

# **SAPS ELECTRONIC REGISTER FOR PERPETRATORS OF ABUSE AGAINST WOMEN**

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## **SUMMARY**

Abuse against women is a severe social problem that needs an effective combat mechanism. Globally, women have been subjected to violence to such an extent that the problem has caught the international community's attention. In response to the abuse of women, the international community has introduced a legal framework to assist countries in setting up preventative and protective measures to realise women's rights and make them free from all forms of violence. The instruments introduced by the international community include UN Resolutions, General Recommendations on violence against women and children, and the like. The Constitution of the Republic of South Africa, 1996 guarantees everyone the right to freedom of security, including the right to be free from all forms of violence. While South Africa has made great strides in passing legislation to protect women from violence, the preventative methods have not been effective in combating women abuse. Thus, South Africa needs more preventative mechanisms to protect women, and police at the forefront of implementing those preventative mechanisms. This article investigates mechanisms that the international community has suggested, looks at other countries' approaches to combating violence against women, and then argues for a process where women have access to information about a potential abuser's previous criminal history.

## **1 INTRODUCTION**

Violence against women has been recognised internationally as a severe and pervasive phenomenon, affecting women's lives and health and violating their human rights.<sup>1</sup> Violence against women is prevalent in many countries, including South Africa. According to Statistics South Africa, one in five women (21 per cent) reported being physically abused by their partners

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<sup>1</sup> Hawkins "Women's Human Rights: The Global Intersection of Gender Equality, Sexual and Reproductive Justice, and Healthcare" 2012 4 *Journal of Research on Women and Gender* 159 184; The World Bank "Gender-Based Violence (Violence Against Women and Girls)" (25 September 2019) [https://www.worldbank.org/en/topic/socialsustainability/brief/violence-against-women-and-girls#:~:text=Gender%2Dbased%20violence%20\(GBV\),or%20non%20partner%20sexual%20violence](https://www.worldbank.org/en/topic/socialsustainability/brief/violence-against-women-and-girls#:~:text=Gender%2Dbased%20violence%20(GBV),or%20non%20partner%20sexual%20violence) (accessed 2021-05-19).

in 2021.<sup>2</sup> The effects of gender-based violence can be physical, sexual, financial, psychological, or emotional, and are encountered by people of all races and socio-economic groups. Analysts and reports agree that South Africa's rate of violence (especially gender violence) is among the highest in the world.<sup>3</sup> Medical expenses, psychological problems, lost productivity, and intergenerational violence drain billions of rands annually from communities in social costs that violate safety, health, welfare and economies.<sup>4</sup> As of 2014, the cost of gender-based violence in South Africa was calculated at between R28.4 billion and R42.4 billion per year, which is between 0.9 and 1.3 per cent of the country's Gross Domestic Product.<sup>5</sup> Violence against women is any act of gender-based violence that results in or is likely to result in physical, sexual or mental harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life.<sup>6</sup> In section 12(1)(c), the Constitution states that everyone has the right to freedom and security, including the right to be free from any form of violence, whether stemming from public or private sources.<sup>7</sup> Interpersonal violence presents complex challenges in the context of violence prevention, implementation of laws, and interventions with abuse survivors.<sup>8</sup>

This article examines the existing international legislative instruments available to combat violence against women in intimate partner relationships. The article also looks into preventative methods introduced in other jurisdictions to assist in the fight against violence in women's intimate relationships. The author then makes a case for possible legislative procedures South Africa can adopt as a preventative method to combat violence against such women. The framework aims to allow women in potentially abusive environments to receive information on a potential abuser's previous criminal history.

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<sup>2</sup> Stats SA "Crimes Against Women in South Africa, An Analysis of the Phenomenon of GBV and Femicide" (undated) [https://www.parliament.gov.za/storage/app/media/1\\_Stock/Events\\_Institutional/2020/womens\\_charter\\_2020/docs/30-07-2020/A\\_Statistical\\_Overview\\_R\\_Maluleke.pdf](https://www.parliament.gov.za/storage/app/media/1_Stock/Events_Institutional/2020/womens_charter_2020/docs/30-07-2020/A_Statistical_Overview_R_Maluleke.pdf) (accessed 2022-07-15).

<sup>3</sup> Goldscheid "Gender Violence and Work in the United States and South Africa: The Parallel Processes of Legal and Cultural Change" 2011 19(3) *American University Journal of Gender, Social Policy & the Law* 921 924.

<sup>4</sup> *S v Baloyi* 2000 (1) BCLR 86 (CC) par 11, referring to a document drafted by the US National Council of Juvenile and Family Court Judges.

<sup>5</sup> KPMG Human and Social Services "Too Costly to Ignore: The Economic Impact of Gender-Based Violence in South Africa" (18 September 2014) <https://home.kpmg/za/en/home/insights/2014/09/too-costly-to-ignore.html> (accessed 2022-07-15).

<sup>6</sup> World Health Organisation (WHO) "Violence Against Women" (undated) [https://www.who.int/health-topics/violence-against-women#tab=tab\\_1](https://www.who.int/health-topics/violence-against-women#tab=tab_1) (accessed 2021-05-21).

<sup>7</sup> The Constitution of the Republic of South Africa, 1996 (the Constitution).

<sup>8</sup> Parker "Violence Against Women in South Africa: Perspectives From a Mental Health Context" 2020 *Acta Juridica* 287 289.

## 2 INTERNATIONAL TREATIES

A few of the relevant international agreements are discussed here. The Preamble to the United Nations Charter acknowledges a need to reaffirm faith in fundamental human rights, the dignity and worth of the human person, and the equal rights of men and women.<sup>9</sup> The international community has introduced various mechanisms to combat violence against women.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>10</sup> aims primarily to eliminate discrimination against women. South Africa signed the treaty on 29 January 1993, ratified it on 15 December 1995, and the Convention came into effect in South Africa on 15 January 1996.<sup>11</sup> Since the original version of CEDAW does not directly speak to violence against women, several documents (in the form of recommendations) have been issued by the CEDAW Committee to assist in the fight against abuse of women.

General Recommendation No. 12 of CEDAW<sup>12</sup> calls on States Parties to report periodically to the CEDAW Committee on legislation enacted to protect women from violence, as well as on measures adopted to eradicate violence against women, and the availability of support services for women who are the victims of aggression or abuse.

General Recommendation No. 19, adopted by the CEDAW Committee at its 11th session in 1992, invited all States Parties to take appropriate measures to fight against violence against women that resulted from public or private actions.<sup>13</sup> Public acts of violence perpetrated by public authorities include acts against women by any person, organisation or enterprise.<sup>14</sup> Private actions by private individuals can also be considered a violation of State responsibility if the State fails to act diligently to prevent the violation of rights or if it investigates inadequately and fails to punish acts of violence.<sup>15</sup>

<sup>9</sup> United Nations *Charter of the United Nations* 1 UNTS XVI (1945) <https://www.un.org/en/about-us/un-charter/preamble> (accessed 2021-05-25).

<sup>10</sup> UN General Assembly *Convention on the Elimination of All Forms of Discrimination Against Women* 1249 UNTS 13 (1981) Adopted: 18/12/1979; EIF: 03/09/1981 <https://www.ohchr.org/documents/professionalinterest/cedaw.pdf> (accessed 2021-05-25).

<sup>11</sup> Office of the Chief State Law Adviser "South African Treaty Register" (undated) [https://treaties.dirco.gov.za/dbtw-wpd/exec/dbtwpub.dll?AC=GET\\_RECORD&XC=/dbtw-wpd/exec/dbtwpub.dll&BU=https%3A%2F%2Ftreaties.dirco.gov.za%2Fdbtw-wpd%2Ftextbase%2Ftreatywebsearch.htm&GI=&TN=TreatyWeb&SN=AUTO27357&SE=158&RN=54&MR=20&TR=0&TX=1000&ES=0&XP=&RF=Printingformat2018&EF=Basic+Record+Form&DF=Web+full+record&RL=1&EL=1&DL=1&NP=1&ID=&MF=&DT=&ST=0&IR=525&NR=0&NB=2&SV=0&SS=0&BG=&FG=&QS=TReaties+New+Master](https://treaties.dirco.gov.za/dbtw-wpd/exec/dbtwpub.dll?AC=GET_RECORD&XC=/dbtw-wpd/exec/dbtwpub.dll&BU=https%3A%2F%2Ftreaties.dirco.gov.za%2Fdbtw-wpd%2Ftextbase%2Ftreatywebsearch.htm&GI=&TN=TreatyWeb&SN=AUTO27357&SE=158&RN=54&MR=20&TR=0&TX=1000&ES=0&XP=&RF=Printingformat2018&EF=Basic+Record+Form&DF=Web+full+record&RL=1&EL=1&DL=1&NP=1&ID=&MF=&DT=&ST=0&IR=525&NR=0&NB=2&SV=0&SS=0&BG=&FG=&QS=TReaties+New+Master) (accessed 2021-05-25).

<sup>12</sup> UN Committee on the Elimination of All Forms of Discrimination Against Women *CEDAW General Recommendation No. 12: Violence Against Women* (8th Session, 1989).

<sup>13</sup> CEDAW Committee *General Recommendation No. 19: Violence against Women* (11th Session, 1992) A/47/38 par 24(a).

<sup>14</sup> CEDAW Committee *General Recommendation No. 19* par 8 and 9.

<sup>15</sup> *Ibid.*

General Recommendation No. 35 (GR No. 35) aims to assist States Parties with mechanisms (legislative or otherwise) for combating violence against women on the domestic front. The Recommendation's mechanisms focus on prevention, protection, prosecution and punishment.<sup>16</sup> GR No. 35 further advises States Parties to seek support, where necessary, from the international community (that is, from UN specialised agencies) to meet human rights obligations by designing and implementing all appropriate measures to eliminate and respond to violence against women.<sup>17</sup>

On 2 February 1998, the UN General Assembly adopted a resolution on crime prevention and criminal justice measures to eliminate violence against women.<sup>18</sup> The resolution focused on strategies and practical steps in crime prevention and criminal justice to stop violence against women. In the resolution, member states are urged to review, evaluate and revise their national legal systems' procedural, criminal and civil laws to ensure that all acts of violence against women are prohibited.<sup>19</sup>

In September 2015, the United Nations Sustainable Development Summit adopted a sustainable development goal (SDG) to eradicate violence against women.<sup>20</sup> As part of the international development agenda, gender-based violence (GBV) was included for the first time.<sup>21</sup>

Following CEDAW, the Constitutional Court has confirmed that states are obliged to make laws and take other measures to eliminate discrimination against women.<sup>22</sup> The Constitutional Court reaffirmed that the South African government has a duty under international law to prohibit any form of discrimination against women that impairs their enjoyment of fundamental rights and freedoms, and a duty to take reasonable measures to prevent the violation of their rights.<sup>23</sup>

In South Africa, international law is adopted and internalised through sections 231, 232 and 233 of the Constitution.

### **3 ABUSE AGAINST WOMEN IN INTIMATE RELATIONSHIPS AND ITS PERVASIVE NATURE**

According to a report published on 9 March 2021 by the World Health Organisation (WHO) on the prevalence of women's violence globally, one in

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<sup>16</sup> CEDAW Committee *General Recommendation No. 35: Violence Against Women* (67<sup>th</sup> Session, 2017) par 27–45.

<sup>17</sup> CEDAW Committee *General Recommendation No. 35* par 54.

<sup>18</sup> UN General Assembly *Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women: Resolution A/RES/52/86* Adopted: 12/12/1997; EIF: 02/02/1998 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/764/59/IMG/N9876459.pdf?OpenElement> (accessed 2021-05-31) 4.

<sup>19</sup> *Ibid.*

<sup>20</sup> Parker 2020 *Acta Juridica* 289.

<sup>21</sup> *Ibid.*

<sup>22</sup> *S v Baloyi supra* par 13.

<sup>23</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) par 62.

three women has experienced violence at least once in their lifetime.<sup>24</sup> Globally, nearly one-third of women between the ages of 15 and 49 reports being physically or sexually abused by their intimate partners.<sup>25</sup> A lifetime prevalence estimate of intimate partner violence varies from 20 per cent in the Western Pacific, to 22 per cent in high-income countries and Europe, 25 per cent in the WHO regions of the Americas, 33 per cent in the WHO African region, 31 per cent in the WHO Eastern Mediterranean region, and 33 per cent in the WHO South-East Asia region.<sup>26</sup> Most intimate partner and sexual violence is perpetrated by men against women.<sup>27</sup> Within the first half of 2020, the police received 21 203 reports of domestic violence in South Africa.<sup>28</sup> In South Africa, one report states that men inflict most GBV on women and girls owing to unequal power distribution between women and men.<sup>29</sup> As a result of gender discrimination and lower socio-economic status, women have fewer options and resources available to escape abusive situations and seek justice.<sup>30</sup>

The Constitutional Court has acknowledged that the effects of family violence can be devastating physically, emotionally, spiritually and financially.<sup>31</sup> Violence against women has significant short-term, medium-term and long-term impacts on women's physical and mental health, and on their wellbeing.<sup>32</sup> Among the long-term effects of violence are blindness, impaired hearing, paralysis, amputation and crippling.<sup>33</sup> Numerous studies indicate that battered women experience difficulties like depression and post-traumatic stress disorder.<sup>34</sup> A growing body of research documents how intimate partner abuse negatively impacts abused women's reproductive health.<sup>35</sup> Several studies have concluded that constant maltreatment causes miscarriages, unwanted pregnancies, abortions, premature births and foetal abnormalities.<sup>36</sup> Long after physical abuse has stopped, its effects persist.<sup>37</sup> It is common for psychological abuse to accompany physical violence in

<sup>24</sup> World Health Organisation "Violence Against Women" (9 March 2021) <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> (accessed 2021-04-15).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> ENCA "Over 21,000 Domestic Violence Cases Reported This Year: Cele" (1 September 2020) <https://www.enca.com/news/over-21000-domestic-violence-cases-reported-cele> (accessed 2021-08-31).

<sup>29</sup> KPMG Human and Social Services <https://home.kpmg/za/en/home/insights/2014/09/too-costly-to-ignore.html>.

<sup>30</sup> *Ibid.*

<sup>31</sup> *S v Baloyi supra* par 11.

<sup>32</sup> WHO <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

<sup>33</sup> Damon *Factors Underlying Women's Decision not to Report Physical Abuse: A Qualitative Exploration* (master's thesis, Stellenbosch University) 2003 11.

<sup>34</sup> Slabbert *The Experience of Low-Income Female Survivors of Domestic Violence* (doctoral thesis, Stellenbosch University) 2010 32.

<sup>35</sup> Damon *Factors Underlying Women's Decision not to Report Physical Abuse* 11.

<sup>36</sup> *Ibid.*

<sup>37</sup> Felletti, Andra, Nordenberg, Williamson, Spitz, Koss and Marks "Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults" 1998 14(4) *American Journal of Preventive Medicine* 99 107.

intimate partner relationships.<sup>38</sup> As a result of the constant fear of physical exploitation, women end up feeling emotionally numb.<sup>39</sup> Even after the abuse has stopped, survivors experience feelings of worthlessness and think they are both deserving of and are blamed for the abuse.<sup>40</sup> Those who have experienced intimate partner abuse believe there is no way out of the situation; they feel helpless, powerless and defenceless.<sup>41</sup> Women are less likely to leave violent partners when they lack access to income and employment.<sup>42</sup> The feeling of helplessness often results in survivors not reporting the abuse. When women report abuse or sexual offences, they occasionally encounter prejudice and get unhelpful responses from staff members in various sectors (including legal, health, social and criminal justice).<sup>43</sup> The stigma of family and society, survivors' fears, and the complexity of criminal justice systems contribute to women not reporting crimes.<sup>44</sup> All these challenges frequently discourage women from reporting crimes or asking for more help.<sup>45</sup> In addition, victims of domestic violence who do not receive adequate support from police, prosecutors and judges also have difficulties navigating the criminal justice system.<sup>46</sup> Previous studies estimate that many cases of violence against women go unreported.<sup>47</sup> Ineffective criminal justice systems exacerbate the victims' subordination and helplessness that is due to family violence.<sup>48</sup> Thus, providing women with psychological and legal information helps them make informed decisions about their futures.<sup>49</sup>

The abuse of women also has severe social and economic consequences for countries and societies.<sup>50</sup> As a hidden, repetitive act, domestic violence has massive repercussions on society and, specifically, on families.<sup>51</sup> Violence in families negatively affects women and all family members, especially children who learn from violent behaviour that physical violence can be an acceptable means of coping with problems or gaining control over others.<sup>52</sup>

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<sup>38</sup> Campbell and Soeken "Forced Sex and Intimate Partner Violence: Effects on Women and Women's Health" 1999 5(9) *Violence Against Women* 95 99.

<sup>39</sup> Damon *Factors Underlying Women's Decision not to Report Physical Abuse* 12.

<sup>40</sup> Damon *Factors Underlying Women's Decision not to Report Physical Abuse* 13.

<sup>41</sup> Damon *Factors Underlying Women's Decision not to Report Physical Abuse* 12.

<sup>42</sup> Goldblatt "Violence Against Women in South Africa: Constitutional Responses and Opportunities" (March 2018) [https://www.researchgate.net/publication/326682166\\_Violence\\_against\\_women\\_in\\_South\\_Africa\\_Constitutional\\_Responses\\_and\\_Opportunities](https://www.researchgate.net/publication/326682166_Violence_against_women_in_South_Africa_Constitutional_Responses_and_Opportunities) (accessed 2021-05-18) 3.

<sup>43</sup> Parker 2020 *Acta Juridica* 301.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Lippman "Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence" 2012 76(3) *Albany Law Review* 1417 1422.

<sup>47</sup> Parker 2020 *Acta Juridica* 298.

<sup>48</sup> *S v Baloyi supra* par 12.

<sup>49</sup> Parker 2020 *Acta Juridica* 301.

<sup>50</sup> WHO <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

<sup>51</sup> *S v Baloyi supra* par 1.

<sup>52</sup> *Ibid.*

Owing to the widespread reporting of violence against women, including high-profile cases like Anene Booysen's rape and murder, and Reeva Steenkamp's murder, South African society has become accustomed to hearing about it. There have been renewed calls for the government to take a decisive stand against the crimes of murder and rape, including those of Karabo Mokoena, Uyinene Mrwetyana, Meghan Cremer, Leighandre Jegels, Courtney Pieters and Janika Mallo in recent years.<sup>53</sup>

The fight against violence against women in South Africa is fraught with many challenges. Not many of the domestic violence cases reported to the South African Police Services (SAPS) eventually get finality through court processes.<sup>54</sup> There could be several reasons for this. It is possible that the legislative measures in place do not serve adequately in bringing to justice those who have committed domestic violence.<sup>55</sup> From the perspective of victims, the law may also not be strong enough to protect them against the resurgence of violence by the perpetrators after they report the matter to SAPS for the first time.<sup>56</sup> Owing to the ineffectiveness of the criminal justice system in dealing with family violence, victims often feel subordinated and helpless.<sup>57</sup> The inefficiencies within the criminal justice system have also been documented in the courts. An example of deficiencies within the criminal justice system is evident from *Naidoo v Minister of Police*,<sup>58</sup> a case in which a survivor of domestic violence went to open a case of assault against her husband.<sup>59</sup> The police informed her that before they could help her, she must apply for a protection order in terms of the Domestic Violence Act.<sup>60</sup> At the magistrates' courts, she was told that a protection order is not a prerequisite for registering a domestic violence charge with the police.<sup>61</sup> When the survivor returned, the police officer advised her to settle the matter. When the survivor insisted on registering a domestic violence case, the police officer who was assisting her threatened that the husband could register a counter-charge. After Mrs Naidoo insisted on laying a charge, the husband (on the advice of the police officer) laid a charge against Mrs Naidoo, and she was also arrested.<sup>62</sup> The Supreme Court of Appeal criticised the police officer handling Mrs Naidoo's complaint.<sup>63</sup> The court held that the police's actions against Mrs Naidoo were negligent, and her arrest was unlawful.<sup>64</sup>

<sup>53</sup> Barkley "A Crisis of Violence Against Women: Has South Africa Fulfilled Its Obligations in Terms of the Convention on the Elimination of All Forms of Discrimination Against Women?" 2020 *Acta Juridica* 165 167.

<sup>54</sup> Goldblatt in Dixon and Roux (eds) *Constitutional Triumphs, Constitutional Disappointments* 141–3.

<sup>55</sup> Goldblatt <https://www.researchgate.net/publication/326682166>.

<sup>56</sup> *Ibid.*

<sup>57</sup> *S v Baloyi supra* par 12.

<sup>58</sup> [2015] 4 All SA 609 (SCA).

<sup>59</sup> *Naidoo v Minister of Police supra* par 2.

<sup>60</sup> 116 of 1998; *Naidoo v Minister of Police supra* par 2.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Naidoo v Minister of Police supra* par 42.

<sup>63</sup> *Naidoo v Minister of Police supra* par 43.

<sup>64</sup> *Naidoo v Minister of Police supra* par 56.

The ineffectiveness of the criminal justice system, moreover, tells the whole society that the daily trauma faced by a significant number of women does not matter much.<sup>65</sup> According to Burman, the enormity of domestic violence and its adverse effects on victims and society require extraordinary, (even revolutionary) measures to prevent further abuse.<sup>66</sup>

#### 4 CONSTITUTIONAL PROTECTION OF WOMEN FROM ABUSE

The protection of women from all forms of violence does not stem from emotional sympathy; rather, such protection is constitutionally entrenched and is based on human values. The Constitution offers various forms of security to all people who live in the Republic of South Africa. The Constitution further sets itself as the ultimate standard on how everyone must be treated and entrenches itself as the supreme law of the land.<sup>67</sup> The various rights afforded in relation to protecting women from violence include rights to dignity and life, the right to be free from all forms of violence, and the right to bodily integrity.<sup>68</sup> The right to dignity envisions that individuals should not just be used as instruments of others' wills, as respect for their intrinsic worth is implied.<sup>69</sup> The right to dignity entails that women be viewed and appreciated in their concrete reality and be respected for what they represent in their family and personal lives. Section 10 also entails that women have the right to protect their dignity, which implies they have a right to claim protection from the State from having their dignity impaired by others.<sup>70</sup> Referring to the right to life, O'Regan J in *S v Makwanyane*<sup>71</sup> explained that without dignity (which goes beyond mere existence) human lives are substantially diminished.<sup>72</sup> The right to life includes the right to be treated as an individual with dignity.<sup>73</sup> A person's right to freedom and security consists of being free from all forms of violence.<sup>74</sup>

According to the Constitutional Court, the right to be free from all forms of violence means there is a direct obligation on the State to protect victims of domestic or private violence.<sup>75</sup> In other words, in section 12(1)(c), the State must protect the individual's rights by not invading those rights and by taking steps to prevent the rights' invasions. Although private citizens may be entitled to remain passive when there is a threat to other citizens' rights, the South African government has a positive duty to protect the rights enshrined

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<sup>65</sup> *Ibid.*

<sup>66</sup> Burman "Prevention of Family Violence Act: Criticism Misses the Point" 1994 *De Rebus* 317.

<sup>67</sup> S 2 of the Constitution.

<sup>68</sup> Ss 10, 11 and 12 of the Constitution.

<sup>69</sup> Schackter "Human Dignity as a Normative Concept" 1983 (77) *AJIL* 848.

<sup>70</sup> Haysom "Dignity" in *South African Constitutional Law: The Bill of Rights* (2005) 17.

<sup>71</sup> 1995 (6) BCLR 665 (CC).

<sup>72</sup> *S v Makwanyane supra* par 327.

<sup>73</sup> *Ibid.*

<sup>74</sup> S 12(1)(c) of the Constitution.

<sup>75</sup> *S v Baloyi supra* par 11.

in the Bill of Rights.<sup>76</sup> The Supreme Court of Appeal (SCA) has reaffirmed that where there is a potential threat to any of the constitutionally protected rights to human dignity, life or security of the person, the State (represented by its officials) has a constitutional duty to protect them.<sup>77</sup> In *Van Eeden v Minister of Safety and Security*,<sup>78</sup> the court held that certain police officers who had information that adversely affected a person's fitness to possess firearms had a legal duty to take reasonable steps to prevent harm to the public.<sup>79</sup> In like manner, the police should disclose the information about the person being inquired about to the potential victim of abuse. In the interests of protection, legislation must allow possible victims of abuse to access criminal history information about their potential abusers. As indicated in *Minister of Safety and Security v Van Duivenboden*,<sup>80</sup> police disclosure of information that prevents harm to the public enhances rather than impedes efficient police functioning.<sup>81</sup> Thus, the State has to develop preventative mechanisms to see the realisation of rights enshrined in the Constitution to prevent violence against women.

## 5 CURRENT POSITION

There are currently two ways in which a person can seek information on a potential abuser's criminal history.

The first is through section 11 of the Promotion of Access to Information Act (PAIA).<sup>82</sup> Section 11 provides that public bodies, including the South African Police Service community service centres, must give a requester access to public records, provided that the requester complies with the procedural requirements, and that access is not prohibited in terms of Chapter 4 of PAIA.<sup>83</sup> Section 34 of PAIA further provides that information about third parties may not be withheld if the person has been warned that the information would be made available to the public. It is argued in this article that this provision of PAIA allows the police to make available, on request by a potential survivor, information that they have on a potential abuser regarding the latter's previous criminal history. Such information could assist the requester in understanding how to exercise her rights. Thus, women can apply to the police to access information, provided they can show that the access to the information will enable them to access their rights. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*, the court held:

"Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an

<sup>76</sup> *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) par 14.

<sup>77</sup> *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA) par 22.

<sup>78</sup> *Supra*.

<sup>79</sup> *Van Eeden v Minister of Safety and Security supra* par 18.

<sup>80</sup> *Supra*.

<sup>81</sup> *Minister of Safety and Security v Van Duivenboden supra* par 21.

<sup>82</sup> 2 of 2000.

<sup>83</sup> S 11(1)(a) and (b) of PAIA.

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applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information will assist him in exercising or protecting that right.”<sup>84</sup>

The problem with the first approach is that it may end up being costly and prolonged should the likely victim experience resistance from public officials in accessing information on the potential abuser. Speedy access to the information assists as domestic violence victims are most at risk of further and more severe violence immediately after attempting to obtain assistance.<sup>85</sup>

The second approach for potential survivors to accessing information is indirectly through section 271 of the Criminal Procedure Act.<sup>86</sup> Section 271 provides that, after an accused person has been convicted of an offence and before sentence, the state prosecutor may prove the previous convictions of such an accused person. There are various challenges for a potential abuse survivor taking this route. First, an accused must first be convicted before the previous convictions may be read to the court in a public court (in which the potential abuse victim would have to be present).<sup>87</sup> Secondly, the prosecutor has a discretion whether to prove an accused person’s previous convictions.<sup>88</sup> Another challenge with this option is that only an accused’s previous convictions are mentioned in court and these do not include prior arrests and charges on which the accused was acquitted.<sup>89</sup>

Both options mentioned offer women a limited preventative mechanism in the form of accessing information through police stations. South Africa needs a more efficient and structured approach as a preventative mechanism to ensure women’s right to freedom from violence. Such a mechanism is available in other jurisdictions such as the United Kingdom (UK) and the United States of America (USA).

## **6 CLARE’S LAW IN THE UK, CANADA AND THE USA**

Over the years, the UK (in England and Wales) has introduced a policy scheme known as Clare’s Law, or the Domestic Violence Disclosure Scheme (DVDS).<sup>90</sup> The DVDS came after the high-profile case of Clare Wood, who was murdered by her ex-boyfriend.<sup>91</sup> By sharing public protection information, the DVDS prevents the escalation of violence or its

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<sup>84</sup> 2001 (10) BCLR 1026 (SCA) par 28.

<sup>85</sup> Meintjes van der Walt “Domestic Violence” in *Family Law Service* (2021) M18.

<sup>86</sup> 51 of 1977.

<sup>87</sup> S 271(1) of the Criminal Procedure Act 51 of 1977.

<sup>88</sup> *S v Maphaha* 1980 (1) SA 177 (V) 295.

<sup>89</sup> *S v Khambule* 1991 (2) SACR 277 (W) 283.

<sup>90</sup> Policy Paper “Domestic Violence Disclosure Scheme Factsheet” (undated) <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet> (accessed 2021-08-18).

<sup>91</sup> Fitz-Gibbon and Walklate, “The Efficacy of Clare’s Law in Domestic Violence Law Reform in England and Wales” 2017 17 *Criminology & Criminal Justice* 284 286.

outbreak in relationships.<sup>92</sup> Clare's Law is founded on two fundamental rights: the right to ask and the right to know. Any member of the public seeking information about an individual's history of domestic violence can apply to the police for that information. The right to know refers to a situation where the police pre-emptively request information to protect a potentially high-risk victim from harm by their partner. In the first calendar year of a trial operation of the DVDS (8 March 2014 to 31 December 2014), 4 724 applications were received, and 1 938 disclosures were made nationally.<sup>93</sup> Since its introduction, the DVDS has only existed as a policy and has never been incorporated into legislation. In the year 2020, the UK Parliament tried to introduce the DVDS through legislation. Clause 64 of the Domestic Abuse Bill incorporates into law the existing DVDS as proposed at the time.<sup>94</sup> However, such a clause never made it into law under the current Domestic Abuse Act in the UK.<sup>95</sup> The UK government's decision not to include the DVDS in the Domestic Abuse Act has received a negative response from the public.<sup>96</sup>

Clare's Law has been mirrored in Canada and Australia. Clare's Law legislation in Canada empowers police to inform a current or former partner, or a third party such as a parent, about someone's history of intimate partner violence.<sup>97</sup> There is a similar DVDS in South Australia. The DVDS in South Australia provides an avenue for a person at risk of domestic violence to access information about their partner or former partner and make decisions about their safety and the future of their relationship.<sup>98</sup> In all the jurisdictions discussed above, the police only disclose recorded information that is relevant to the individual at risk. Also, the police share the data on a person's history of violence directly with the affected person or potential victim.<sup>99</sup>

There is currently no national piece of legislation in the USA that provides for a domestic violence registry. Over the last several years, some US states (including Connecticut, Georgia, Hawaii, Kansas, Kentucky, Mississippi,

<sup>92</sup> Grace "Clare's Law, or the National Domestic Violence Disclosure Scheme: The Contested Legalities of Criminality Information Sharing" 2015 79(1) *Journal of Criminal Law* 36 37.

<sup>93</sup> Fitz-Gibbon and Walklate 2017 *Criminology & Criminal Justice* 290.

<sup>94</sup> The Guardian "Anger as Tory MPs Vote Against Register for Stalkers and Domestic Abusers" (16 April 2021) <https://www.theguardian.com/society/2021/apr/16/anger-tory-mps-vote-against-register-stalkers-domestic-abusers> (accessed 2021-08-18).

<sup>95</sup> Home Office "Domestic Violence Disclosure Scheme (DVDS) Guidance" (December 2016) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575361/DVDS\\_guidance\\_FINAL\\_v3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf) (accessed 2021-08-18) 3.

<sup>96</sup> The Guardian <https://www.theguardian.com/society/2021/apr/16/anger-tory-mps-vote-against-register-stalkers-domestic-abusers>.

<sup>97</sup> Government of Canada "RCMP Can Now Participate in Clare's Law Legislation in Saskatchewan and Alberta" (31 March 2021) <https://www.canada.ca/en/public-safety-canada/news/2021/03/rcmp-can-now-participate-in-clares-law-legislation-in-saskatchewan-and-alberta.html> (accessed 2021-08-18).

<sup>98</sup> South Australia Police "Domestic Violence Disclosure" <https://www.police.sa.gov.au/your-safety/dvds> (accessed 2021-08-18).

<sup>99</sup> South Australia Government "Make a Domestic Violence Disclosure Request" (30 November 2021) <https://www.sa.gov.au/topics/family-and-community/safety-and-health/domestic-violence-and-sexual-assault/make-a-domestic-violence-disclosure-request> (accessed 2021-08-18).

Nevada and Texas) have introduced legislation to create a domestic abuser registry.<sup>100</sup> No such national legislation passed as of yet. The Kansas Bureau of Investigation has developed an online offender registry search form, which is not state-run, but allows individuals to search for a specific offender by providing certain details.<sup>101</sup>

New York City has enacted the Family Protection and Domestic Violence Intervention Act.<sup>102</sup> The legislation creates a form for reporting domestic incidents, which has improved police reporting and tracking.<sup>103</sup> As a result of the Family Protection and Domestic Violence Intervention Act, a state-wide computerised registry of all protection orders has been established and maintained.<sup>104</sup> As part of the 2011 update to the registry, New York State created a Domestic Incident Report Repository that allows law enforcement officials to search for information on domestic violence incidents in different jurisdictions regardless of which police agency responded to the call.<sup>105</sup> The repository enhances both victim and officer safety by enabling law enforcement and other authorised users to search domestic incident reports submitted by agencies in the 57 counties outside of New York City.<sup>106</sup>

Prosecutors also benefit from the repository, as searches of the database can uncover patterns of behaviour that would otherwise have gone unnoticed, helping to build stronger cases that result in stiffer penalties.<sup>107</sup>

The National Domestic Violence Registry, a non-profit organisation, is the first database of domestic violence convictions available to the public in the USA.<sup>108</sup> The non-profit organisation administering the registry is privately run and funded. In addition to listing names of offenders who have been found guilty in a court of law, it claims to verify all submissions and documents received.<sup>109</sup> The National Domestic Violence Registry houses criminal records of those found guilty of offences related to domestic violence, such as physical battering, stalking, imprisonment, intimidation, strangulation and sex crimes.<sup>110</sup>

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<sup>100</sup> Virginia State Crime Commission "Domestic Abuser Registry" (undated) <http://vscc.virginia.gov/documents/Domestic%20Abuser%20Registry.pdf> (accessed 2021-08-05).

<sup>100</sup> Fox News "Why There Is No National Domestic Assault Offender Registry – Yet" (30 November 2019) <https://www.foxnews.com/us/national-domestic-assault-offender-registry-nicole-montalvo> (accessed 2021-08-31).

<sup>101</sup> Virginia State Crime Commission <http://vscc.virginia.gov/documents/Domestic%20Abuser%20Registry.pdf>.

<sup>102</sup> Family Protection and Domestic Violence Intervention Act of 1994 ch 222, 1994 NY Laws 2704.

<sup>103</sup> Lippman 2012 *Albany Law Review* 1417 1425.

<sup>104</sup> *Ibid.*

<sup>105</sup> Jmaloni "State Announces New Domestic Incident Report Repository" (2011-12-30) *Niagra Frontia Publications* 1.

<sup>106</sup> Lippman 2012 *Albany Law Review* 1417 1425.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Fox News <https://www.foxnews.com/us/national-domestic-assault-offender-registry-nicole-montalvo>.

<sup>110</sup> Lippman 2012 *Albany Law Review* 1417 1425.

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## 7 THE NATIONAL INSTRUCTION AND THE DOMESTIC VIOLENCE AMENDMENT ACT

### 7.1 National Instruction<sup>111</sup>

The Preamble to the Domestic Violence Act (DVA)<sup>112</sup> acknowledges that victims of domestic violence are among the most vulnerable in society. The South African Law Commission Research Paper on Domestic Violence, which led to the DVA, noted that domestic violence is a complex phenomenon.<sup>113</sup> The Research Paper also pointed out that the ills associated with domestic violence cannot be solved solely by legislative reforms.<sup>114</sup> However, whenever victims of domestic abuse seek protection from the law, the response must be effective and efficient.<sup>115</sup> Therefore, the country must have a mechanism that allows women to enquire about the criminal history of their potential abusers. The DVA must be amended to provide provisions similar to Clare's Law and the National Domestic Violence Registry.

The provisions of the National Instruction of the Domestic Violence Regulations are the closest that South Africa has come to the examples mentioned in the preceding paragraphs. The National Instruction requires police officers to keep a register of domestic violence incidents reported in each police station.<sup>116</sup> The National Instruction further entails that, where a protection order has been granted, a copy of such order must be forwarded to a police station of the complainant's choice.<sup>117</sup> The author argues that the legislature can further develop the mandate in the National Instruction to provide for an electronic register. Such an electronic repository must be accessible and in sync with all the SAPS community service centres throughout the country. This way, survivors of abuse can easily access the information wherever they are in the republic.

### 7.2 The Domestic Violence Amendment Act<sup>118</sup>

The Domestic Violence Amendment Act (DVAA) introduced an electronic repository for the court's domestic violence orders for the first time.<sup>119</sup> Section 6A seeks, among other things, to introduce an integrated electronic repository for domestic violence protection orders and related matters.<sup>120</sup> The repository aims to migrate from the paper-based system to an electronic system for managing the protection orders issued in terms of sections 5 and

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<sup>111</sup> National Instruction 7/1999 in GG 20778 of 1999-12-30.

<sup>112</sup> 116 of 1998.

<sup>113</sup> South African Law Commission "Research Paper on Domestic Violence" (April 1999) 2.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> National Instruction 7/1999 in GG 20778 of 1999-12-30.

<sup>117</sup> *Ibid.*

<sup>118</sup> 14 of 2021.

<sup>119</sup> S 6A of the DVA, as amended.

<sup>120</sup> *Ibid.*

6 of the DVA.<sup>121</sup> In terms of section 6A(2)(a), the Director-General of the Department of Justice and Constitutional Development must designate a person responsible for administering the electronic repository.<sup>122</sup> The DVAA further provided that the repository's administrator and the Information Regulator, established in section 39 of the Protection of Personal Information Act,<sup>123</sup> must issue directives for various purposes.<sup>124</sup> The directives must, among other things, provide for the persons allowed to access the electronic repository.<sup>125</sup> To ensure that the electronic repository is in line with the right to freedom from all forms of violence, it is submitted that it should provide access to potential victims of violence. Such access will also enhance preventative responses in the fight against the abuse of women.

The integrated electronic repository created by the DVAA must be accessible to the South African Police Service community service centres. The community service centres operate 24 hours daily, assisting those who need information throughout the day. In a judgment issued by the Constitutional Court, the court reaffirmed the importance of SAPS as a primary agency to protect the public, including women and children, against sexual abuse and violence.<sup>126</sup> Recent court decisions have noted that the constitutional right to be free from violence requires the police to act proactively to prevent violent crime.<sup>127</sup>

A proportionality test should be applied to ensure that the register proposed in this article will be in line with constitutional values. The proportionality test should assist in deciding whether a person may be permitted to access the information in the register. Jamie Grace suggests that, in considering a proportionate disclosure under the register, the police should look to establish that:

- a) interference with the rights of a person enquired about as an (alleged) perpetrator of domestic violence is sufficiently important to justify interfering with his rights;
- b) there is a rational connection between the purpose of the proposed information sharing and the purpose of the powers of the police (common law or statutory) in disclosing information;
- c) wherever possible, interference with the rights of the person enquired about is minimal; and lastly
- d) a balancing exercise has been conducted, weighing the rights of the person enquired about and the rights of the (potential) victim.<sup>128</sup>

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<sup>121</sup> *Ibid.*

<sup>122</sup> S 6A(1) and (2)(a) of the DVA, as amended.

<sup>123</sup> 4 of 2013.

<sup>124</sup> S 6A(3) of the DVA, as amended.

<sup>125</sup> S 6A(3)(d) of the DVA, as amended.

<sup>126</sup> *Carmichele v Minister of Safety and Security supra* par 62.

<sup>127</sup> *Van Eeden v Minister of Safety and Security supra* par 18.

<sup>128</sup> Grace 2015 *Journal of Criminal Law* 42.

Existing laws (such as common law crimes of perjury and defeating the ends of justice) may assist in punishing those who abuse the processes established to protect the potential victims of violence.

## **8 ACCESS TO INFORMATION AND THE PROTECTION OF PERSONAL INFORMATION ACT**

The purpose of the Protection of Personal Information Act (POPIA),<sup>129</sup> among others, is to safeguard personal information when a responsible party processes such information.<sup>130</sup> The protection afforded by POPIA elaborates on section 14 of the Constitution, which guarantees everyone the right to privacy. However, according to the Constitutional Court, privacy does not concern anything outside the inner sanctum of a person, such as their family life, sexual preferences, and home environment, which are protected from erosion by conflicting community rights.<sup>131</sup> The right to privacy becomes more susceptible to limitations when one moves from the protected environment into the criminal justice system. It is in the latter system that an abuser has been found guilty of contravening the law. Such a perpetrator does not enjoy an unfettered right to privacy, and the right can be limited if the limitation is within the confines of the Constitution. The Constitution does allow for the restriction of a right.<sup>132</sup> The right to privacy can be limited, provided the limitation is justifiable and reasonable.<sup>133</sup>

In certain circumstances, it is possible to access personal information that is protected by POPIA. The personal information referred to in POPIA includes the personal data of a natural person relating to their criminal history.<sup>134</sup> POPIA gives authority to process personal information provided it is in pursuit of the legitimate interests of a third party to whom the information is supplied.<sup>135</sup> It is argued here that giving potential victims of abuse access to relevant information is not in conflict with the Constitution or POPIA. Section 36 of the Constitution can be used by the legislature to allow a limitation on the potential abuser's right to privacy. As a result of a limitation clause, there must be two stages of analysis.<sup>136</sup> As a first step, one must determine if the right in question has been infringed.<sup>137</sup> Secondly, it is necessary to determine if an infringement of that right can be justified as a legitimate limitation of that right.<sup>138</sup> Constitutional rights may also be limited in a democratic society where it is reasonable and necessary (as per the

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<sup>129</sup> 4 of 2013.

<sup>130</sup> S 2 of POPIA.

<sup>131</sup> *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC) par 67.

<sup>132</sup> S 36 of the Constitution.

<sup>133</sup> *Ibid.*

<sup>134</sup> S 1 of POPIA.

<sup>135</sup> S 11 of POPIA.

<sup>136</sup> *S v Zuma* 1995 (4) BCLR 401 (CC) 414.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

limitation clause in the Interim Constitution of South Africa) after weighing competing values and assessing proportionality.<sup>139</sup>

However, the courts must interpret a legislative provision that violates a potential abuser's constitutional rights in the least restrictive way.<sup>140</sup>

## 9 OBJECTIONS TO THE REGISTER FOR DOMESTIC ABUSERS

Across the world, objections have been made to the creation of a register of domestic violence abusers. The subsequent paragraphs only refer to a few of the objections. Those who are against maintaining a register for domestic violence offenders have always argued that access to information as a preventative measure creates a false sense of security.<sup>141</sup> The argument goes that it is impossible for registries to indicate accurately the number of abusive individuals who may pose a danger to others since only a small percentage of those who violate the law enter the criminal justice system.<sup>142</sup> Another argument is that a solution such as creating a register for domestic abusers is a simple response to a complex situation of domestic violence toward women. Opponents of a domestic abuser register argue that it ignores the fact that many victims are killed by abusive partners when they leave abusive relationships or after leaving them.<sup>143</sup> While the arguments against a domestic abuser register may be reasonable, the absence of such registers also does not solve the problem. Many women, when seeking information on a potential abuser, may decide to get assistance from third parties based on the police's advice. Some women do not want the criminal justice system route and avoid litigation in the domestic violence courts by any means possible. Having access to information may help them to decide to save themselves from potential abuse and the potential of dragging the relationship through the law courts in the future.

The register also has the potential to encourage victims to report such cases so that more perpetrators' names are in the system. This potential will depend on the effectiveness of the register once it is in place. Another argument is that if abusers' names are in a public registry, they might retaliate against the victims.<sup>144</sup> To date, there has been no conclusive proof that perpetrators listed on these registers have retaliated against the innocent victims who made them appear on the registers.

<sup>139</sup> *S v Makwanyane* 1995 3 SA 391 (CC) par 104.

<sup>140</sup> *South African Transport and Allied Workers Union (SATAWU) v Moloto NO* 2012 (11) BCLR 1177 (CC) 43.

<sup>141</sup> National Network to End Domestic Violence "Potential Unintended Consequences of Domestic Violence Offender Registries" (undated) [https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/5bfec2b3aa4a995f459c926e/1543430836088/OffenderRegistries\\_2016\\_access.pdf](https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/5bfec2b3aa4a995f459c926e/1543430836088/OffenderRegistries_2016_access.pdf) (accessed 2021-08-21).

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

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## 10 CONCLUSION

South Africa has a severe problem of violence directed at women. Violence against women is a complex phenomenon and cannot be solved solely by legislative reforms. For the country to combat this scourge against women effectively, it must find innovative, effective preventative methods. This could include amending existing laws further. The National Instruction must be amended to provide an electronic incident repository similar to that of New York State. The S6A(3) directives should make the electronic register accessible to the police, which will facilitate the implementation of a system similar to Clare's Law. Whenever victims of domestic abuse seek protection from the law, the response must be effective and efficient. The response must seek to prevent the violation of constitutional rights. As agents of the State, the police must protect the public from acts of criminal activity, including the violation of constitutional rights. One possible way of protecting women against abuse is to create a channel that allows potential victims of violence to access information about potential abusers. The existing mechanisms prevent potential victims from accessing such information speedily and in a cost-effective manner. Thus, a speedier, more reliable process is needed. It is important for potential abuse victims to be able to access historical contraventions of the DVA by abusers. This article, therefore, suggests that South Africa should enact legislative measures that make an abuser's historical contraventions of the DVA accessible.