range of other rights guaranteed in the Bill of Rights.[16] Given the fact that there is no detailed legislation or regulations on the issue, unaccompanied and separated minors are faced with serious problems regarding proper documentation to regularise their stay in South African and further they are faced with the dangerous reality of becoming stateless.

(a) *Documentation Options*

(i) *Refugee Status*

'The 1951 Convention and 1967 Protocol relating to the Status of Refugees define a refugee regardless of age, and make no special provision for the status of refugee children.'[17] The Refugees Act[18] also does not make special provision for determining the status of a minor. Documentation is an important element of protecting children within South Africa's borders. The type of documentation a child will be conferred with will depend on his or her situation (i.e. accompanied, unaccompanied and/or separated), and the status of the care giver will be highly relevant.

As part of the Children's Court inquiry, a social worker may conduct an age assessment so as to ensure that the child is under eighteen years and thus qualifies for protection under the Children's Act. The age assessment can be a form of identification for the child, but it does not legalise the child's stay in the country. If a child appears to have an asylum claim, the Children's Court may make an order that the child is a child in need of care.

For the child to be conferred with status, the status of the care giver will be the determining factor. If the care giver is not a parent, the relationship must be confirmed by the Children's Court.

16 The Constitution of the Republic of South Africa (1996) chapter 2.

17 Ibid at 97.

18 130 of 1998.

'It is important that refugees have documentation enabling them to establish their identity. The necessity of providing all refugees with such documentation is recognized in Article 27 of the 1951 United Nations Convention relating to the Status of Refugees.'[19] A result of not receiving proper documentation, as mentioned before, the refugee child is left exposed to the reality of staying in the country illegally and in most instances their right to basic services, which they are entitled to in terms of the Constitution, is denied.

(b) *Statelessness*

The rights of stateless persons are established in two international conventions: the 1954 Convention relating to the Status of Stateless Persons, which establishes basic rights; and the 1961 Convention on the Reduction of Statelessness, which looks to prevent statelessness. A 'stateless person' is someone who is not considered a national by any State under the operation of its law.[20] 'A stateless child lacks the guaranteed protection of any state. His or her basic rights, legal status, security in the country of residence and travel outside that country are subject to state discretion.'[21]

South Africa has not signed or ratified either of the conventions on statelessness and is therefore not automatically subject to the obligations encompassed in the conventions. This does not mean, however, that South Africa has no legal obligations to any of the undocumented minors who are classified as stateless persons. One of the arguments to support this is 'the right to a nationality', which is entrenched in both international and domestic law.

(c) *Right to nationality*

Article 15 provides that 'everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.'[22] The International Covenant on Civil and Political Rights, to which South Africa is a party, asserts that 'every child has the right to acquire a nationality.'[23] Section 28 of the Constitution affirms that 'every child has the right to a name and a nationality from birth.'

Despite both international and domestic law providing for the right to a nationality, the right seems to be limited in terms of section 2 of the Citizenship Amendment Act of 2010.[24] It provides that a person born in the Republic who is not

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19 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: *http://www.refworld.org/docid/3be01b964.html*

20 UN General Assembly, *Convention Relating to the Status of Refugees,* 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: *http://www.refworld.org/docid/3be01b964.html*

21 UN High Commissioner for Refugees (UNHCR) *Refugee Children: Guidelines on Protection and Care* (1994) at 104.

22 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: *http://www.refworld.org/docid/3ae6b3712c.html*

23 Article 24 (3).

24 17 of 2010.

otherwise a South African citizen (by virtue of his parents' nationality, for instance) and is not a citizen or a national of another country may be a South African citizen by birth so long as his birth was properly registered.

In theory this provision seems to be the solution to children who are born in the Republic from parents who have other nationalities. In reality the requirement of birth registration is a difficult process for foreign nationals, especially in the case of foreign nationals who do not have valid documentation due to various reasons. The Department of Home Affairs is currently not registering children born of foreign nationals who have invalid documentation. This will hinder the child's ability to claim South African citizenship at eighteen years and thus contribute to the risk of such children becoming stateless.

Similarly, children who were not born in South Africa but travelled to South Africa at a very young age or who were abandoned and have no ties with their countries of origin also face statelessness as the above provision only applies to those children born after 2013.

Thus, by the very fact that South Africa is obligated to protect the best interests of the child and by extension allowing the child to acquire a nationality, South Africa is obligated to put in place mechanisms which ensure that all children born in South Africa are registered to avoid them being stateless or be at risk of becoming stateless.

V CONCLUSION AND RECOMMENDATIONS

The stringent requirements set out in South African national law, with regard to unaccompanied and separated minors, results in children in the country not being recognised as nationals and not being properly documented. This has a direct bearing on the types of services accessible to this group of children.

It is recommended strongly that the State expedite and simplify the process of unaccompanied and separated minors becoming documented. The consequence of South Africa not implementing international and domestic laws more progressively and practically have left and continue to leave children destitute, which goes against their rights entrenched in the Constitution. The South African Government is obligated to protect minors in these situations and especially minors in South Africa without parents, without a home, without documentation, and without a nationality. South Africa further needs to enact legislation and/or regulations which give state officials the necessary guidelines to deal effectively with the potential realities with which unaccompanied and separated minor children are faced.


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