Journal of African Law, 63, 1 (2019), 53–77 © SOAS, University of London, 2019.
doi:10.1017/S0021855319000081

Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa's Domestic Violence Legislation

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Abstract

Now that it has been in operation for 20 years, it is necessary to reflect on the impact the South African Domestic Violence Act has had on women's lives. This article analyses this key legislation and the police's duty to ensure its proper implementation. It focuses on the reports of the Independent Complaints Directorate and Civilian Secretariat of Police, the bodies responsible for measuring police compliance with the act. The reports identify serious transgressions, highlighting the police's perception that domestic violence is a private affair with which it should not interfere. This perception plays a particularly subtle and destructive role in legitimizing, supporting and permitting violence against women. In focusing on key court decisions in which the state (police) was held financially accountable for the failure to protect women against violence, the author highlights the importance of challenging the social and legal understanding of women's experiences with violence in promoting a system that takes account of those experiences.

Keywords

Domestic violence, implementation, police, state accountability, South Africa

INTRODUCTION

Now that South Africa's domestic violence legislation has been in operation for 20 years, it is necessary to reflect on the impact it has had on women's lives. Consistent high levels of violence against women have highlighted the complex nature of such violence in a country with a legacy of racial domination and a strong patriarchal culture.[1] Violence against women, particularly

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1 L Vogelman and G Eagle "Overcoming endemic violence against women in South Africa" (1991) 18 *Social Justice* 209 at 209; H Combrinck "The dark side of the rainbow: Violence against women in South Africa after ten years of democracy" (2005) *Acta Juridica* 171 at 171; L Artz and D Smythe "Feminism vs the state? A decade of sexual offences law reform in South Africa" (2007) *Agenda* 6 at 6; C Albertyn, L Artz, H Combrinck, S Mills and L

domestic violence, has been described as so prevalent and widely tolerated that it is perceived as the norm instead of being challenged.[2]

Although it is notoriously difficult to obtain statistics on domestic violence, a 2016 report indicates that one in five women experiences physical violence by a partner.[3] It is within the context of these lived realities that one has to view South Africa's seemingly progressive domestic violence legislation and its effectiveness in supporting women and protecting them against violence.

In 1993, South Africa passed its first domestic violence legislation in the Prevention of Family Violence Act 133 of 1993. This act provided for an interdict system, where a woman had to approach a judge or magistrate, who had the discretion to grant an interdict prohibiting an abuser from assaulting her or requiring compliance with conditions.[4] A suspended warrant of arrest would simultaneously be issued, which, if breached, could lead to the arrest of the abuser.

Women's movements were very sceptical about the act's promulgation as it closely coincided with South Africa's first democratic elections and it was interpreted as a cynical attempt by the then apartheid government to attract female voters.[5] Its hasty implementation and the lack of consultation with women's organizations were construed as an overall failure to reflect the real needs of abused women.[6]

The act was further criticized as it essentially focused on physical violence and traditional marital relationships, applying only to "a man and a woman who are married or were married to each other according to any law or custom, and also a man and a woman who ordinarily live or lived together as husband and wife, although not married to each other".[7]

South Africa's new Constitution of 1996 (the Constitution) afforded further protection to South African women, as domestic violence violated several

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Wolhuter "Women's freedom and security of the person" in E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007, Juta) 295 at 321.

2 Vogelman and Eagle "Overcoming endemic violence", ibid.

3 Statistics South Africa *South Africa Demographic and Health Survey: Key Indicator Report 2016* (2017) at 54.

4 Prevention of Family Violence Act, sec 2, as discussed in J Fedler "Lawyering domestic violence through the Prevention of Family Violence Act 1993: An evaluation after a year in operation" (1995) 112 *South African Law Journal* 231 at 231.

5 Id at 234; D Smythe "South Africa's response to domestic violence" in C Benninger-Budel (ed) *Due Diligence and its Application to Protect Women from Violence* (2008, Martinus Nijhoff) 161 at 167.

6 S Meintjies "The politics of engagement: Women transforming the policy process - domestic violence legislation in South Africa" in AM Goetz and S Hassim (eds) *No Shortcuts to Power: African Women in Politics and Policy Making* (2003, ZED Books) 140 at 149.

7 Prevention of Family Violence Act, sec 1(2); Fedler "Lawyering domestic violence", above at note 4 at 239.

constitutionally guaranteed rights, including the rights to equality, dignity and freedom and security of the person.[8] Important in the new constitutional dispensation is the positive duty on the state to protect, promote and fulfil the rights of women to have their safety and security protected, including the implementation of legislative measures that target violence.[9]

The Domestic Violence Act 116 of 1998 (DVA) was implemented within this new constitutional framework. Heeding the concerns raised by its predecessor, this was a collaborative effort between the Department of Justice, the South African Law Reform Commission and several non-governmental organizations.[10] Similar to its predecessor, the DVA provides for a protection order essentially interdicting a person from committing acts of domestic violence.[11] The DVA includes a broad definition of what constitutes a domestic relationship and what amounts to domestic violence.[12]

The positive duty of the state, specifically the police, to assist domestic abuse complainants, is ingrained in the DVA. However, the legislation also grants flexible discretionary powers to the police to assist domestic violence victims. Section 2 of the DVA provides that the police must provide such assistance at the scene of a domestic incident *as may be required* and, should assist in finding suitable shelter or medical treatment if needed. The officers, *if it is reasonably possible*, must explain the remedies available to the victim (applying for a protection order or lodging a criminal complaint).

Section 3 states that, if an officer *reasonably suspects* a person to have committed an act of violence, the officer may arrest the individual without a warrant.[13] Further, section 8 states that, if a protection order has been breached, it is left to *the discretion* of the police to decide whether to arrest the abuser,

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8 See the Constitution, secs 9, 10 and 12; Albertyn et al "Women's freedom and security", above at note 1 at 322.

9 Id, sec 7(2) states: "The state must respect, protect and fulfil the rights in the Bill of Rights". Sec 12(1)(c) states: "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." See I Currie and J de Waal *The Bill of Rights Handbook* (6th ed, 2013, Juta) at 282.

10 Albertyn et al "Women's freedom and security", above at note 1 at 323.

11 DVA, sec 4 sets out the procedure to apply for a protection order.

12 Under id, sec 1, a domestic relationship refers to: a marital relationship according to any law, religion or custom; couples living together; parents of children; family members; engaged couples; and individuals sharing a residence with anyone in any of these relationships, also including a same-sex relationship. Sec 1 further defines domestic violence as: physical abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant's residence without consent where they do not live together; and any other controlling or abusive behaviour towards a complainant. L Artz and D Smythe "Bridges and barriers: A five year retrospective on the domestic violence act" (2005) *Acta Juridica* 200 at 201.

13 Id, sec 3. The National Instructions to the Domestic Violence Act 7 of 1999 (National Instructions) expand further and impose certain obligations on the police in dealing with domestic violence.

based on whether the complainant will *suffer imminent harm* if the abuser is not arrested.[14]

The National Instructions to the DVA elaborate further on the police's obligations under the DVA.[15] These include the police's duty to maintain records of domestic violence incidents, including: completing a domestic violence register and keeping copies of protection orders and arrest warrants; having a copy of the DVA and National Instructions available at all times in the stations and vehicles that respond to complaints; and making a victim-friendly care centre available to receive domestic violence complaints. The legislation and instructions make it clear that the police plays a seminal role in the effective implementation of the act, as the police is often the first port of call when women seek protection against violence.

Despite these clear duties, research indicates that the ineffective policing of the act greatly contributes to South Africa's high levels of violence.[16] The reasons for this are complex. Lillian Artz describes the police as the gatekeepers of the criminal justice system, as their discretionary powers under the legislation play a primary role in determining the validity and seriousness of a domestic violence incident.[17] According to her, the police's wide discretionary powers under the DVA allow for their own interpretation of what constitutes domestic violence.[18]

This article focuses on these interpretations and how the masculinist culture embedded in the police prohibits South African women from accessing protection under the DVA. However, before such an analysis is undertaken, it is important to establish the extent to which the police deviates from its statutory obligations under the DVA.

A DUTY TO PROTECT: POLICE COMPLIANCE AND THE DOMESTIC VIOLENCE ACT

South African research has documented women's experiences when approaching the police to obtain assistance with domestic violence complaints.[19] The

14 Sec 8(4)(b) (emphasis added). DVA, sec 8(5) states that, in considering whether a complainant may suffer imminent harm, the officer must take into account: the risk to the safety, health or wellbeing of the complainant; the seriousness of the conduct comprising the alleged breach of the protection order; and the length of time since the alleged breach occurred.

15 National Instructions, secs 3–15; L Vetten "Police accountability and the Domestic Violence Act 1998" (2017) 59 *South African Crime Quarterly* 7 at 9.

16 P Paranzee, L Artz and K Moult *Monitoring the Implementation of the Domestic Violence Act: First Research Report 2000–2001* (2001); Albertyn et al "Women's freedom and security", above at note 1 at 328.

17 L Artz "The weather watchers: Gender, violence and social control" in M Steyn and M van Zyl (eds) *The Prize and the Price: Shaping Sexualities in South Africa* (2009, HSRC Press Books) 169 at 186.

18 Ibid.

19 Paranzee, Artz and Moult *Monitoring the Implementation*, above at note 16 at 81; D Govender "Is domestic violence being policed in South Africa?" (2015) 28 *Acta*

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

research has indicated that women are not taken seriously and are mostly blamed for the violent behaviour.[20] For example, following the report of a domestic violence incident, the police may only respond hours later or even the next day and, if reporting an incident, women are often asked to come back at a time when the police are not busy or to go directly to the magistrates' court without the police keeping any record of the incident.[21]

The police's statutory discretion whether to arrest transgressors of a protection order is often used as a discretion not to assist. To establish if imminent harm is present, officers will mostly arrest an individual only if physical harm is present and at most keep the transgressor in custody for a few hours.[22] Victims are provided with very little information about their available remedies under the DVA or on the progress of matters.[23]

It is these attitudes that prevent women from exercising their rights under the DVA, with most women having no confidence in the ability of the police (and state) to provide them with protection against domestic violence.[24] This failure to assist has also been captured by the directorates responsible for monitoring the effective implementation of the act.

Under the DVA, a failure by the police to comply with its obligations under the act constitutes misconduct that must be reported to the Independent Complaints Directorate.[25] The directorate (whose role has since been taken over by the Civilian Secretariat of Police) must report to Parliament every six months on the number and particulars of complaints received against the police under the act and the steps taken against transgressing members.

An analysis of the parliamentary reports provides an important framework by which to assess the effective implementation of the DVA and highlights the patriarchal and masculine framework within which domestic violence is viewed. This leads to the important question of whether public accountability can shift societal attitudes.

Monitoring compliance: Parliamentary reports for the period 2010–17

In 2010 the Independent Complaints Directorate noted a long list of police non-compliance with the DVA.[26] Most transgressions related to the police's failure to: arrest an abuser where an offence of violence had been committed;

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Criminologica 32; R Retief and S Green "Some challenges in policing domestic violence" (2015) 51 *Social Work* 135 at 135.

20 Albertyn et al "Women's freedom and security", above at note 1 at 329.

21 Artz "The weather watchers", above at note 17 at 183.

22 Albertyn et al "Women's freedom and security", above at note 1 at 329.

23 Artz "The weather watchers", above at note 17 at 183; Khayelitsha Commission *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* (2014) 140 at 141.

24 Artz "The weather watchers", above at note 17 at 183.

25 DVA, sec 18.

26 Independent Police Investigative Directorate *Domestic Violence Act Report* (2010).

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

arrest an alleged abuser where a warrant had been issued; and search and seize firearms and ammunition when a domestic violence complaint had been made.[27]

Overall, the directorate noted that the police did not understand their obligations under the DVA and National Instructions and that, despite transgressions, members were not disciplined by their stations.[28] Noteworthy was the directorate's observation that there existed a "culture of silence" surrounding domestic violence.[29]

In its report covering the period January 2011 to March 2012, the directorate recorded 104 complaints of non-compliance.[30] Similar to the 2010 report, the complaints related to the police's failure to arrest an abuser where an act of domestic violence had been committed or where a warrant had been issued.[31]

In 2012, the newly established Civilian Secretariat for Police reported that police stations failed to keep proper records of domestic violence matters, that interviewed officers displayed very little knowledge of the DVA and that there were quite a large number of police officers who had domestic violence cases against themselves.[32] The secretariat recommended that station commanders enhance and strengthen their management and supervisory role, as transgressions could be attributed to a lack of inspection and follow-up.[33] The secretariat's report for 2013 did not differ much from the previous reports. The secretariat again highlighted the police's lack of basic knowledge of the DVA and made reference to the police's uncertainty in who has to serve protection orders. The police argued that serving protection orders was the primary responsibility of the Department of Justice, which left most victims to serve their own protection orders.[34]

The report also highlighted serious transgressions in the arrest of abusers who contravened protection orders. The police argued that they were unsure

27 Id at 4–11.
28 Id at 24.
29 Ibid.
30 Independent Police Investigative Directorate *Domestic Violence Act Report* (January 2011–March 2012) at 1.
31 Ibid.
32 Civilian Secretariat for Police Service *Report on the Implementation of the Domestic Violence Act* (April–September 2012) at 14.
33 Id at 17.
34 Civilian Secretariat for Police Service *Report on the Implementation of the Domestic Violence Act* (second quarter 2013) at 1. DVA, sec 5(3)(a) states: "An interim protection order must be served on the respondent in the prescribed manner and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued." National Instructions, sec 3 states: "A member may be ordered by the court to serve an interim or final protection order. If a member is ordered to serve an interim protection order, the member must serve the order without delay as it only becomes binding on the respondent once the order has been served on him or her. As long as an interim protection order remains unserved, the complainant may be in danger. A final protection order becomes binding immediately upon it being issued even though it may not have been served."

what constituted "imminent harm" in allowing an arrest.[35] Another challenge was that there was no standard way of keeping records of officers who themselves were perpetrators of domestic violence.[36] Members of Parliament noted that the secretariat had to employ more concerted efforts to ensure police compliance, as the same problems were raised continuously.[37]

In its report for the period October 2014 to March 2015, the secretariat noted that there was no improvement in police compliance with the DVA. It questioned whether traditional and patriarchal views contributed to the high levels of non-compliance.[38] According to the secretariat, most police officers viewed domestic violence as a private affair, resulting in their passive approach to arresting transgressors or in keeping proper records.[39] The report highlighted (sometimes with devastating consequences as the cases below illustrate) that, out of the 58 domestic violence cases lodged against police officers, in only 26 cases were the transgressors' service firearms seized. Legislation clearly prohibits any person who has been served with a protection order, or who has been visited by the police concerning allegations of violence, from possessing a firearm.[40]

The same rhetoric followed in the secretariat's report for 2016–17.[41] During this period, 234 police stations were audited and 103 cases of non-compliance identified. Of great concern was the fact that 67 per cent of the police stations served protection orders over a period of two months and, in most cases, made no arrests.[42] Further transgressions related to poor and incomplete record keeping, with the Free-State province noting that police officers preferred to register domestic violence cases as ordinary assault matters to avoid the additional administrative burden.[43] 67 police officials were reported as domestic violence offenders with most of them still in possession of their firearms.[44]

Overall, the parliamentary reports highlight that there exist serious transgressions in relation to the police's duties under the DVA. The fact that these transgressions are repetitive seems to relate to the perception that domestic violence is a private family affair with which the police should not interfere. This is a particularly dangerous perception that should be challenged, as it supports and permits violence against women. The discussion

35 Civilian Secretariat for Police Service *Report on the Implementation of the Domestic Violence Act* (second quarter 2013) at 3.
36 Id at 2.
37 Id at 1.
38 Civilian Secretariat for Police Service *Report on the Implementation of the Domestic Violence Act* (October 2014–March 2015) at 4.
39 Ibid.
40 Id at 14; regulation 14(1)(a) of the Firearms Control Act Regulations, 26 March 2004, issued under the Firearms Control Act 60 of 2000.
41 Civilian Secretariat for Police *Report on the Implementation of the Domestic Violence Act* (October 2016–March 2017) at 1.
42 Ibid.
43 Id at 6.
44 Id at 4.

below challenges this notion of privacy and questions whether state liability can enforce a greater measure of public accountability.[45]

THE PUBLIC / PRIVATE DIVIDE AND ITS INFLUENCE IN PERPETUATING VIOLENCE AGAINST WOMEN

In addressing domestic violence, feminists have long advocated for making private matters public, to compel state intervention and legal protection for women in violent relationships.[46]

The historic public / private dichotomy demarcated the roles attributed to the different genders. Men were deemed suited to the public world of labour and commerce, and women to the private one where they stayed at home and raised a family.[47] In the private sphere, a woman was subordinate to her husband, as marital power allowed a husband to control his wife by taking over her legal identity (she could not own property in own name) and control of her own body (married women could not be raped).[48] The impact of the dichotomy (both controlled by men) was profound, as legal rules made it impossible for women to function independently from the public sphere, and the private sphere was not subjected to the law as it was ruled by "affection".[49] Ultimately, this dichotomy supported a legal system that relegated women to the domestic sphere, in which the law refused to intervene.[50]

In calling for a redefinition of the private as public, feminists have called for a shift in cultural norms concerning the legal rights of women.[51] In terms of domestic violence, this meant that domestic violence had to be recognized as a crime with the full backing of the criminal justice system, which could contribute to dismantling male hierarchy and social subordination based on gender.[52]

> "The concept of privacy encourages, reinforces and supports violence against women. Privacy says that violence against women is immune from sanction, that it is permitted, acceptable and part of the basic fabric of American family life. Privacy says that what goes on in the violent relationship should not be the subject of state or community intervention. Privacy says that it is an individual

45 E Schneider "The violence of privacy" in M Albertson, Fineman and R Mykitiuk (eds) *The Public Nature of Private Violence* (1994, Routledge) 36 at 44.

46 C Hanna "No right to choose: Mandated victim participation in domestic violence prosecutions" (1996) 109 *Harvard Law Review* 1849 at 1869.

47 S Goldfarb "Violence against women and the persistence of privacy" (2000) 61 *Ohio State Law Journal* 1 at 20.

48 K Miccio "Exiled from the province of care: Domestic violence, duty and conceptions of state accountability" (2005) 37 *Rutgers Law Journal* 1 at 42.

49 Goldfarb "Violence against women", above at note 47 at 21.

50 Id at 22.

51 D Weissman "The personal is political and economic: Rethinking domestic violence" (2007) *Brigham Young University Law Review* 387 at 395.

52 Ibid.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

> and not a systemic problem. Privacy operates as a mask for inequality, protecting male violence against women."[53]

Public recognition of domestic violence could challenge patriarchal norms, and demand recognition and protection by public actors for violence against women.[54]

However, utilizing the criminal justice system to pierce the public / private divide has been challenging, as the masculinist and patriarchal construction of the law has done little to recognize why men batter, but has shifted the focus to why women allow themselves to be battered: why doesn't she leave.[55] The system and those who operate within its masculinist construction fail to focus on the core concept of domestic violence: the exercise of power and control, and ultimately domination.[56] Elizabeth Schneider argues that it is extremely difficult for domestic violence to be taken seriously within criminal justice systems as it forces those within the system (including the police) to challenge images of the family as a "haven in a heartless world".[57] When domestic violence is seen as personal domination, as opposed just to physical battering, it challenges an individual's perception of normality and specifically a masculinist interpretation of normality.[58] In perceiving women who are victims of domestic violence as weak, passive or partly responsible for the violence because they do not leave, we maintain patriarchy and the precious perception of the family as private.[59]

The further inaccurate portrayal of abusers as physically imposing monsters makes it difficult for the police and magistrates to believe that a "normal" man could commit such an offence.[60] If the criminal justice system is unable to acknowledge the power relationships at play within violent domestic relationships, it will keep on failing to understand why "decent men" batter and "strong women" let themselves be battered.[61]

Although the private has become public by providing legislative protection to women who find themselves in a battering relationship, the implementation of this protection and actual remedies are still shrouded within a system that protects masculine power and privilege.[62] The experience of women who

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53 Schneider "The violence of privacy", above at note 45 at 43.

54 Weissman "The personal is political and economic", above at note 51 at 395.

55 E Schneider "Domestic violence law reform in the twenty-first century: Looking back and looking forward" (2008) 42 *Family Law Quarterly* 353 at 356.

56 D Coker "Crime control and feminist law reform in domestic violence law: A critical review" (2001) 4 *Buffalo Criminal Law Review* 801 at 855; A Harris "Gender violence, race and criminal justice" (2000) 52 *Stanford Law Review* 777 at 785.

57 E Schneider "Particularity and generality: Challenges of feminist theory and practice in work on woman-abuse" (1992) 67 *New York University Law Review* 520 at 539.

58 Ibid.

59 N Cahn and J Meier "Domestic violence and feminist jurisprudence: Towards a new agenda" (1995) 4 *Public Interest Law Journal* 339 at 344.

60 Ibid.

61 Id at 356.

62 Artz "The weather watchers", above at note 17 at 182.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

approach the police and courts for assistance indicates how a form of social control shifts from the context of personal domination to structural domination.[63] This structural domination forms part of the violence:

> "When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of the violence. Society is organized through images in mass media and through broadly based social attitudes that condone violence. Society permits such violence to go unchallenged through the isolation of families and the failures of police to respond. Public, rather than private patterns of conduct of morals are implicated. Some police officers refuse to respond to domestic violence; some officers themselves abuse their spouses. Some clerks and judges think domestic violence matters do not belong in court. These failures to respond to domestic violence are public, not private actions."[64]

The police's failure to assist women subjected to domestic violence makes it clear that their perception of what constitutes violence is greatly influenced by stereotypical notions of what is perceived as a very private affair with which they should not interfere.

Lillian Artz comments that the aim of feminist jurisprudence is to expose the state and criminal justice system (the police) as systems that only cater to men's needs, ultimately upholding the power of men over women.[65] The criminal justice system is a socially constructed reality and feminists continuously grapple with the question of whether it is worth attempting to reconstruct this reality.[66]

Legal reform remains an important site of struggle "in shifting, or at least acknowledging inequalities" that entrench gender-based violence.[67] As part of this struggle and in an attempt to force the state to comply with its constitutional duty to protect women against violence, women have turned to the courts to ensure that the private remains public, and that the public takes account of gender-based violence.

To this end, the Constitution has been strategically employed to hold the state accountable for its failure to protect women against violence; the ensuing liability has become an important arena in which to challenge the social and legal understanding of women's experiences with violence. The discussion below traces this development in South African law and highlights how, in litigating for accountability, women are able to

63 Id at 184.

64 M Minow "Words and the door to the land of change: Law, language and family violence" (1990) 43 *Vanderbilt Law Review* 1665 at 1671.

65 Artz "The weather watchers", above at note 17 at 171.

66 Id at 188.

67 L Artz and D Smythe "Introduction: Should we consent?" in L Artz and D Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* (2008, Juta) 1 at 15.

articulate their experience of violence and promote a system that publicly takes account of it.[68]

STATE ACCOUNTABILITY IN PROTECTING WOMEN AGAINST VIOLENCE

As women have held the South African state financially accountable for its failure to protect them against violence, the private has increasingly become public. The development of South African state liability has been complex, functioning within a framework of Roman, Dutch and English law.[69] In the late 1950s, the State Liability Act 20 of 1957 provided more clarity and empowered courts to uphold delictual claims against the state based on vicarious liability.[70] Later, with the enactment of the Constitution, state accountability was further stretched in placing a positive duty on its officials to protect and promote the rights in the Bill of Rights, which included delictual liability for negligent omissions.[71]

The discussion below focuses on the early jurisprudence of the Constitutional Court in establishing the state's duty to protect women against violence. The analysis provides an important framework through which to consider police accountability and, although it should be acknowledged that financial liability cannot decrease male intimate violence, litigating accountability may incentivize public actors to comply with their legislative duties.[72] In the absence of accountability, it is difficult to change behaviour, as it fosters a culture of silence, reinforcing the very private nature of violence.[73]

A positive duty to protect

Early in South Africa's new democracy, South African women had to defend their legislative gains, when the Prevention of Family Violence Act was challenged for supposedly creating a reverse burden of proof, infringing a batterer's right to a

68 Ibid.

69 F du Bois "State liability in South Africa: A constitutional remix" (2010) 25 *Tulane European & Civil Law Reform* 139 at 140; L Boonzaier "State liability in South Africa: A more direct approach" (2013) 130 *South African Law Journal* 330 at 331.

70 State Liability Act, sec 1 states: "Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant." A Price "State liability and accountability" (2015) 1 *Acta Juridica* 313 at 317.

71 The Constitution, sec 7(2) states: "The state must protect, promote and fulfill the rights in the Bill of Rights". Id, sec 39(2) states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." Price, id at 325.

72 Miccio "Exiled from the province of care", above at note 48 at 18.

73 Id at 22.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

fair trial.[74] In *S v Baloyi* (*Baloyi*), the complainant obtained a protection order against her husband, which he breached and for which he was arrested.[75] Baloyi challenged the relevant sections of the Prevention of Family Violence Act and argued that it placed a reverse onus to prove absence of guilt when charged with breaching a protection order.[76] The High Court found in his favour and the matter was referred to the Constitutional Court for confirmation.[77]

During the confirmation proceedings, the Constitutional Court was faced with the complex task of establishing a balance between the state's constitutional duty to provide effective remedies against domestic violence and its simultaneous obligation to respect constitutional fair trial rights.[78] The Constitutional Court refused to confirm the High Court's order and upheld the legislation, demonstrating sensitivity to the social context and gendered nature of domestic violence:

> "All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography and is all the more pernicious because it is so often concealed and so frequently goes unpunished. … In my view, domestic violence compels constitutional concern in yet another respect. To the extent that it is systemic, pervasive and overwhelmingly gender specific, domestic violence

74 The Constitution, sec 35(3) states: "Every accused person has the right to a fair trial, which includes the right … (h) to be presumed innocent, to remain silent, and not to testify during the proceedings."

75 2000 (2) SA 425.

76 Prevention of Family Violence Act, sec 3(5) states: "The provisions of the Criminal Procedure Act 51 of 1977, relating to the procedure which shall be followed in respect of an enquiry referred to in s 170 of that Act, shall apply mutatis mutandis in respect of an enquiry under ss (4)." Criminal Procedure Act 51 of 1977, sec 170 states: "(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under ss (2). (2) The court may, if satisfied that an accused referred to in ss (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, *unless the accused satisfies the court that his failure was not due to fault on his part*, convict him of the offence referred to in ss (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months." (Emphasis added)

77 The Constitution, sec 167(5) states: "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of a similar status, before that order has any force."

78 *Baloyi*, above at note 75, para 3.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

> both reflects and reinforces patriarchal domination, and does so in a particularly brutal form."[79]

The court stressed the private nature of domestic violence and noted that the procedures and remedies provided for in the Prevention of Family Violence Act were specifically tailored to address the complex nature of domestic violence.[80] *Baloyi* set the tone for subsequent court decisions relating to violence against women, as it confirmed that domestic violence reflected and reinforced patriarchal domination.[81]

Shortly after *Baloyi*, the first case of state accountability for violence against women was heard in *Carmichele v Minister of Safety and Security and Another* (*Carmichele*).[82] Carmichele was brutally attacked by Coetzee who, at the time of the attack, was on bail on a charge of rape. Coetzee had been granted bail, despite the prosecutor and police being aware that he had several previous convictions.[83] Carmichele claimed damages against the state and argued that the police and prosecutors negligently failed to comply with the legal duty they owed her to prevent Coetzee from harming her (the so-called delictual duty of care).[84] The High Court found that that there was no evidence upon which such a finding could be made and rejected the claim.[85] Carmichele appealed to the Supreme Court of Appeal, where the case was also dismissed, upon which she approached the Constitutional Court.

The Constitutional Court relied on section 39 of the Constitution, which places an obligation on all courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights.[86] The court acknowledged that the rights to life, dignity and freedom and security of the person could be

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79 Id, paras 11–12 (footnotes omitted).

80 Id, paras 16–19 and 33; P Andrews "The Constitutional Court provides succor for victims of domestic violence: *S v Baloyi*" (2000) 16 *South African Journal on Human Rights* 337 at 340.

81 *Baloyi*, above at note 75, paras 11–12. It should be noted that the Constitutional Court heard a similar matter with almost identical facts in *Omar v Government of the Republic of South Africa* 2006 (2) SA 289 (CC) under the DVA, which replaced the Prevention of Family Violence Act. The *Omar* judgment also highlighted the prevalence of domestic violence, the scant protection by the criminal justice system and the negative impact domestic violence has on women. The court reached a similar finding to that in *Baloyi*.

82 2001 (4) SA 938 (CC).

83 Combrinck "The dark side of the rainbow", above at note 1 at 177.

84 *Carmichele*, above at note 82, para 3.

85 Ibid.

86 Id, paras 32–41. The Constitution, sec 39 states: "(1) When interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

enforced not only negatively but also positively.[87] The court found that the matter had sufficient merit and that the complex legal issues required careful consideration, referring the matter back to the High Court for consideration.[88]

The High Court found that the state officials indeed owed the plaintiff a legal duty to protect her against the risk of violence and that they had negligently failed to do so. The state was held liable for damages, a decision against which it appealed.[89] However, before the *Carmichele* appeal was heard, two further cases were decided on the state's duty to protect women against violence.

In *Minister of Safety and Security v Van Duivenboden* (*Van Duivenboden*),[90] a man shot and killed his wife and daughter and wounded his neighbour, Van Duivenboden, during a domestic dispute. Van Duivenboden sought to recover damages from the minister for the injuries he suffered. He argued that the police had been aware of and attended previous domestic incidences, but had not confiscated the accused's firearm. The court confirmed the state's positive duty to protect individuals from violence and found that the test for wrongfulness in delict should be informed by the norms and values of the Constitution.[91] If the constitutionally protected rights to human dignity, life and security of the person are in peril, the state, represented by its officials, has a constitutional duty to protect them and, when it fails to do so, could be held liable.[92] The judgment confirmed the state's duty to take appropriate action to prevent violence, a duty that was again confirmed in *Van Eeden v Minister of Safety and Security* (*Van Eeden*).[93]

In *Van Eeden* a young woman was violently raped by a dangerous known criminal and serial rapist, who had escaped from police custody. She instituted a claim for delictual damages, claiming that members of the police owed her a legal duty to take reasonable steps to prevent the prisoner from escaping and harming her.[94] The court found that the law of delict was subject to the rights in the Bill of Rights and confirmed that section 12(1)(c) of the Constitution placed a positive duty on the state to protect everyone from violent crime.[95] Her claim succeeded.

By the time the *Carmichele* appeal was finally heard,[96] the legal landscape concerning the delictual liability of the state had developed considerably in light of the *Van Duivenboden* and *Van Eeden* decisions.[97] The state's appeal

87 *Carmichele*, above at note 82, para 44.
88 Id, paras 81–83.
89 *Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C).
90 2002 (6) SA 431 (SCA).
91 Combrinck "The dark side of the rainbow", above at note 1 at 180.
92 *Van Duivenboden*, above at note 90, para 22.
93 2003 (1) SA 389 (SCA), para 13.
94 Id, para 3.
95 Id, paras 12–13.
96 *Minister of Safety and Security and Another v Carmichele* 2004 (2) BCLR 133 (SCA) (*Carmichele SCA*).
97 Combrinck "The dark side of the rainbow", above at note 1 at 182.

was dismissed, as the court found that there was no reason to depart from the general principle, which established that the state would be held liable for its failure to comply with its constitutional duty to protect a person who required protection.[98]

The legal precedent created by these decisions had a positive impact on protecting women against violence. Although the judgments did not address the pervasive social acceptance of violence, they did acknowledge that women had the right to be protected by the state and that, if the state failed to comply with this duty, it could be held liable. By infusing delictual claims with constitutional norms, *Carmichele* set a new standard for police behaviour towards women, or so it was hoped.[99]

Police liability and accountability: A positive duty to protect

The Constitutional Court decisions that followed *Carmichele* highlighted the special relationship between law-enforcing authorities and women, and confirmed the positive duty that these institutions and actors have in protecting women and preventing violence.[100]

In *K*, the question was whether the minister of safety and security could be held vicariously liable for a rape committed by a police officer while in full uniform and on duty. The court found that, against the backdrop of the Constitution, and in particular K's constitutional rights and the state's constitutional obligations, the employee / employer relationship was sufficiently close to render the state liable.[101]

For the current discussion, the importance of the judgment lies not in infusing the principle of vicarious liability with constitutional norms, but the acknowledgement that the police have a special duty to protect women against violence:

> "Our Constitution mandates members of the police to protect members of the community and to prevent crime. It is an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community. Where such trust is established, the achievement of the tasks of the police will be facilitated. In determining whether the Minister is liable in these circumstances, courts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed. In this case, and viewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her.

98 *Carmichele SCA*, above at note 96, para 43.

99 Albertyn et al "Women's freedom and security", above at note 1 at 335.

100 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) (*K*); *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) (*F*).

101 *K*, id, para 53.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

> Thirdly, the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in the brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case. In my view, these three inter-related factors make it plain that viewed against the background of our Constitution, and in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable."[102]

The strong confirmation of police accountability was reiterated in the case of *F*. In *F*, a 13 year old girl was brutally raped by a police officer who was on standby duty.[103] Relying on the dicta in *K*, the High Court found that there was a sufficiently strong link between the actions of the police officer and his employer (the police) to justify the imposition of vicarious liability.[104] However, the Supreme Court of Appeal overturned the decision and F approached the Constitutional Court. The Constitutional Court focused on the vulnerability of women and children and the responsibilities the police have towards them:

> "Whenever a vulnerable woman or girl-child places her trust in a policeman on standby duty, and that policeman abuses that trust by raping her, he would be personally liable for damages arising from the rape. Additionally, if his employment as a policeman secured the trust the vulnerable person places in him, and if his employment facilitated the abuses of that trust, the State might be held vicariously liable for the delict. The victim's understanding of the situation would presumably be that she is being protected or assisted by a law enforcement agent, empowered and obliged by the law to do so. Whether he is on or off duty would, in all likelihood, be immaterial to her. From where she stands, he is a policeman, employed to protect her, and should therefore be trusted to uphold, and not to contravene the law."[105]

K and *F* made it clear that the police have a special duty to protect women against violence and paved the way for subsequent liability in cases where the police failed to act in terms of their duties in the DVA.

Police liability and accountability: A positive duty to protect under the DVA

These cases set a clear precedent that the police have a constitutional duty to protect, and prevent violence against, women. Despite the precedent and the

102 Id, paras 52–53.
103 *F*, above at note 100, para 1.
104 Id, para 18.
105 Id, para 66.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

clear duties the police have under the DVA, the cases below demonstrate that the police have institutionalized mainstream assumptions about gender-based violence.[106]

Minister of Safety and Security v Venter and Others (*Venter*)[107] is a clear example of the police's failure to perform their statutory duties under the DVA. Van Wyngaard, a violent man, threatened on several occasions that he would kill his ex-wife Christa and their children. To prevent him from entering their home she and her new partner, Venter, approached the magistrates' court where they were advised to obtain an interdict; however, they first needed a case number from the police.[108] They did not go through with the process and did not obtain the interdict. As time passed, they approached their police station on a few occasions and complained about Van Wyngaard's violent behaviour and that they wanted him barred from their property.[109] The police simply advised them that they could only act if he entered the house.[110] They were never informed about their rights under the DVA or assisted to enforce them. Van Wyngaard did enter their property, raped Christa and shot Venter. A damages claim was instituted against the state for its officials' failure to perform their statutory duties under the DVA.

In court, the police did not dispute the fact that they failed to protect Christa and Venter, but argued that the respondents failed to prove that their negligence caused the couple's damages. They maintained that Christa and Venter's own negligence contributed to the cause of events, as they would not have taken steps to protect themselves, even if they had been assisted.[111] The court found that the police's failure to inform the respondents of their rights under the DVA constituted a delictual omission, which was linked to the harm they suffered. However, damages were apportioned as the court found that the respondents were negligent in not applying for an interdict after the magistrates' court told them that it was a possibility.[112] Damages were apportioned, with the respondents being held 25 per cent responsible and the police 75 per cent.[113]

What is interesting about *Venter* is the police's argument that the respondents were to blame for the violence. It is a reality that many victims of domestic violence fail to lay charges or follow through with them. Although this is immensely frustrating, the frustration seems to have spilt over into a culture of neglect, as the police simply stereotype all domestic violence complainants as "flighty at best and vengeful at worst".[114]

106 Artz "The weather watchers", above at note 17 at 186.
107 2011 (2) SACR 67 SCA.
108 Id, para 6.
109 Id, paras 8–10.
110 Ibid.
111 Id, para 19.
112 Id, para 32.
113 Id, para 35.
114 Artz and Smythe "Bridges and barriers", above at note 12 at 220.

In analysing the implementation of the DVA, Paranzee et al describe this negative attitude of the police as a failure to understand the social realities that victims of domestic violence (especially women) face.[115] Police are often not sensitive to economic and social dependence in a relationship, which all contribute to the complexity of perceiving realistic options in going through with a domestic violence charge.[116] The annoyance felt by the police when charges are dropped, manifests in the attitude that domestic violence cases are not worthy of serious attention.[117]

The same attitude was evident in *Basdew NO v Minister of Safety and Security* (*Basdew*).[118] In this case, the deceased approached the police in the middle of the night for protection after a domestic violence incident. She informed the police that her husband was violent and that he had a firearm that she was afraid he was going to use.[119] The police accompanied the deceased to her home to fetch her belongings. Upon arrival, they neither searched the husband nor kept him under observation and, while she was busy collecting her things, he shot and killed her.[120] A claim was instituted on behalf of her three children for loss of support.[121] The court held the police liable as they failed to protect the deceased against foreseeable harm.[122] This reluctance to arrest violent men reflects society's traditional views toward women, the family and marital privacy.[123] Society sees the violence as a marital dispute that the parties themselves should resolve and that it is not the police's place to interfere. Women are also seen to be spiteful in laying charges in order to "get back" at their men.

This attitude was reflected in *Naidoo v Minister of Police* (*Naidoo*).[124] Naidoo was violently assaulted by her husband. On approaching her closest police station to lay a charge of assault, she was informed that she first needed to apply for a protection order before she could do so.[125] At the magistrates' court she was informed that this was not the case and that she could lay an assault charge irrespective of a protection order being obtained.[126] She returned to the police station but nobody wanted to assist her; instead she was arrested for assault as her husband laid an assault charge against her.[127] The charge was subsequently withdrawn and Naidoo instituted a claim against the police

115 Paranzee, Artz and Moult *Monitoring the Implementation*, above at note 16 at 83–84.
116 Schneider "Particularity and generality", above at note 57 at 558.
117 Paranzee, Artz and Moult *Monitoring the Implementation*, above at note 16 at 84.
118 2012 (2) SACR 205 (KZD).
119 Id, para 6.
120 Id, paras 6–11.
121 Id, para 1.
122 Id, para 15.
123 SE Schuerman "Establishing a tort duty for police failure to respond to domestic violence" (1992) 34 *Arizona Law Review* 355 at 358.
124 2016 (1) SACR 468 (SCA).
125 Id, para 2.
126 Ibid.
127 Ibid.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

for their failure to comply with their duties under the DVA and for wrongfully arresting her.[128] The police officer who assisted Naidoo testified that he did not help her immediately when she returned from the magistrates' court but called her husband to endeavour to seek a reconciliation between the parties.[129] When Naidoo was adamant that she wanted to lay a charge against her husband, the police officer informed her that she could also be held liable and suggested that a counter charge be instituted against her, which led to her arrest.[130] The court held the minister liable, as the humiliation and trauma to which she was subjected was the antithesis of what the DVA and National Instructions set out to achieve.[131] *Venter*, *Basdew* and *Naidoo* clearly illustrate the strong masculinist culture of the police that influences their response to domestic violence incidents.[132]

What is striking from the case law and parliamentary reports, is how many cases relate to police members' own violent transgressions. Paranzee et al point to the fact that the most far-reaching and progressive legislation will be rendered toothless if it is enforced by those who themselves do not believe in its necessity.[133]

In *Minister of Safety and Security and Another v Madyibi*,[134] a police officer shot his wife with his service pistol and took his own life. His wife, who survived the attack, instituted a claim against the minister of police for loss of support in her own capacity and on behalf of her four minor children. She argued that the station commissioner and his colleagues failed to disarm her husband, despite being aware of his violent behaviour and domestic abuse history, and that the police had a legal duty to protect her and her children, which they breached.[135] Considering the facts, the court found that it was clear that such a legal duty existed and allowed her claim against the minister.

In *Dlanjwa v Minister of Safety and Security*,[136] a police officer also shot his wife with his service pistol and turned the gun on himself. Again, the wife instituted a claim for the police's failure to protect her and to prevent her husband from killing himself.[137] She led evidence that detailed that she had previously approached his station to request that he be disarmed as he was violent towards her and threatened to kill her.[138] She also obtained a protection

128 Id, para 3.
129 Id, para 32.
130 Ibid.
131 Id, para 33. The minister was held liable for R200,000 in respect of the legal duty the police owed her under the DVA, R70,000 for her unlawful arrest and R10,000 for assault, as she was man-handled by the police upon her arrest.
132 Artz and Smythe "Bridges and barriers", above at note 12 at 220.
133 Paranzee, Artz and Moult *Monitoring the Implementation*, above at note 16 at 84.
134 2010 (2) SA 356 (SCA).
135 Id, para 2.
136 2015 JDR 2094 (SCA).
137 Id, para 2.
138 Id, para 5.

order, still she received no assistance.[139] In the trial court, various police officers testified for the defence.[140] They claimed that, although the wife approached them, she never reported that she had been assaulted or that her husband had threatened to use his firearm.[141] They kept no records of the incidents and the police maintained that she was lying.[142] In its finding, the court pointed to the fact that the police's free recall of events was unreliable and that they failed to keep proper records as required under the National Instructions.[143] The court stressed the police's constitutional and legislative duty to protect members of the public, especially women and children.[144] The police were held liable.

Of great concern in these matters is the police's failure to search for and seize firearms, especially if it is known that an abuser is in possession of a firearm. The availability of a firearm greatly increases the likelihood that a domestic violence dispute will result in a fatality, especially if there has been a history of violent behaviour.[145]

In light of this analysis, the question remains whether anything has been achieved in holding the state financially accountable for its failure to protect South African women against violence and, specifically, domestic violence. The conclusion that follows unpacks this question and highlights the catch-twenty-two in using the justice system to gain protection against violence against women:

> "Law can reflect social change, even facilitate it, but it can seldom if ever initiate it. No matter what the formal legal articulation, implementation of legal rules will track and reflect the dominant conceptualizations and conclusions of the majority culture. Thus, while law can be used to highlight the social and political aspects it reflects, it is more a mirror than a catalyst when it comes to effecting enduring social change."[146]

ACCOUNTABLE TO WHOM?

Because of law's patriarchal nature, one of the challenges has always been how to make the law sensitive to women's experience and, in this instance, women's experience of violence.[147] In holding the state financially account-

139 Id, para 6.
140 Id, para 8.
141 Ibid.
142 Ibid.
143 Id, para 15.
144 Id, para 24.
145 A Nathan "At the intersection of domestic violence and guns: The public interest exception and the Lautenberg amendment" (2000) 85 *Cornell Law Review* 822 at 824.
146 MA Fineman "Introduction" in MA Fineman and NS Thomadsen (eds) *At the Boundaries of Law: Feminism and Legal Theory* (1991, Routledge) i at xiv.
147 S Burns "Notes from the field: A reply to Professor Colker" (1990) 13 *Harvard Women's Law Journal* 189 at 196.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

able for its failures, it was hoped that it would encourage its officials to comply with their constitutional and legislative duties.[148]

Since the final *Carmichele* judgment, the law pertaining to the state's duties to protect women against violence has grown considerably and subsequent case law shows a positive trend in acknowledging the uniquely gendered nature of violent crime.[149] However, as precedents have grown, the pervasiveness of state inaction in complying with its constitutional and legislative duties has also come to light.

The parliamentary reports by the Independent Complaints Directorate and Civilian Secretariat of Police indicate that there is a gross scale of non-compliance with the DVA and that the same patterns of non-compliance are noted year after year. Cases such as *Venter*, *Basdew* and *Naidoo* illustrate that the police offer domestic violence victims very little assistance. Despite these transgressions and the ensuing financial loss, the state has done little to ensure police compliance with the DVA.

Seeing as the DVA grants wide discretionary powers to the police, one option might be to amend the legislation to place specific duties on the police. However, to amend already progressive legislation will have little effect, as the main problem remains stereotypical attitudes harboured against victims of domestic violence:

> "Perhaps the most important, and least acknowledged ingredient of social change to end domestic violence, lies in the shifting of attitudes. Progressive legislation enforced by those with unprogressive attitudes can create hostility and resentment on the part of law enforcement agents towards complainants. The reality is that many of those responsible for implementing the legislation do not understand the dynamics of domestic violence, and may themselves have many unresolved issues about the problem. Many may harbour attitudes such as 'women who are abused have done something to provoke it'; 'if it is so bad, why doesn't she leave?' or simply deeply sexist ideas that it is a man's right to hit his wife from time to time. Evidence shows too that there are high levels of domestic violence within the police service, and it hardly bears mentioning that even the most far-reaching legislation will be rendered toothless if it is enforced by those who themselves do not believe in its necessity. Law enforcement agents have not been empowered with knowledge about the complexity of domestic violence and the importance of their own role in ensuring the safety of a complainant."[150]

What is glaringly obvious is the lack of adequate training in terms of the police's responsibilities under the DVA. Proper training is critical for the

148 A Gouws "The public discourse on rape in South Africa: Turning women into vulnerable victims" in M Verwoerd and C Lopes (eds) *Sexualised Violence in the National Debate: Cross Border Observations on India and South Africa* (2015, Heinrich Böll Stiftung) 66 at 70.

149 Combrinck "The dark side of the rainbow", above at note 1 at 185.

150 Paranzee, Artz and Moult *Monitoring the Implementation*, above at note 16 at 83.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

effective implementation of the legislation and, although training might not change personal beliefs, it does create an opportunity to pierce the private with publicly held responsibilities.

Paranzee et al note that part of the problem of domestic violence is that it is channelled through a complex legal system that is in itself "flawed, under-resourced, and plagued with inequalities".[151] They further surmise that the effective implementation of the DVA is not on the state's agenda, as the state views the promulgation of the legislation as adequate in dealing with domestic violence.[152] This disinterest has prompted women to approach the courts to expose the ineffective implementation of the DVA and, in this sense, litigation remains a powerful arena in which women's "experiences of 'violence' are articulated and visions of justice promoted".[153]

A diverse range of opinions have warned against the illusion that litigation and the courts can have a substantive impact on society.[154] While legal realists and critical legal scholars have been sceptical about the ability of law, and specifically litigation, to have an impact on societal norms,[155] legal mobilization scholars have been more optimistic about the potential of litigation to initiate, or play a role in, change.[156] Legal realists have pointed to the disparities between formal litigation outcomes and the actual implementation of these outcomes. They believe that government input and / or legislation is necessary to effect "real" social change.[157] They believe that social change activists would achieve more by interacting with government when policies are being formulated, rather than engaging in litigation.[158] Supporting the legal realist position, some critical legal scholars have argued that litigation could weaken social movements as a result of law's ideological bias that reinforces current and dominant social structures and hierarchies.[159] Both realists and these critical legal scholars believe that litigation is not able to address actual social inequality and injustice.[160]

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151 Ibid.

152 Ibid.

153 Artz and Smythe "Introduction", above at note 67 at 15.

154 A Hunt "Rights and social movements: Counter-hegemonic strategies" in M McCann (ed) *Law and Social Movements* (2006, Ashgate) 309 at 309.

155 For a discussion of the viewpoint of a legal realist, see G Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (1991, University of Chicago Press). For the viewpoints of critical legal scholars, see P Gabel "The phenomenology of rights consciousness and the pact of the withdrawn selves" (1984) 62 *Texas Law Review* 1563; and M Kelman *A Guide to Critical Legal Studies* (1987, Harvard University Press).

156 C Holzmeyer "Human rights in an era of neoliberal globalization: The Alien Tort Claims Act and grassroots mobilization in *Doe v Unocal*" (2009) 43 *Law & Society Review* 271 at 273; J Klaaren, J Dugard and J Handmaker "Public interest litigation in South Africa: A special issue introduction" (2011) 27 *South African Journal on Human Rights* 1.

157 Holzmeyer, ibid.

158 Ibid.

159 Ibid.

160 Ibid.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

At the other end of the spectrum, legal mobilization scholars locate litigation within a wider struggle for change and focus on the indirect impact of litigation and not just judicial outcome.[161] In this sense, indirect impact refers to spurring on or supporting movement-building efforts, generating public support for new rights claims, providing pressure to supplement political tactics and garnering media attention.[162] Mobilization scholars acknowledge that judicial victories may fail to bring desired relief or immediate social change, but realise the potential that even unsuccessful or indeterminate court actions have to generate important legal resources for broader political campaigns.[163]

What emerges from the work of legal mobilization scholars is that law, and specifically litigation, is only a single stepping-stone to initiate social change. The key seems to be to devise a strategy that would harness the power of law in such a way that it would create meaningful opportunities, despite the outcome of a court decision that could subsequently advance a certain social agenda.[164]

Carol Smart articulated certain problems when using rights as part of a feminist strategy to achieve change.[165] According to her, the acquisition of rights in a given area may over-simplify complex power relations and the more powerful party might appropriate the relevant rights.[166] Rights claims can also be countered by competing claims, as litigation is centred on individuals, which erodes the intention of fighting for the social good.[167] Still, claiming rights through litigation gives women an important sense of collective identity, actively shapes public discourse and is a source of empowerment.[168] The public nature of rights assertion is especially significant because of the often private nature of violence against women.[169]

The failure of women to utilize the court system would send a very dangerous message to both victims and perpetrators of domestic violence. For the victims, it would reinforce the belief that law enforcement is irrelevant and that nothing will stop the violence; for the perpetrator, it would reaffirm the idea that male intimate violence is acceptable and beyond public

161 Klaaren, Dugard and Handmaker "Public interest litigation", above at note 156 at 2; M McCann "Reform litigation on trial" (1992) 17 *Law and Social Inquiry* 715 at 716.

162 M McCann "Legal mobilization and social reform movements: Notes on theory and its application" in M McCann (ed) *Law and Social Movements* (2006, Ashgate) 225 at 230; J Dugard and M Langford "Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism" (2011) 27 *South African Journal on Human Rights* 39 at 55; P Houtzager and L White "The long arc of pragmatic economic and social rights advocacy" in L White and J Perelman (eds) *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (2011, Stanford University Press) 172.

163 Holzmeyer "Human rights in an era", above at note 156 at 275.

164 Id at 274.

165 C Smart *Feminism and the Power of Law* (1989, Routledge) at 144.

166 Ibid.

167 Id at 145.

168 SL Roach Anleu *Law and Social Change* (2000, SAGE Publications) at 172.

169 Ibid.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press

scrutiny.[170] With women utilizing the courts and enforcing state compliance, the language of the private is turned into the language of public, helping us to understand the dimensions of violence against women.[171]

In further understanding the dimensions of domestic violence and the recourse victims have through the DVA, we need to be conscious of the class and race structures in South African society.[172] Although social imbalance driven by patriarchy can be classified as a common denominator for violence against women, South Africa's violent apartheid past and power imbalances in terms of race and class have produced a complex web of oppression and domination, the intersection of which needs to be understood in addressing this violence.[173]

Public (and private) institutions need to take account of the reality that poor, black women are especially vulnerable to domestic violence and poor service if they seek protection.[174] The Khayelitsha Commission Report made it clear that deep levels of poverty and poor levels of infrastructure have hampered effective policing and service delivery in black townships, including assisting victims of domestic violence.[175] In understanding this intersection of multiple levels of oppression, we need to understand the wider context in which they are produced, experienced and mediated; this calls for policies and procedures to address the multi-faceted nature of violence.[176] The Khayelitsha Commission recommended that research be undertaken to establish the manner in which domestic violence is policed. This information could contribute to understanding how domestic violence is viewed in society; however, it is uncertain whether this research has been undertaken.[177]

As the parliamentary reports and court cases noted above illustrate, addressing violence against women is complex and calls for a multifaceted understanding of the private within the context of the public, as well as how these systems interact.[178] In litigating for redress, South African women have been able to operate within the confines of the justice system to address

170 Ibid.

171 Schneider "The violence of privacy", above at note 45 at 44–45.

172 Vogelman and Eagle "Overcoming endemic violence", above at note 1 at 214.

173 C Romany "Black women and gender equality in a new South Africa: Human rights law and the intersection of race and gender" (1996) 21 *Brooklyn Journal of International Law* 857 at 868; NJ Sokoloff and I Dupont "Domestic violence at the intersections of race, class, and gender" (2005) *Violence Against Women* 38 at 43; M Bograd "Strengthening domestic violence theories: Intersections of race, class, sexual orientation, and gender" (1999) 25 *Journal of Marital and Family Therapy* 275 at 277.

174 PE Andrews "Violence against women in South Africa: The role of culture and the limitations of the law" (1999) 8 *Temple Political & Civil Rights Law Review* 425 at 430.

175 Khayelitsha Commission *Towards a Safer Khayelitsha*, above at note 23 at 140.

176 J Conaghan "Intersectionality and the feminist project in law" in E Grabham, D Cooper, J Krishnadas and D Herman (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (2009, Routledge-Cavendish) 21 at 29.

177 Khayelitsha Commission *Towards a Safer Khayelitsha*, above at note 23 at 459.

178 Weissman "The personal is political and economic", above at note 51 at 388.

gender-based violence, which might contribute to gendered social change: "[i]f the feminist project is seen not only as the immediate dismantling of sexist social structures but also as raising gender issues, gradually influencing legal and popular discourses about gender, and mobilizing women to claim their constitutional rights, then success should be measured otherwise than by a count of cases won and lost".[179]

179 E Bonthuys "Institutional openness and resistance to feminist arguments: The example of the South African Constitutional Court" (2008) 20 *Canadian Journal on Women and the Law* 1 at 35.

https://doi.org/10.1017/S0021855319000081 Published online by Cambridge University Press