

NOWHERE TO RUN, NOWHERE TO HIDE:  
THE ABSENCE OF PUBLIC POLICY ON INTIMATE  
PARTNER VIOLENCE ABROGATES THE RIGHTS TO  
HEALTH CARE AND BODILY INTEGRITY UNDER  
THE SOUTH AFRICAN CONSTITUTION

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ABSTRACT

*An estimated 31-55% of South African women experience lifetime intimate partner violence (“IPV”). The imminent danger of physical, psychological or sexual violence that all South African women face daily not only threatens their very existence, it impairs their development and agency, and thus the ability of each woman to pursue a life that reflects her own comprehensive vision of a fulfilling way of being in the world. This article first establishes the legal basis for the proposition that the South African Constitution and South Africa’s international obligations require a form of public intervention that has the ability to diminish IPV. The article then provides the factual predicate of our argument: (1) the nature and the extent of IPV; and (2) a lacuna in extant law that disables the state from properly attending to IPV. Given the absence of any law, policy or protocol that engages intimate partner violence, the article concludes that the state has failed to discharge its constitutional obligations under section 12 (the right of freedom and security of the person), section 27 (the right of access to health care services) and section 7(2) (the general duty of the state to respect, protect, promote, and fulfill the entire Bill of Rights), and South Africa’s international obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women. Read together, and in light of the factual predicate, these rights and duties support two important findings. First, several constitutional infirmities exist, including the failure of the state to create a coordinated and comprehensive plan that technically and feasibly addresses IPV. Second, any comprehensive and coordinated plan must recognize that public health care practitioners play a critical role in the treatment of and the protection of women subject to IPV, and that these practitioners must receive adequate training and funding in order to deal with this crisis in an effective manner.*

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## INTRODUCTION

This article addresses the following complex quandary. First, nurses in public health facilities are confronted daily with patients who present with illnesses and injuries caused by intimate partner violence (“IPV”) in South Africa. The accepted definition of IPV is physical, sexual, or psychological abuse, attempted or completed, by a current or former partner.<sup>1</sup> An estimated 31-55% of South African

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<sup>1</sup> WORLD HEALTH ORG., RESPONDING TO INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE AGAINST WOMEN: WHO CLINICAL AND POLICY GUIDELINES, at vii (2013), [http://apps.who.int/iris/bitstream/10665/85240/1/9789241548595\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/85240/1/9789241548595_eng.pdf) [hereinafter WHO CLINICAL & POLICY GUIDELINES].

women routinely experience such violence.<sup>2</sup> Second, no plan, policy, or law exists to guide nurses and other health professionals as to how women who have experienced IPV ought to be treated within the South African public health system. Third, IPV constitutes one of the greatest obstacles to South African women's health, well-being, and human development.

Novel constitutional arguments rarely carry the day. As in most legal jurisdictions, South African courts are inevitably more comfortable working with their own precedents than they are in creating innovative, and perhaps controversial, forms of relief. Claims resting, in large part, on an abrogation of one of the South African Constitution's ("Final Constitution" or "FC") socio-economic rights<sup>3</sup> prove particularly difficult to vindicate. The state's response (through law and policy) to pernicious socio-economic problems usually requires no more than a "showing" that the various arms of the state have produced, and acted upon, a progressively realizable, comprehensive and coordinated plan that meets the relatively low standard of reasonableness. Nevertheless, the state must prove that it has moved beyond paper promises and begun to deliver on such a plan.

This article's argument turns, in part, on that last proposition. IPV is endemic in South Africa.<sup>4</sup> Worse still, the wholesale absence of law, policy or protocols feasibly designed to address, diminish, and ultimately eradicate IPV, strongly supports the contention that unjustifiable violations of the rights to health care services (under FC section 27)<sup>5</sup> and bodily integrity (under FC section 12)<sup>6</sup> occur on a recurring basis. In addition, the state of South Africa has failed to create conditions that ensure the full enjoyment and protection of the provisions in the Bill of Rights (under FC section 7)<sup>7</sup> and to discharge its obligations under the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").<sup>8</sup> Each of the aforementioned rights' violations and the failure to

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<sup>2</sup> Gass and others assessed exposure to intimate partner violence, health-risk, health-seeking behaviours and chronic physical illness among a sample of 1, 229 married and cohabiting women using data from the nationally representative South African Stress and Health study, finding "prevalence of reported violence was 31%." See Jesse Gass et al., *Intimate Partner Violence, Health Behaviours and Chronic Physical Illness Among South African Women*, 100 S. AFR. MED. J. 582, 582 (2010). In a study conducted by Dunkle and her colleagues, among 1,395 pregnant women in South Africa, 30% of the study participants reported being sexually or physically assaulted in the last 12 months by a male partner and 55.5% of participants reported being sexually and/or physically assaulted by a male partner at least once over the course of their lives. Kristin L. Dunkle et al., *Prevalence and Patterns of Gender-Based Violence and Revictimization Among Women Attending Antenatal Clinics in Soweto, South Africa*, 160 AM. J. EPIDEMIOLOGY 230, 230 (2004).

<sup>3</sup> S. AFR. CONST., 1996, §§ 24, 26-29 (covering rights to a healthy environment, housing, health care, water, food, social security, children's rights and education).

<sup>4</sup> HUMAN RIGHTS WATCH, *VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: THE STATE RESPONSE TO DOMESTIC VIOLENCE AND RAPE* 44 (1995).

<sup>5</sup> S. AFR. CONST., 1996, § 27.

<sup>6</sup> *Id.* § 12.

<sup>7</sup> *Id.* ch. 2 (Bill of Rights), § 7(2) ("The state must respect, protect, promote and fulfil the rights in the Bill of Rights.").

<sup>8</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

meet international obligations might, on its own, be sufficient to support a finding that the South African state has failed to discharge its negative and positive duties under South Africa's Final Constitution. The concatenation of these constitutional contraventions leaves little room for doubt.

Since the state has not satisfied its obligations under the Final Constitution or CEDAW with regard to IPV, South African plaintiffs must now place the state on notice of this lacuna in the law by seeking adequate remedies in South African courts. At a minimum, South African courts must require that the state create: (a) a coordinated and comprehensive plan to address IPV; (b) a plan that is administratively and financially feasible; and (c) a plan that immediately attends to women in "crisis" and women in most "urgent need" of care and protection.<sup>9</sup> South African health care professionals, development scholars, and public interest lawyers already have some sense of the shape of such a plan. Nurses in South African public health facilities operate as the *de facto* initial (and sometimes the *de facto* final) responders to the depredations of IPV.<sup>10</sup> They have, over time, developed an array of interventions that embrace intake assessments, treatment, and referrals to appropriate agencies that offer short-term protection.<sup>11</sup> That sounds organized. It most certainly is not. These responses, which vary across different public health settings, are generally motivated by a sense of professional obligation, the urgent need of patients, a nurse's own personal experience of IPV, and the vacuum in care and in protection created by the state itself.<sup>12</sup> Rare is the South African public health facility that will meet all the needs of women who experience IPV. That nurses have, on their own, responded to women who experience IPV only underscores the need for a well-conceived, coherent, comprehensive, coordinated, feasible, implementable, and progressively realizable set of public health laws, policies, and protocols that first address and then eradicate IPV. Until the state addresses this problem in a concrete manner, it stands in breach of a panoply of constitutional rights (FC section 12 and FC section 27), constitutional duties (FC section 7(2)) and international obligations, chiefly, CEDAW.

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<sup>9</sup> "Crisis" and "urgent need" appear and reappear in various sets of circumstances and cases, from *Blue Moonlight, 51 Olivia Road, Kyalami Ridge to Grootboom*. See *Blue Moonlight Properties 39 (Pty) Ltd*, 2012 (2) SA 104 (CC) (S. Afr.); *Occupiers of 51 Olivia Road*, 2008 (3) SA 208 (CC) (S. Afr.); *Minister of Public Works v. Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) (S. Afr.); *Government of the Republic of South Africa v. Grootboom* [2000] ZACC 19 (CC) (S. Afr.).

<sup>10</sup> See *infra* Part IV.

<sup>11</sup> Courtenay Sprague et al., *How Nurses in Johannesburg Address Intimate Partner Violence in Female Patients: Understanding IPV Responses in Low- and Middle-Income Country Health Systems*, J. INTERPERSONAL VIOLENCE 11-13 (June 19, 2015), <http://jiv.sagepub.com/content/early/2015/06/18/0886260515589929.full.pdf+html> [hereinafter *Response of Nurses in Johannesburg to IPV*]. See ABIGAIL M. HATCHER ET AL., "WILLING BUT NOT ABLE": HIGH ACCEPTABILITY OF ADDRESSING INTIMATE PARTNER VIOLENCE IN ANTENATAL CARE IS HINDERED BY PERSISTENT GAPS IN POLICY AND RESOURCES 1 (2013); Kate Joyner & Bob Mash, *A Comprehensive Model for Intimate Partner Violence in South African Primary Care: Action Research*, BMC HEALTH SERVS. RES. 1-10 (Nov. 14, 2012), <http://www.biomedcentral.com/1472-6963/12/399>.

<sup>12</sup> *Id.* at 2.

*A. Intimate Partner Violence as a Health Problem and a Threat to Women's Bodily Integrity*

What does IPV look like? Researchers around the world have identified a continuum of physical, sexual, and psychological violence perpetrated against women by their partners. They range from restrictions on freedom of movement, hitting, choking, and burning to stabbing.<sup>13</sup> What are IPV's health consequences for women? The injuries sustained by South African women, and catalogued by Human Rights Watch ("HRW"), encompass:

[F]ractures of the head, limbs, sternum and ribs, followed by scalp and facial lacerations as well as penetrating chest wounds involving the lungs. In addition to the physical injuries sustained from such abuse, battered women often develop somatic symptoms such as headaches, backaches, fatigue, abdominal and pelvic pain, recurrent vaginal infections, sleep and eating disorders, sexual dysfunctions and other signs of moderate or severe depression. In the worst cases, violence against women by their partners results in death.<sup>14</sup>

One-third of adult women around the world experience IPV;<sup>15</sup> and, IPV ranks fifteenth, in terms of years of life lost with respect to its effect on women's health and human development.<sup>16</sup> South African women's IPV prevalence ranges from 31% to 55%.<sup>17</sup> That number could be higher given the regular underreporting of this phenomenon.<sup>18</sup> Moreover, IPV tends to be cyclical.<sup>19</sup> Women—many of whom are financially dependent upon their partners—find themselves without meaningful legal recourse when subjected to this form of violence.<sup>20</sup> The systematic evidence of IPV's pernicious consequences led the World Health Organization to recognize IPV as a global public health problem.<sup>21</sup> No one doubts that IPV constitutes a domestic public health crisis in South Africa.

<sup>13</sup> David M. Buss & Joshua D. Duntley, *Intimate Partner Violence in Evolutionary Perspective*, in *THE EVOLUTION OF VIOLENCE 5* (Todd K. Shackelford & Randal D. Hansen eds., 2014).

<sup>14</sup> HUMAN RIGHTS WATCH, *supra* note 4.

<sup>15</sup> WHO CLINICAL & POLICY GUIDELINES, *supra* note 1, at 10.

<sup>16</sup> See INST. FOR HEALTH METRICS AND EVALUATION, *THE GLOBAL BURDEN OF DISEASE: GENERATING EVIDENCE, GUIDING POLICY 24* (2013).

<sup>17</sup> Dunkle et al., *supra* note 2, at 230.

<sup>18</sup> See Shanaaz Mathews et al., "So now I'm the Man": *Intimate Partner Femicide and Its Interconnections with Expressions of Masculinities in South Africa*, 55 *BRIT. J. CRIMINOLOGY* 107, 109-10 (2015).

<sup>19</sup> Claudia García-Moreno, *Dilemmas and Opportunities for an Appropriate Health-Service Response to Violence Against Women*, 359 *LANCET* 1509, 1509 (2002). For a U.S. study of national data indicating IPV recurrence, see Michael R. Rand & Linda E. Saltzman, *The Nature and Extent of Recurring Intimate Partner Violence Against Women in the United States*, 34 *J. COMP. FAM. STUD.* 137, 137-38, 140-48 (2003). For foundational research on IPV recurrence, see generally RICHARD J. GELLES, *INTIMATE VIOLENCE IN FAMILIES 1-39* (3d ed. 1997).

<sup>20</sup> See LISA VETTEN ET AL., *I HAVE A PROBLEM: WOMEN'S HELP-SEEKING IN ACORNHOEK, MPUMALANGA, TSHWARANANG LEGAL ADVOCACY CTR. TO END VIOLENCE AGAINST WOMEN RESEARCH BRIEF NO. 1*, at 5 (2009) [hereinafter TLAC RESEARCH BRIEF NO. 1].

<sup>21</sup> In 2002, the World Health Organization published the first global report on violence and health.

*B. Intimate Partner Violence as a Matter of Law in South Africa*

While nurses in public health care facilities operate as the *de facto* caretakers of women who have experienced IPV, Lady Justice herself appears blind. The wholesale absence of law or policy designed to address and to diminish intimate partner violence strongly support this article's contention that unjustifiable violations of the right to health care (under FC section 27)<sup>22</sup> and the right to bodily integrity (under FC section 12)<sup>23</sup> occur on an ongoing basis. In addition, despite the constitutional duty imposed on the state of South Africa to create conditions that will ensure the full enjoyment and the protection of the provisions in the Bill of Rights (FC section 7(2))<sup>24</sup> and the state's obligations under CEDAW,<sup>25</sup> these commitments have not been kept.

The alleged legal violations above should be sufficient to support a finding that the South African state has failed to discharge both its negative and positive duties toward women who experience IPV. A thorough demonstration that such violations continue to occur unabated is but one purpose of this article. The second purpose is to demonstrate how the blunt cudgel of the law might diminish the extent of such violence against women in South African society.

In Part I, we trace the general legal backdrop against which our contentions must be measured. In Part II, we narrow our focus and develop the legal argument that ought to be crafted so as to mitigate the deleterious consequences of IPV. In Part III and Part IV, our gaze shifts to the brutal facts of IPV in South Africa. Our purpose in these two sections is to create the factual predicate that must buttress the legal arguments to be made in a court of law (or to be placed before the apposite executive or legislative policy-maker). In Part V, we demonstrate that our major premise—the law—and our minor premise—the facts—lead ineluctably to the conclusion that the South African state must create a comprehensive and coherent programme to address and, ultimately, to eradicate intimate partner violence against women in South Africa.

I. THE LEGAL BACKDROP: THE PROTECTION THE LAW AFFORDS WOMEN SUBJECT TO INTIMATE PARTNER VIOLENCE AND ITS LIMITS

Lawyers and academics regularly complain<sup>26</sup> about the manner in which the South African courts' ostensibly cramped reading of the text of the Final

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*See generally* Etienne G. Krug et al., *The World Report on Violence and Health*, 360 LANCET 1083 (2002). The report provided evidence on the relationship between IPV and negative effects on women's health. *Id.* at 1084-87.

<sup>22</sup> S. AFR. CONST., 1996, § 27.

<sup>23</sup> *Id.* § 12.

<sup>24</sup> *Id.* ch. 2 (Bill of Rights), § 7(2) ("The state must respect, protect, promote and fulfil the rights in the Bill of Rights.").

<sup>25</sup> CEDAW, *supra* note 8.

<sup>26</sup> *See generally* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998). If academics stuck with Klare's express thesis, then we might be safe: "[t]his

Constitution diminishes the strength of socio-economic rights.<sup>27</sup> They want a hard core, if not more.<sup>28</sup> However, we work with a text that subjects socio-economic

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essay focuses on adjudication as *one* branch of the law-making process in democratic societies.” *Id.* (emphasis added). Unfortunately, Klare’s thesis has not been so cabined. See, e.g., Sanele Sibanda, *Not-Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty*, 22 STELLENBOSCH L.R. 482 (2011) (arguing that constitutionalism has certain pitfalls which render it limited in the creation of a more equal society and the eradication poverty); Theunis Roux, *Transformative Constitutionalism and the Best Interpretation of the Constitution: Distinction Without a Difference?*, 20 STELLENBOSCH L.R. 258 (2009) (criticizing Klare’s definition of transformative constitutionalism for rejecting the distinction between law and politics and for making the successful implementation of the project of transformative constitutionalism conditional on changing South Africa’s traditionally formalist legal culture).

<sup>27</sup> South African socio-economic rights are generally weak in construction. As we shall see, they are couched in such terms as “progressive realisation” and “available resources”—and rarely, if ever, accord applicants direct or individualized remedies. Some of the leading South African Constitutional Court socio-economic rights cases are: *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.) (introducing the novel requirement that adequate intermediate housing must be provided before an eviction notice by the municipality (based upon inhabitability) can be put into effect, in addition to standard criteria for housing cases); *Governing Body of the Juma Masjid Primary School v. Essay N.O.* [2011] ZACC 13 (CC) (S. Afr.) (finding that a private trust renting land to the state for a public school cannot unilaterally abrogate the contract—even in the face of long term failure to pay rent by the state—if it would negatively impair a learner’s right to a basic education in terms of FC section 29(1)); *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes (Joe Slovo II)* [2011] ZACC 8 (CC) (S. Afr.) (vacating the previous order in *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes (Joe Slovo I)* [2009] ZACC 16 (CC) (S. Afr.) because parties thereafter arrived at a preferable outcome based upon their improved understanding of the available housing options); *Abahlali Basemjondolo Movement SA v. Premier of the Province of KwaZulu-Natal* [2009] ZACC 31 (CC) (S. Afr.) (finding that the Slum Act in question had failed to follow the process of meaningful engagement and was therefore unconstitutional); *Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.) (holding that parties must participate in a meaningful engagement process—including all interested parties—in order to reach a settlement that is both informationally richer and normatively more legitimate than the zero-sum outcome of a binary court judgment); *Fuel Retailers Association of Southern Africa v. Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13 (CC) (S. Afr.) (holding that the state had considered to a sufficient degree the various elements of sustainable development in reaching its conclusion not to allow the creation of another petrol station); *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.) (holding that the state has sufficiently engaged the community with respect to plans for resettlement in terms of the right to housing); *Khosa v. Minister of Social Development, Mahlaule v. Minister of Social Development* 2004 (6) SA 505 (CC) (S. Afr.) (recognizing that permanent residents possess right to social security benefits in terms of both the right to social security and the right to equality); *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.) (holding that the state’s recognition of safety and efficacy of Nevirapine for pregnant women with HIV required a national rollout in terms of FC section 27’s right to health care); *Minister of Public Works v. Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) (S. Afr.) (holding that the rights of the displaced persons in need of urgent shelter and housing after the occurrence of a national disaster trumped other considerations); *Government of the Republic of South Africa v. Grootboom* [2000] ZACC 19 (CC) (S. Afr.) (holding that the state had failed to establish a comprehensive programme to provide housing for persons in urgent need of shelter); *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.) (holding that the right to adequate health care did not require the state to provide dialysis for a patient with terminal kidney failure).

<sup>28</sup> For a monograph on the need for more from a minimum core, see DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* 183 *passim* (2006) (steadfastly defending minimum core arguments: socio-economic rights must have some identifiable content that shape government action and can be relied upon by applicants unless we wish them to mean no more than what the government says they mean). For critiques of various parts of this ever-growing body of jurisprudence, see Theunis Roux, *Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court*, 4 DEMOCRATIZATION 92, 95-98 (2003)

rights, say FC section 26(1)—the right to housing and FC section 27(1)—the right of access to health care, food, water, and social security, to several strict constraints in FC section 26(2) and FC section 27(2).<sup>29</sup>

Why are the structure and the language of FC section 26(1) and FC section 27(1), and FC section 26(2) and FC section 27(2) unusual? For starters, it differs from a normal two-stage Bill of Rights analysis.

As a general matter, constitutional analysis under the South African Bill of Rights takes place in two stages.<sup>30</sup> First, the applicant must demonstrate that the

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(discussing the different standards of review adopted by the Court in socio-economic rights cases); Darrel Moellendorf, *Reasoning About Resources: Soobramoney and the Future of Socio-Economic Rights Claims*, 14 S. AFR. J. HUM. RTS. 327, 329-33 (1998) (rejecting the Court's reasoning for withholding adequate health care in *Soobramoney*); Brian Ray, *Evictions, Aspirations and Avoidance*, 5 CONST. CT. REV. 173, 235-38 (2014) (considering subsidiarity—decision-making at the lowest appropriate political level—as a more effective means of its realization than Constitutional Court fiat). For a monograph that traces and approves of the Court's development of a jurisprudence of meaningful engagement in socio-economic rights and other rights-based cases, see STU WOOLMAN, *THE SELFLESS CONSTITUTION: EXPERIMENTALISM AND FLOURISHING AS FOUNDATIONS OF SOUTH AFRICA'S BASIC LAW 420-502* (2013) [hereinafter *THE SELFLESS CONSTITUTION*]. But for a more skeptical account of the initial developments in meaningful engagement, see Lilian Chenwi, *A New Approach to Remedies in Socio-Economic Rights Adjudication: 51 Olivia Road and Others v City of Johannesburg and Others*, 2 CONST. CT. REV. 371, 373 (2009).

<sup>29</sup> It is worth setting out the rights and their concomitant internal limitations in full: “26. Housing 1. Everyone has the right to have access to adequate housing. 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. 27. Health Care, Food, Water and Social Security 1. Everyone has the right to have access to a. health care services, including reproductive health care; b. sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. 3. No one may be refused emergency medical treatment.” S. AFR. CONST., 1996, §§ 26-27. We are primarily concerned with the text, and the jurisprudence developed under, FC section 27(2). FC section 28 (the rights of children) and FC section 29(1) (the right to a basic education) are interesting anomalies in that they do not possess the internal limitations found in FC section 26 or FC section 27. In any event, both rights are subject to the general limitations clause, FC section 36. On the general limitations clause, which gives organs of the state and private parties an opportunity to show that a law of general application's *prima facie* impairment of a fundamental right is both reasonable and justifiable (and thus not an actual violation, or constitutionally infirm), see Stu Woolman & Henk Botha, *Limitations*, in *CONSTITUTIONAL LAW OF SOUTH AFRICA* ch. 34, 34-1 to -29 (Stu Woolman & Michael Bishop eds., 2d ed. 2008) (pages numbered by and within each chapter). Not all academics agree that the Constitutional Court has erred in its approach. See also Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464, 469-74 (1992). Mureinik convinced the drafters of the Interim Constitution and the Final Constitution that the inclusion of justiciable socio-economic rights would not undermine large-scale development projects designed to ameliorate the depredations of apartheid. *Id.* Cass Sunstein is sympathetic to Mureinik's decisive argument and the Court's standard of reasonableness review. Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. FORUM 123, 130-32 (2001) (defending the Court's administrative law model of socio-economic rights). See also SANDRA LIEBENBERG, *SOCIO-ECONOMIC RIGHTS ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION 163-86* (2010) (identifying merits on both sides of the once bipolar debate—and arguing that a standard of substantive reasonableness (as opposed to mere reasonableness) will eventually develop—on a case by case basis—the normative core that other academics, jurists and practitioners seek).

<sup>30</sup> See *State v. Zuma* 1995 (4) BCLR 401 at para. 21 (CC) (S. Afr.). Fundamental rights analysis under FC chapter 3 “calls for a ‘two-stage’ approach. First, has there been a contravention of a



exercise of a fundamental right has been impaired, infringed, or, to use the Final Constitution's term of art, "limited." This demonstration itself has several parts. First, the applicant (or another potential beneficiary of the right) must show that the content of the right upon which she relies, in fact, actually provides the constitutional solace that she seeks.<sup>31</sup> Put differently, the applicant must show that the conduct for which she seeks protection falls within the value-determined ambit of the right. Second, if a *prima facie* violation has been demonstrated, the respondent, in terms of the limitation clause found in FC section 36, has an opportunity to demonstrate that the law so impugned serves equally important ends and that this limits the protected activity in a reasonable and justifiable manner.

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guaranteed right? [Second], [i]f so, is it justified under the limitation clause [now FC section 36])?" *Id.* Under FC section 36, the state or a private party has an opportunity to demonstrate that the "law of general application" upon which they rely constitutes a reasonable and justifiable impairment of the right in question. The limitation clause reads as follows: "36. Limitations (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided for in subsection (1) or any other provision of this Constitution, no law shall limit any right entrenched in the Bill of Rights." S. AFR. CONST., 1996, § 36. Eventually, however, the Constitutional Court expressly recognized that an important distinction exists between a normal two-stage rights analysis and the socio-economic rights analysis. See *Khosa v. Minister of Social Development, Mahlaule v. Minister of Social Development* 2004 (6) SA 505 (CC) (S. Afr.). In *Khosa* the Constitutional Court stated, "[t]here is a difficulty in applying section 36 of the Constitution to the socio-economic rights entrenched in sections 26 and 27 of the Constitution." *Id.* at para. 83. Why? Again. Because while in a normal Bill of Rights analysis, one first assesses whether there has been a *prima facie* infringement of the right. After this first stage, the Court proceeds to the general limitations clause, FC section 36, to see whether the law impairing the right meets the test for a reasonable and justifiable limitation. See *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC) (S. Afr.). With respect to the socio-economic rights found in FC sections 26 and 27, the limitations analysis occurs in terms of FC sections 26(2) and 27(2). In socio-economic rights matters that engage FC sections 26(2) and 27(2), there is no further space for justification of the impairment of the socio-economic right. In other words, all of the normal two-stage analysis of infringement and justification has taken place within such socio-economic rights as FC sections 26 and 27. On internal limitations generally, see Woolman & Botha, *supra* note 29, ch. 34, at 34-31 to -41.

<sup>31</sup> As the Constitutional Court has repeatedly noted, the Bill of Rights' provision on standing, FC section 38, and the Court's doctrine of objective unconstitutionality mean that the person before the court need not be obliged to show that he or she is the person whose rights have been infringed or threatened with infringement. See *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (2) SA 1 (CC) at paras. 28-29 (S. Afr.) ("On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person."); *Member of the Executive Council for Development Planning and Local Government, Gauteng v. Democratic Party* 1998 (4) SA 1157 (CC) at para. 64 (S. Afr.). In re-affirming its commitment to the objective theory of unconstitutionality, the Court wrote that "the practice that has been urged upon this Court carries with it the distinct danger that Courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant." *Id.* But see *Poswa v. Member of the Executive Council Responsible for Economic Affairs Environment and Tourism* [2001] ZASCA 31 at para. 22 (S. Afr.). Although FC section 38 standing requirements are quite generous, the Supreme Court of Appeal stated that the absence of any real interest in the disposition of a matter is manifestly not "irrelevant to the real question of whether the relief sought and granted was properly sought and granted." *Id.*

A few caveats attach to this general scheme of Bill of Rights analysis. If the court hearing the matter finds that a challenged law infringes the exercise of the fundamental right in question, the analysis *may* move to a second stage.<sup>32</sup> Again, in this second stage of analysis, the party that would benefit from upholding the limitation will attempt to demonstrate that the infringement of a fundamental right is reasonable and justifiable (or proportional) in terms of the well-established test developed under FC section 36.<sup>33</sup> This second stage of analysis occurs, generally speaking, not within the context of the substantive fundamental right but within a second stage, the limitation clause (FC section 36). The important word in this paragraph is *may*.

We say the analysis *may* move to a second stage for two primary reasons. First, if the limitation of a right does not take place in terms of “a law of general application,” then no opportunity arises to offer a justification in terms of FC section 36. (“Law” here means more than “mere” conduct: law as promulgated by recognized authorities takes the form of Acts of Parliament (or provincial legislation or municipal by-laws), regulation, customary law, or common law.) Second, while all rights admit, as an abstract matter, of the possibility of justifiable limitation, not all proportionality analysis takes place within the confines of FC section 36. For example, FC section 9 (the right to equality) most often engages in an inquiry into unfair discrimination. If unfair discrimination is established with the Court’s elaboration of FC section 9, that finding exhausts all meaningful inquiry into the justification for any such violation. In twenty years, the South African Constitutional Court has never used FC section 36 to overturn a finding of unfair discrimination.<sup>34</sup> (No state or private actor receives two bites at the cherry.) Similarly, FC section 25’s test for arbitrary deprivation of property consciously incorporates a sliding-scale proportionality assessment—the *sine qua non* of limitations’ inquiries—into the rights stage of the analysis.<sup>35</sup> No space remains for additional forms of justification to be offered under FC section 36.

FC sections 26 and 27 make express provision for justifiable limitations on the socio-economic rights found in those sections. FC sections 26(2) and 27(2)

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<sup>32</sup> See *Moise v. Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC) at para. 19 (S. Afr.) (“It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under [FC section] 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court.”).

<sup>33</sup> FC section 36 places the burden of justification on the party seeking to uphold the limitation. S. AFR. CONST., 1996, § 36.

<sup>34</sup> See *Harksen v. Lane* 1998 (1) SA 300 (CC) (S. Afr.). While the Court holds that FC section 36 as an abstract matter involves proportionality analysis and the form of analysis under the right to equality, FC section 9(3), the Court notes in passing that a text that might suggest a difference between the two concepts is not the same as using them in a different manner. *Id.*

<sup>35</sup> *First National Bank of SA Limited t/a Wesbank v. Commissioner, South African Revenue Services; First National Bank of SA Limited t/a Wesbank v. Minister of Finance* 2002 (4) SA 768 (CC) (S. Afr.).

provide the textual basis for these internal limitations. FC section 36 would not appear to afford the state any additional bases for justification regarding its positive duties. However, *negative* duties—in FC sections 26 and 27—are not subject to FC sections 26(2) and 27(2). That nuanced distinction has no bearing on the analysis undertaken in this article and will not be explored further.

While FC section 26(1) and FC section 27(1) protect South Africa's denizens against *negative* interference by the state and private parties, FC section 26(2) and FC section 27(2) *now* attract the lion's share of attention from academics and jurists, and a sizable share of public law litigation. (By contrast, a decade ago, Deputy Chief Justice Dikgang Moseneke lamented the fact that only four significant socio-economic rights cases had been decided in the previous decade.)<sup>36</sup> Over the next ten years, roughly four to five cases per annum would address socio-economic rights.) FC section 26(2) and FC section 27(2) require the state to make good on the promise of FC section 26(1) and FC section 27(1). But! There is always a "but." That promise is subject to several caveats in the Constitution: (a) "reasonable legislative and other means;" (b) "available resources;" and (c) "progressive realisation." These provisos limit, expressly and intentionally, the relief plaintiffs may seek and the remedies courts can fashion.<sup>37</sup> Since the South African Constitutional Court possesses neither guns nor butter, and in such matters finds itself controlled by the internal limitations found in FC section 26(2) and FC section 27(2), the current socio-economic rights jurisprudence can be articulated in the form of the following multi-pronged test:

1. Socio-economic rights do not, strictly speaking, embrace an immediate remedy for a particular plaintiff. The general question, when claiming a breach, is whether the state has catered for all parties affected through the adoption of a reasonable plan?<sup>38</sup>

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<sup>36</sup> Personal correspondence between Stu Woolman and Deputy Chief Justice Dikgang Moseneke (June 5, 2005) (on file with Stu Woolman). See generally Dikgang Moseneke, *A Personal Tribute to Former Chief Justice Pius Langa*, in A TRANSFORMATIVE JUSTICE: ESSAYS IN HONOUR OF PIUS LANGA 3, 7 (Alistair Price & Michael Bishop eds., 2015) (current Deputy Chief Justice, tracing, in part, the arc of South Africa's socio-economic rights jurisprudence over the former Chief Justice's career); Pius Langa, *A Vision of the Constitution*, 120 S. AFR. L.J. 670, 675-77 (2003) (articulating the need for the highest court to press the interests of the most disadvantaged members of South Africa's polity).

<sup>37</sup> See S. AFR. CONST., 1996, §§ 26(2), 27(2).

<sup>38</sup> See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.) (holding that Court's own policies and findings on the safety and the efficacy of Nevirapine in pilot programmes justified the need for a national rollout of Nevirapine in order to limit, substantially, Mother-to-Child-Transmission of HIV); *Government of the Republic of South Africa v. Grootboom* [2000] ZACC 19 (CC) (S. Afr.) (holding that the State's failure to establish a comprehensive programme to provide housing, and, in particular for persons in urgent need of shelter, constituted a violation of FC section 27(2)); *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.) (denying requested relief grounded upon the right to adequate health care on the grounds that only 40 dialysis machines were available to doctors and their patients in the entire province of Kwa-Zulu Natal, that the patient had terminal end-state kidney failure and that doctors and Department of Health were better placed to determine who needed access to those extremely limited resources). The South African Constitutional Court's jurisprudence of shared constitutional interpretation, participatory bubbles and a commitment to flourishing regarding the content of fundamental rights is on full display in the socio-

2. Because socio-economic rights simply require the state progressively to realise the access to a particular good for all members of the polity, one must ask whether the state has done so within “available resources”?<sup>39</sup>
3. Is the state’s duty to “progressively realise” a right reflected in terms of a “reasonable” plan?<sup>40</sup>

economic rights jurisprudence—though the outcomes may disappoint many commentators. For a philosophical foundation for the Court’s meaningful engagement jurisprudence, see THE SELFLESS CONSTITUTION, *supra* note 28, at 318-47. South Africa’s Constitutional Court has refused, as a general matter, to identify a minimum core (content) for each socio-economic right. In this respect, South Africa’s socio-economic rights jurisprudence reflects a marked departure from the jurisprudence of the UN Committee on Social, Economic and Cultural Rights. Instead, the Court has set out, with the odd exception, general norms that govern the progressive realization of socio-economic rights and that leave the political branches ample room to experiment with policies that give effect to those rights. See *Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S. Afr.); *Grootboom*, [2000] ZACC 19 (CC) (S. Afr.); *Soobramoney*, 1998 (1) SA 765 (CC) (S. Afr.). A panoply of housing cases over the past five to seven years reflect the Constitutional Court’s increased level of comfort in creating remedial structures designed to realize more optimal empirical and normatively legitimate outcomes. See *City of Johannesburg v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.); *Governing Body of the Juma Masjid Primary School v. Essay N.O.* [2011] ZACC 13 (CC) (S. Afr.); *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes (Joe Slovo II)* [2011] ZACC 8 (CC) (S. Afr.); *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes (Joe Slovo I)* [2009] ZACC 16 (CC) (S. Afr.); *Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.). See also THE SELFLESS CONSTITUTION, *supra* note 28, at 196-248. More compelling still is the Court’s willingness to allow the parties themselves to identify solutions that they believe better fit the needs of all concerned. *Id.* at 260-317. Flexible settlements are not all that is new and noteworthy. In two education cases, *Ermelo* and *Juma Masjid*, the Court has alighted upon mechanisms that ensure that what appears to work in terms of the order delivered at the end of an initial judgment continues to work over time. In *Ermelo*, the Court required both the school governing body and the provincial department of education to report back to the Court at regular intervals so it could assess the progress the parties had made in realizing the learners’ right to receive an adequate basic education. *Head of Department: Mpumalanga Department of Education v. Ermelo* 2010 (2) SA 415 (CC) at paras. 2, 46, 49-53 (S. Afr.). In *Juma Masjid*, the genius of the Court’s shaping of the bubble of parties lies (a) in its willingness to treat the applicants and the respondents (learners and a private trust) as natural and juristic persons engaged in a horizontal dispute over the right to a basic education; and (b) in its invitation to the Centre for Child Law and the Socio-Economic Rights Institute into a dauntingly complex polycentric matter requiring subtle non-partisan analysis. *Governing Body of the Juma Masjid Primary School*, [2011] ZACC 13 (CC) (S. Afr.). Here too, the Court requested feedback from the state and other parties regarding the manner in which learners had been accommodated. *Id.* at para. 3 n.5.

<sup>39</sup> *Soobramoney*, 1998 (1) SA 765 (CC) (S. Afr.) (citing S. Afr. CONST., 1996, § 27(2)).

<sup>40</sup> See *Khosa v. Minister of Social Development, Mahlale v. Minister of Social Development* 2004 (6) SA 505 (CC) at para. 43 (S. Afr.) (“In determining reasonableness, context is all-important. There is no closed list of factors involved in the reasonableness enquiry and the relevance of various factors will be determined on a case by case basis.”). At the same time, the Constitutional Court in *Khosa* notes that the Final Constitution commits us to an understanding of such rights as dignity, equality and social security in terms of which “wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.” *Id.* at para. 74. The Court’s language echoes Rawls’ description of a Kantian “realm of ends” in which “[e]veryone recognizes everyone else as not only honouring their obligation of justice and duties of virtue, but also, as it were, legislating law for their moral commonwealth. For all know of themselves and of the rest that they are reasonable and rational, and that this fact is mutually recognized.” JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 208-211 (Barbara Herman ed., 2d ed. 2003). See also Stu Woolman, *Dignity, in CONSTITUTIONAL LAW OF SOUTH AFRICA* ch. 36, 36-6 to -18 (Stu Woolman & Michael Bishop eds., 2d ed. 2008). Surely the *Khosa* Court’s reasoning—wealthy members of a society owe poorer members a constitutional obligation to provide social security—and the holding—permanent residents are, like citizens, entitled to social security grants—results in a fairly thick remedy with respect to a socio-economic right. *Khosa*, 2004 (6) SA 505 (CC) (S. Afr.).

4. Does the state's plan, assuming it exists, meet the following desiderata:<sup>41</sup>
  - (a) Is it a comprehensive and coordinated programme that engages all spheres of government?
  - (b) Does the plan ensure that "the appropriate financial and human resources are available"?
  - (c) Is the plan genuinely capable "of facilitating the realisation of the right"?
  - (d) Is the plan reasonable in terms of "both conception and implementation"?<sup>42</sup>
5. Does the plan attend to "crises"?<sup>43</sup>
6. Is the plan conceived in a manner that does not exclude "a significant segment" of the affected population?<sup>44</sup>
7. Does the plan "respond to the urgent needs of those in desperate situations"?<sup>45</sup>
8. In housing matters, does the plan provide adequate temporary shelter whilst persons evicted from dangerous housing environments wait for better and adequate housing?<sup>46</sup>

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<sup>41</sup> See *Grootboom*, [2000] ZACC 19 (CC) (S. Afr.).

<sup>42</sup> See *id.* at paras. 39–46, 52–53, 63–69, 74, 83.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.). The requirement to respond to such persons by providing interim adequate housing has given socio-economic rights some degree of minimum core content. See also *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes (Joe Slovo II)* [2011] ZACC 8 (CC) (S. Afr.); *Abahlali Basemjondolo Movement SA v. Premier of the Province of KwaZulu-Natal* [2009] ZACC 31 (CC) (S. Afr.) (finding the "slum act" in question unconstitutional on the grounds that inadequate consultation had taken place with the affected communities); *Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.) (establishing need for meaningful engagement between all concerned parties before evictions can occur and new housing is provided by either the state or a private party). In *Joe Slovo II*, the Court requested that both the residents and the MEC lodge affidavits that stated that the eviction order was no longer necessary. *Joe Slovo II*, [2011] ZACC 8 (CC) at paras. 13–16 (S. Afr.). So they did. *Id.* The *Joe Slovo II* Court noted that it possessed the power to vary orders as necessary and where justice and equity so required. *Id.* at para. 22. It added the following fascinating qualifier that "[i]here may be some force in the argument that there is no reason in logic or policy why an order that is made because it is just and equitable to make it should not be susceptible to rescission when justice and equity require that course. Indeed, it seems illogical for this Court to have the power to vary an order issued on the basis that it was just and equitable when changing circumstances require, but not to have the power to discharge an order when the dictates of justice and equity require. Common sense tells us, and we must emphasise, that there is a fundamental difference between the variation of an order and its rescission. That difference requires that orders of this Court ought not to be discharged lightly. In our view, something more than a change in circumstances pointing to a different justice and equity conclusion is required." *Id.* at para. 24. Whereas *Joe Slovo I* is notable for the ratification of a court ordered requirement that the parties meaningfully engage one another, *Joe Slovo II* is remarkable because the Court ratified an alteration in the settlement requested by the parties themselves. *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes (Joe Slovo I)* [2009] ZACC 16 (CC) (S. Afr.). All five cases recognize the right of persons without adequate housing to "meaningful engagement" with state officials or private parties prior to giving effect to law, policy or conduct that might require them to move.

One can understand why many commentators are troubled by the basic tenets of the Constitutional Court's socio-economic rights jurisprudence.<sup>47</sup> The question that the state must answer often boils down to whether a reasonable, coordinated, comprehensive, achievable and affordable "plan" simply exists and whether parties in urgent need are accommodated in the event of a crisis. If the state can demonstrate that such a plan exists, then it is understood to have discharged its duties under FC section 26(2) and FC section 27(2). So, for example, because the City of Johannesburg was found to have applied its mind, repeatedly, to the creation of policies that would supply the residents of Phiri, Soweto with a regular supply of water, the Court in *Mazibuko* held that it had discharged its responsibilities in terms of FC section 27(2)(b) and the right to water.<sup>48</sup>

*Mazibuko* has, as a result of its ostensibly anti-poor outcome, become a lightning rod for critics of the Court's reasonableness standard in socio-economic rights cases. Should it? Or, has there been some basic misunderstanding of the purpose and the limits of South Africa's Constitution?

One might rightly respond that most constitutions are best understood as scaffolding. By "scaffolding," we simply mean that the South African Constitution (like any other constitution) provides: (a) a framework for the hurly burly of our democratic order; (b) a safe space (from intervention) for the heterogeneous sub-publics and associations that provide the meaningful settings for all of our actions; and (c) a very rough, or schematic, social contract for the radically heterogeneous, naturally and socially determined individuals who must endure a terribly brief existence before shuffling off their mortal coils.<sup>49</sup> Constitutions can be good places to start over. Yet they can provide neither: (1) a rule of law culture reciprocally related to a robust civil society,<sup>50</sup> nor (2) political accountability through regular

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<sup>47</sup> Advocates of minimum core content for socio-economic rights tend to blame the courts for non-delivery of resources. However, the text is crystalline clear regarding the limits placed on the judiciary to effect delivery of basic goods and services. According to FC section 27(2), "[t]he State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." S. AFR. CONST., 1996, § 27(2) (emphasis added). The text cabins the courts in a number of different ways and acknowledges that certain rights may not guarantee denizens of South Africa an immediate remedy. Critics, such as David Bilchitz, argue that (a) the Court has placed a largely "procedural" notion at the core of its socio-economic jurisprudence rather than engaging substantively with what these rights require of the government; (b) for rights to have bite, one cannot simply accept how the government defines the content of a right or the ends it pursues; (c) the absence of guidance by the Court increases the risk of undue deference to judgments by the state. David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L.J. 484, 494-501 (2001).

<sup>48</sup> *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.) (finding that the state, over time, had consistently attempted to determine and implement the best possible means for water to be delivered to residents of a number of Johannesburg townships).

<sup>49</sup> See Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 485-94 (2004); Stu Woolman, *Humility, Michelman's Method and the Constitutional Court: Rereading the First Certification Judgment and Reaffirming a Distinction Between Law and Politics*, 24 STELLENBOSCH L. REV. 242, 252-54 (2013); Jack M. Balkin, *The Court Affirms Our Social Contract*, ATLANTIC (June 29, 2012), <http://www.theatlantic.com/national/archive>.

<sup>50</sup> Martin Krygier, *The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the*

elections that allow citizens to kick the bums out and break up patronage arrangements;<sup>51</sup> nor (3) administrative bodies that deliver those public goods necessary for individual flourishing.<sup>52</sup> Only once these three basic requirements are *largely* in place can we begin to bring to fruition increasingly egalitarian economic arrangements and the patient redistribution of wealth needed to ensure genuine liberation.<sup>53</sup> That seems rather obvious.<sup>54</sup> Why? Because many post-1989 Constitutions originated as peace treaties of a particular kind—high browed, detailed social contracts.<sup>55</sup> Because these Constitutions are *bargains*, they tend to be conservative documents. As a result, they preserve a substantial portion of the *status quo*.<sup>56</sup> That is not always so bad. Most of that which gives meaning to our lives lies elsewhere, in the daily exchanges and substructures that pre-exist constitutional orders. If new constitutional orders do anything well, then they improve these daily exchanges and substructures.<sup>57</sup> The mutual concern and respect many South Africans enjoy today is a function of dramatic changes made to and through the basic law.<sup>58</sup>

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*Rule of Law, in* OUT OF AND INTO AUTHORITARIAN LAW 55, 221, 249-56 (Andras Sajó ed., 2002); Stu Woolman, *On the Reciprocal Relationship Between the Rule of Law and Civil Society*, in ACTA JURIDICA 374, 384-94 (2015).

<sup>51</sup> Sujit Choudhry, “*He Had a Mandate*”: *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 8-19 (2009).

<sup>52</sup> MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 9-16 (1965); Martha Nussbaum, *Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 5-10 (2007).

<sup>53</sup> FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY 40-51 (2014).

<sup>54</sup> JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: A CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 2-3 (1996) (“The development of constitutional democracy along the celebrated ‘North Atlantic’ democracies has certainly provided us with results worth preserving, but once those who do not have the good fortune to be the heirs of the Founding Fathers turn to their own traditions, they cannot find criteria and reasons that would allow them to distinguish what would be worth preserving from what should be rejected.”).

<sup>55</sup> Stu Woolman & Jonathan Swanepoel, *Constitutional History*, in CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 2, 2-35 to -40, 2-46 to -47 (Stu Woolman & Michael Bishop eds., 2d ed. 2008).

<sup>56</sup> For example, the property clause, FC section 25, makes provision for both land restitution and the protection of property rights. S. AFR. CONST., 1996, § 25. See Sanele Sibanda, *Not Quite a Rejoinder: Some Thoughts and Reflections on Michelman’s Liberal Constitutionalism, Property Rights and the Assault on Property*, 24 STELLENBOSCH L. REV. 329, 332-35 (2013).

<sup>57</sup> For example, the right to dignity, FC section 10, has had a demonstrably positive effect on social engagements and economic arrangements—but it cannot deliver a social democracy of equals from the get-go, or even within twenty years. S. AFR. CONST., 1996, § 9. See LAURIE ACKERMANN, HUMAN DIGNITY: THE LODESTAR OF EQUALITY 5-10 (2013); AHARON BARAK, HUMAN DIGNITY: A CONSTITUTIONAL VALUE AND A CONSTITUTIONAL RIGHT 8-12 (2015).

<sup>58</sup> For example, the right to equality—that requires mutual concern and respect—can result in systemic changes, i.e. the recognition that same sex life partners enjoy the same benefits of rights and privileges under the Constitution as opposite sex life partners. *Amici Curiae of Doctors for Life International, Minister of Home Affairs v. Fourie* [2005] ZACC 19 (CC) (S. Afr.); *Lesbian and Gay Equality Project v. Minister of Home Affairs* [2005] ZACC 20 (CC) (S. Afr.). To the extent that South Africans genuinely enjoy these changes, they can be traced to several palpable alterations in the manner in which South Africans operate. First, the state and our representatives now represent all South Africans able to exercise the franchise. See S. AFR. CONST., 1996, § 1(d) (“The Republic of South Africa is one, sovereign, democratic state founded on the following values: . . . d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic

Whether the South African Constitution ought to be viewed as “transformative” or as “scaffolding” is not our quarry here. As matters currently stand, South Africa possesses the capacity to create a comprehensive and coordinated plan that addresses IPV.<sup>59</sup> Such a plan will make full use of the state’s available resources in a manner that progressively realizes access to adequate health care in FC section 27 fulfils the right to bodily integrity in FC section 12<sup>60</sup> and makes good our international commitment to CEDAW.<sup>61</sup>

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government, to ensure accountability, responsiveness and openness.”). Second, political elites are held *partially* accountable. Minority parties, the Constitutionally-Mandated Chapter 9 Institutions (State Institutions Supporting Constitutional Democracy), the media and 11,000 citizen protests per annum exert a bit of pressure. See, e.g., Cathi Albertyn, *Commission for Gender Equality*, in CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 24D, 24D-1, 24D-10 to -11 (Stu Woolman & Michael Bishop eds., 2d ed. 2008); Jonathan Klaaren, *South African Human Rights Commission*, in CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 24C, 24C-2 to -6 (Stu Woolman & Michael Bishop eds., 2d ed. 2008); Stu Woolman & Michael Bishop, *Public Protector*, in CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 24A, 24A-1, 24A-7 to -17 (Stu Woolman & Michael Bishop eds., 2d ed. 2008); Stu Woolman & Yolanda Schutte, *Auditor General*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 24B, 24B-1 to -16 (Stu Woolman & Michael Bishop eds., 2d ed. 2008); Stu Woolman & Julie Soweto-Aullo, *Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities*, in CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 24F, 24F-1, 24F-10 to -19 (Stu Woolman & Michael Bishop eds., 2d ed. 2008). See also Stu Woolman, “You Break It, You Own It”: *South African Freedom of Assembly Jurisprudence After Garvis*, 9 VIENNA J. INT’L CONST. L. 548, 550-52 (2015); Stu Woolman, *My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in Garvis v SATAWU (Minister for Safety & Security, Third Party) 2010 (6) SA 280 (WCC), 27 S. Afr. J. HUM. RTS. 346, 348-53 (2011).*

<sup>59</sup> See WHO CLINICAL & POLICY GUIDELINES, *supra* note 1.

<sup>60</sup> FC section 12 states: “Freedom and Security of the Person. 12. (1) Everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way. (2) Everyone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.” S. Afr. CONST., 1996, § 12. The Constitutional Court first recognized the positive dimensions of FC section 12(1)(c) when considering a challenge to the Domestic Violence Act in *State v. Baloyi*: “The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with section 7(2), section 12(1) has to be understood as *obliging the state directly* to protect the right of everyone to be free from private or domestic violence.” *State v. Baloyi* 2000 (2) SA 425 (CC) at para. 11 (S. Afr.) (emphasis added) (footnote omitted) (stating that Domestic Violence Act 116 of 1998 should be read not to impose a reverse onus provision on accused). The Court subsequently confirmed the positive duty imposed on the state by FC section 12(1)(c) in *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) at paras. 39-45 (S. Afr.). In *Carmichele*, a woman had been attacked by a man—accused of rape and murder—who had recently been released from jail on bail. *Id.* at paras. 1-24. The gravamen of Carmichele’s complaint was that the attack was a direct consequence of the failure of the state—in the form of the investigating officer and the prosecutor—to oppose bail for her attacker in a previous matter. *Id.* at para. 62. The Constitutional Court then found that “there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights [including section 12(1)(c)]. In some circumstances, there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.” *Id.* at para. 44. This holding has spawned a revolution in the law of delict. This new duty—grounded in FC section 12(1)(c)—extends the state’s general duty to protect its citizens by imposing liability in the event of egregious failures. It is worth noting that a significant proportion of these successful delictual actions have vindicated the rights of women to be free from violence. FC section 12(1)(c), read with the requirement of accountability, has also broadened the common-law doctrine of vicarious liability. *K. v. Minister of Safety and Security* 2005 (6) SA 419 (CC) at paras. 22-52 (S. Afr.). In *K. v. Minister of Safety and Security*, the applicant had been raped by



## II. CRAFTING THE LEGAL ARGUMENT REGARDING THE STATE'S OBLIGATION TO PROVIDE A PLAN THAT ADDRESSES INTIMATE PARTNER VIOLENCE

In other works, we have explored creative socio-industrial responses to the absence of a national HIV treatment program in South Africa,<sup>62</sup> the retrogressive policy decision to employ lay counsellors to test and counsel pregnant women for HIV (and the potentially harmful effects—of interrupted state payments to these lay counsellors—for HIV positive pregnant women and their infants),<sup>63</sup> as well as the constitutional and ethical justifications for prioritizing provision of HIV treatment for some groups over other groups.<sup>64</sup> This article confronts neither an AIDS denialist as the President, nor the absence of an HIV treatment program, nor difficult choices about who should be first in the queue for a combination antiretroviral treatment.<sup>65</sup> In the absence of any law, regulation, or a comprehensive and coordinated plan, we would not really need to run through the

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three on-duty policemen who had offered her a lift home. *Id.* at para. 5. Both the High Court and the Supreme Court of Appeal rejected her delictual claim on the grounds that the policemen had been acting contrary to the purpose of their employment and that the Minister could accordingly not be held liable for their actions. *Id.* at paras. 7-23. Justice O'Regan found that the Supreme Court of Appeal had misunderstood the facts of the case and had therefore misapplied the common-law test. *Id.* at paras. 45-57. According to the Constitutional Court, the policemen who raped K. had committed a crime while operating under the colour of law. *Id.* Or, to put the matter in slightly different terms, the officers simultaneously committed a crime that fell outside their duties and omitted to protect K. from a crime that fell well within their duties. The omission created the basis for the finding of vicarious liability. The link drawn by the *K.* Court between the commission of a crime and the failure to fulfil a constitutional duty echoes FC section 12(1)(c)'s link between the duty not to cause violence (negative), and the duty to prevent violence (positive). The state's obligation to prevent violence in terms of FC section 12(1)(c), read with FC section 39(2), was further extended in *Amicus Curiae of the Commission for Gender Equality in Omar v. Government of the Republic of South Africa* 2006 (2) SA 289 (CC) (S. Afr.). The applicant had challenged various provisions of the Domestic Violence Act 116 of 1998 that facilitated the issuance of protection orders and warrants for arrest on the grounds that they violated his rights to freedom and security of the person, access to courts and fair trial. *Id.* The *Omar* court rejected the applicant's challenges and justified the legislation on the grounds that FC section 12(1)(c) requires the state to take active steps to prevent domestic violence and to encourage persons so harmed to report all instances of it, "[w]hereas the privacy of the home and the centrality attributed to intimate relations are valued, privacy and intimacy often provide the opportunity for violence and the justification for non-interference. Persons subject to such violence are ambivalent about their fate and reluctant to go through with criminal prosecution. It is understandable for the legislature to enact measures that differ from those generally applicable to criminal arrests and prosecutions. It is clear that the Act serves a very important social and legal purpose." *Id.* at para. 18.

<sup>61</sup> CEDAW, *supra* note 8.

<sup>62</sup> See generally Courtenay Sprague & Stu Woolman, *Moral Luck: Exploiting South Africa's Policy Environment to Produce a Sustainable National Antiretroviral Treatment Programme*, 22 S. AFR. J. HUM. RTS. 337, 337-79 (2006).

<sup>63</sup> See generally Stu Woolman, Courtenay Sprague & Vivian Black, *Why State Policies that Undermine HIV Lay Counsellors Constitute Retrogressive Measures that Violate the Right of Access to Health Care for Pregnant Women and Infants*, 25 S. AFR. J. HUM. RTS. 102, 102-25 (2009).

<sup>64</sup> See Vivian Black, Courtenay Sprague & Stu Woolman, *The Constitutional Justification and the Ethical Arguments for Granting Enhanced HIV Treatment for Selected Priority Groups in South Africa's Antiretroviral Treatment Programme*, 3 S. AFR. J.L. 496, 496-511 (2011); Vivian Black, Courtenay Sprague & Matthew F. Chersich, *Interruptions in Payments for Lay Counsellors Affects HIV Testing in Antenatal Clinics in Johannesburg*, 100 S. AFR. MED. J. 407, 407-08 (2011).

<sup>65</sup> Mark Heywood, *South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health*, 1 J. HUM. RTS. PRAC. 14, 30 (2009).

Court's multi-pronged test for "reasonableness" in FC section 27 at all. That proposition remains to be established.

Our quandary. First, nurses in public health facilities are confronted daily with female patients whose injuries and illnesses flow from intimate partner violence. IPV is defined as "behaviour by an intimate partner that causes physical, sexual or psychological harm, including acts of physical aggression, sexual coercion, psychological abuse and controlling behaviours."<sup>66</sup> An estimated 31%-55% of South African women routinely experience such violence.<sup>67</sup> Second, no plan, no policy, and no law exist to guide nurses (and other health professionals) as to how women who experience IPV ought to be treated.<sup>68</sup> Third, IPV constitutes one of the greatest obstacles to women's health, well-being, and development in South Africa.<sup>69</sup>

No argument regarding socio-economic rights is easy. However, the facts, as well as the absence of law or policy on the subject of intimate partner violence, strongly support the contention that an unjustifiable violation of FC section 27(2) occurs on an ongoing basis. In addition, the South African Constitutional Court repeatedly notes that the rights enshrined in the Final Constitution are interrelated, interdependent and indivisible.<sup>70</sup> As Justice Sachs writes in *Sidumo*:

<sup>66</sup> WHO CLINICAL & POLICY GUIDELINES, *supra* note 1, at vii. WHO notes: "This definition covers violence by both current and former spouses and other intimate partners. Other terms used to refer to this include domestic violence, wife or spouse abuse, wife/spouse battering." *Id.*

<sup>67</sup> Gass et al., *supra* note 2, at 582; Dunkle et al., *supra* note 2, at 230.

<sup>68</sup> S. AFR. NAT'L DEP'T OF HEALTH, THE PRIMARY HEALTH CARE PACKAGE—A SET OF NORMS AND STANDARDS 57 (2000); TSHWARANANG LEGAL ADVOCACY CTR. TO END VIOLENCE AGAINST WOMEN, BIENNIAL REVIEW 18 (2008-2009) [hereinafter TLAC BIENNIAL REVIEW (2008-2009)].

<sup>69</sup> U.N. Secretary-General, *In-depth Study on All Forms of Violence Against Women*, ¶¶ 112-17, U.N. DOC. A/61/122/Add.1 (July 6, 2006). See MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 78-80 (2000); AMARTYA SEN, DEVELOPMENT AS FREEDOM 189-203 (1999); Nussbaum, *Constitutions and Capabilities*, *supra* note 52, at 77; Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349, 362-63 (1999); Amartya Sen, *More than 100 Million Women Are Missing*, N.Y. REV. BOOKS (Dec. 20, 1990), <http://www.nybooks.com/articles/archives/1990/dec/20/more-than-100-million-women-are-missing/>.

<sup>70</sup> In *Khosa*, the Court ties the socio-economic right to social security [FC section 27] directly to the right to dignity, [FC section 10] when it concludes that "[t]he exclusion of permanent residents in need of social security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. . . . Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants." *Khosa v. Minister of Social Development, Mahlaule v. Minister of Social Development* 2004 (6) SA 505 (CC) at para. 76 (S. Afr.). *Khosa* also supports an additional point expanded upon later in this section: namely, that FC section 7(2) places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. *Id.* On how the five conflicting definitions of "dignity" with which the Court operates often come into conflict with one another in the case law, see Woolman, *Dignity*, *supra* note 40, ch. 36, at 36-25 to -62. If a single right manifests five denotations at variance with one another (from time to time), then it is logically impossible for "an objective, normative value order" to reconcile all twenty-seven substantive provisions in the Bill of Rights. Moreover, the Bill of Rights dictates that all rights should be interpreted in a manner consistent with the creation of an open and democratic society based upon human dignity, equality and freedom. The catchphrase captures the key terms from 2500 years of political philosophy—but does nothing to resolve conflicts about how they should be understood, or conflicts over which has primacy of place, or whether, for example, an "open and democratic society" is parasitic

*Grootboom* expressly referred to the indivisibility and interrelated character of protected rights, emphasising that the determination of what was reasonable in relation to the right of access to adequate housing had to take account of the right to dignity, and the gender and racial dimensions involved. In *Khosa* the question was whether withdrawal of certain welfare entitlements for permanent residents who were not South African citizens, raised a question of equality (non-discrimination), or of the right of access to social welfare, and whether the rights of the child also featured. Mokgoro J stated: “[i]n this case we are concerned with these intersecting rights [socio-economic rights and the founding values of human dignity, equality and freedom] which reinforce one another at the point of intersection.”<sup>71</sup>

Once we establish the constitutional infirmity of the state’s inaction in terms of FC section 27(2), we further contend that an absence of policy or law on IPV constitutes a clear violation of the *positive* duties imposed upon the state in terms of the right to bodily integrity found within FC section 12’s right to freedom and security of the person. In both *Carmichele v. Minister of Safety and Security* and *K. v. Minister of Safety and Security*, the Constitutional Court found that the right to freedom and security of the person imposed positive duties on the state to prevent violations of physical integrity, in particular, rape and other forms of sexual violence.<sup>72</sup> The *Carmichele* Court writes:

In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. . . . Sexual violence and the threat of sexual violence go to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women.<sup>73</sup>

The clauses that support a finding of unconstitutionality with respect to an absence of law or policy concerning the treatment of IPV are not limited to FC section 27 and FC section 12. In *Glenister v. President of the Republic of South Africa*, the Court deployed FC section 7(2)—“the state must respect, protect,

on or distinct from “human dignity, equality and freedom.” As such, it is best to read the Court as saying that the most powerful arguments for a given interpretation of a right are those interpretations buttressed by a variety of different rights and provisions in the Bill of Rights.

<sup>71</sup> *Sidumo v. Rustenburg Platinum Mines Ltd* [2007] ZACC 22 (CC) at paras. 153-54 (S. Afr.) (citing *Khosa*, 2004 (6) SA 505 (CC) at para. 41 (S. Afr.)).

<sup>72</sup> *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) (S. Afr.); *K. v. Minister of Safety and Security* 2005 (6) SA 419 (CC) (S. Afr.).

<sup>73</sup> *Carmichele*, 2001 (4) SA 938 (CC) at para. 62 (S. Afr.) (internal citations and quotations omitted). Bonita Meyersfeld writes that “[t]he South African Constitutional Court has stated that what distinguishes domestic violence from other crimes ‘is its hidden, repetitive character and its immeasurable ripple effects on our society . . . .’” Bonita Meyersfeld, *Domestic Violence, Health and International Law*, 22 EMORY INT’L L. REV. 62, 71 (2008) (quoting *State v. Baloyi* 2000 (1) BCLR 86 (CC) at para. 11 (S. Afr.)). See Stu Woolman, *Security Services*, in CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 23B, 23B-15 to -19 (Stu Woolman & Michael Bishop eds., 2d ed. 2011); Stu Woolman & Michael Bishop, *Freedom and Security of the Person*, in CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 40, 40-48 to -54 (Stu Woolman and Michael Bishop eds., 2d ed. 2008).

promote and fulfil the rights in the Bill of Rights”—to buttress the basic proposition that “without an independent security service capable of ferreting out corruption and various forms of rent-seeking behavior, our fragile polity will simply lack the capacity to provide the most basic platform for the realisation of the egalitarian pluralist society envisaged by the Constitution.”<sup>74</sup> The same basic line of reasoning holds true for our public health system and its ability to protect and to assist women subject to IPV. A state without the capacity to assist women in such a perilous position is a state without law or freedom for upwards of 55% of its female inhabitants.<sup>75</sup>

Does the law have anything more to say? Well, we know that the state recognizes the unfathomably high levels of IPV and realizes that it devotes insufficient resources—health professionals without adequate training or guidance—to address this FC section 27 problem.<sup>76</sup>

To some degree, this situation looks similar to that in *Minister of Health v. Treatment Action Campaign*—a relatively easy socio-economic rights decision.<sup>77</sup> In *Treatment Action Campaign*, the applicants demonstrated: (a) that the state knew Nevirapine to be both safe and efficacious; (b) that the state was aware of the clinical evidence demonstrating Nevirapine’s ability to reduce rates of mother-to-child HIV transmission by 50%; (c) the state had enjoyed comparable positive outcomes at eighteen pilot sites; (d) that Nevirapine had been freely given to the state, and thus readily available; (e) that because Nevirapine had been relatively easy to administer at the pilot sites; and, finally, (f) that no good reason existed to prevent a government rollout of this essential HIV medicine in our public health system.<sup>78</sup>

<sup>74</sup> As the *Glenister* Court writes, “corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project.” *Glenister v. President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para. 166 (S. Afr.).

<sup>75</sup> See Gass et al., *supra* note 2, at 582; Dunkle et al., *supra* note 2, at 230. As Locke wrote, “where there is no law, there is no freedom.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>76</sup> The South African Law Commission understood this essential point. S. AFR. LAW COMM’N, RESEARCH PAPER ON DOMESTIC VIOLENCE para. 8.2, at 235 (1999), <http://www.justice.gov.za/salrc/rpapers/violence.pdf> (“The successful implementation of [gender-based] violence legislation is contingent upon, firstly, the development of appropriate training programmes for *all state role players* and, secondly, the allocation of adequate financial and other resources.” (emphasis added)). For a general discussion about the South African Law Commission’s analysis, see Sheila Meintjes, *The Politics of Engagement: Women Transforming the Policy Process—Domestic Violence Legislation in South Africa*, in NO SHORTCUTS TO POWER: AFRICAN WOMEN IN POLITICS AND POLICY MAKING 140-59 (Anne Marie Goetz & Shireen Hassim eds., 2003). See also Comm. on Econ., Soc. & Cultural Rts., *Domestic Violence—an “Equal Rights Issue” A History and Analysis of ECOSOC and Other UN Documents on the Prevention of and Response to Violence Against Women in the Family*, pts. III-IV, U.N. DOC. E/C. 12/2002/8 (2002) [hereinafter *CESCR on Domestic Violence*] (describing appropriate structures and protocols to address this devastating social ill).

<sup>77</sup> *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

<sup>78</sup> *Id.*

The health care problem we address looks, as a formal matter, quite similar. The state is aware of the problem.<sup>79</sup> The state already possesses health professionals in public health facilities willing to provide the necessary care and prevention without incurring much by way of additional cost.<sup>80</sup> Indeed, a coordinated and comprehensive plan would invariably promote and protect women's health vis-à-vis IPV: it would prevent further harm from injury, suicide or femicide, while offering effective treatment and care in response.<sup>81</sup> As in *Treatment Action Campaign*, the state is already on the hook. Government reports by the Independent Complaints Directorate ("ICD") and the South African Law Commission ("SALC") reflect the state's awareness of the problem and that the security services possess the resources to combat IPV and its effects.<sup>82</sup>

International law provides a final argument in favor of the construction of an adequate, coordinated and comprehensive plan to address IPV. While the South African Constitutional Court has generally been reluctant to use international law when assessing the constitutional infirmity of law, policy, or conduct,<sup>83</sup> once again *Glenister* comes to the rescue.<sup>84</sup> In *Glenister*, the Court relied heavily on international law, especially the U.N. Convention against Corruption,<sup>85</sup> to demonstrate that the state had undertaken an obligation to create and to maintain an effective, independent arm of the security and prosecutorial services—an organ of the state sufficient to combat the corruption, cronyism, and clientelism that undermines the rule of law and the fundamental rights found in the Final Constitution.<sup>86</sup> In short, that CEDAW requires the same of the South African

<sup>79</sup> See Meyersfeld, *Domestic Violence, Health and International Law*, *supra* note 73, at 72. See also *infra* Part III and Part IV, for detailed discussion of the state's awareness of its fitful and unsuccessful attempts to diminish gender based violence.

<sup>80</sup> See Joyner & Mash, *supra* note 11; HATCHER ET AL., *supra* note 11.

<sup>81</sup> Hegarty and fellow investigators found a significant reduction in maternal depressive symptoms in their intervention group. See Kelsey Hegarty et al., *Screening and Counselling in the Primary Care Setting for Women who Have Experienced Intimate Partner Violence (WEAVE): A Cluster Randomised Controlled Trial*, 382 LANCET 249, 249-58 (2013); see also Phyllis W. Sharps et al., *Health Care Providers' Missed Opportunities for Preventing Femicide*, 33 PREVENTIVE MED. 373, 373-80 (2001).

<sup>82</sup> For more on the IDC and SALC reports, see *infra* Part III and Part IV.

<sup>83</sup> See Amicus Curiae of the Society for the Abolition of the Death Penalty in South Africa, *Kaunda v. President of the Republic of South Africa* 2005 (1) SACR 111 (CC) (S. Afr.).

<sup>84</sup> In short, the Constitutional Court is somewhat confused about how international treaties and obligations become part of South Africa's domestic law. The confusion did no damage to the outcome in *Glenister*. See *Glenister v. President of the Republic of South Africa* 2011 (3) SA 347 (CC) (S. Afr.). However, future cases that turn on FC sections 231, 232 and 233 may survive inaccurate scrutiny. The details of *Glenister* are not our quarry here, nor do they directly speak as now to the legal issues surrounding IPV. For insightful overviews on the role international law generally plays in South African constitutional jurisprudence after *Glenister*, see Bonita Meyersfeld, *Domesticating International Standards: The Direction of International Human Rights Law in South Africa*, 5 CONST. CT. REV. 399, 403-16 (2014); Franziska Sucker, *Approval of an International Treaty in Parliament: How Does Section 231(2) "Bind the Republic"?*, 5 CONST. CT. REV. 417, 431-34 (2014); Juha Tuovinen, *What to Do with International Law? 3 Flaws in Glenister*, 5 CONST. CT. REV. 435, 437-49 (2014).

<sup>85</sup> United Nations Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC]. South Africa signed the Convention on December 9, 2003 and ratified it on November 22, 2004. *Id.* at 3.

<sup>86</sup> See *Glenister*, 2011(3) SA 347 (CC) (S. Afr.). The *Glenister* Court writes, in relevant part:

state.<sup>87</sup> CEDAW is, by design, intended to secure the equality of women and to prevent the systemic forms of violence women experience.<sup>88</sup> Having ratified CEDAW, South Africa should be undertaking all appropriate measures: promulgating appropriate domestic legislation and undertaking temporary special public health measures to combat IPV.<sup>89</sup> Our public health system continues to be

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"[Corruption] fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And, in turn, the stability and security of society is put at risk. . . . This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our own . . . legislation, in regional and international conventions and in academic research." *Id.* at paras. 165-70. The Court cites such domestic legislation such as the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Prevention of Organised Crime Act 121 of 1998, and regional conventions such as the Southern African Development Community Protocol against Corruption (SADC Corruption Protocol) adopted on August 14, 2001 and the Southern African Development Community Protocol on Combating Illicit Drugs (SADC Drugs Protocol) adopted on August 24, 1996. *Id.* However, the most important piece of law, and international law at that, is the United Nations Convention against Corruption. See UNCAC, *supra* note 85 and accompanying text. Former U.N. Secretary General, Kofi Annan, summed up the critical role anti-corruption measures play in developing nations when he wrote, "[t]his evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development." *Id.* at iii.

<sup>87</sup> See CEDAW, *supra* note 8. State parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms. *Id.* art. 18, ¶ 1. In 2010, the Secretary-General issued two new reports regarding violence against women. See U.N. Secretary-General, *Intensification of Efforts to Eliminate All Forms of Violence Against Women*, U.N. Doc. A/65/208 (Aug. 2, 2010); U.N. Secretary-General, *Trafficking in Women and Girls*, U.N. Doc. A/65/209 (Aug. 2, 2010). See also AMNESTY INT'L, A FACT SHEET ON CEDAW: TREATY FOR THE RIGHTS OF WOMEN 1 (2015), [http://www.amnestyusa.org/sites/default/files/pdfs/cedaw\\_fact\\_sheet.pdf](http://www.amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf).

<sup>88</sup> The international community's recognition of IPV as a human rights' violation did not begin and end with CEDAW. The next major step forward occurred in 1993. The World Conference on Human Rights promulgated in 1993 a Declaration under which governments became responsible for preventing and addressing IPV. See *CESCR on Domestic Violence*, *supra* note 76; COMM. ON ECON., SOC. & CULTURAL RIGHTS, FACT SHEET NO. 16 (REV. 1) (1993), [http://www.ohchr.org/Documents/Publication\\_s/FactSheet16rev.1en.pdf](http://www.ohchr.org/Documents/Publication_s/FactSheet16rev.1en.pdf). In 2002, the WHO published the first global report on intimate partner violence and health. See Krug et al., *supra* note 21; Francisca de Haan, *A Brief Survey of Women's Rights*, UN CHRONICLE (Feb. 2010), <http://unchronicle.un.org/article/brief-survey-womens-rights>. Of course, historical antecedents go back further still. In 1869, John Stuart Mill wrote, "[t]he object of this Essay is to explain as clearly as I am able the grounds of an opinion . . . That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power on the one side, nor disability on the other." JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 1 (Susan L. Rattiner ed., 1997) (1869).

<sup>89</sup> While *Blue Moonlight* is a housing matter, the general reasoning of the Constitutional Court in that case fleshes out the content of its reasonableness standard in other socio-economic rights cases. See *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (S. Afr.). Combrinck writes as follows regarding the definition of violence against women and the positive duties of the South African state to protect women: "The Declaration defines the term 'violence against women' to include any act of violence against women 'that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women. This definition thus places acts of violence committed by private actors squarely within the ambit of the Declaration. Article 2 confirms this proposition by setting out specific instances of violence occurring in the family, in the general

the frontline of engagement between the state and most South African women who have experienced physical violence, psychological violence, and sexual violence (and the severe, multifarious injuries and illnesses that invariably flow from such violence). South Africa has not as yet taken its obligations as a state party to CEDAW seriously.<sup>90</sup> If the Constitutional Court were to replicate the line or form of argument laid out in *Glenister*, then various substantive provisions in the Bill of Rights (FC section 9 (equality), FC section 10 (dignity), FC section 12 (freedom and security of the person), FC section 27 (health)),<sup>91</sup> read with the obligations imposed on the state in terms of FC section 7(2) and CEDAW, should result in a positive duty to create law and policy designed to engage the manifold problems women experience as a result of IPV.<sup>92 93</sup> Now that we have some idea as to how to construct a constitutional argument that the South African state has a positive duty to create law or policy that assists public health professionals who must address problems associated with IPV, we can turn to the actual nature of the problem that confronts us in South Africa.

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community, and perpetrated or condoned by the State. Article 4 of the Declaration declares that ‘states should condemn violence against women and . . . should pursue all appropriate means and without delay a policy of eliminating violence against women.’ It also lists a number of measures to be taken to achieve this result that are reminiscent of the legal, preventive, and protective actions set out under General Recommendation 19 of the Women’s Convention.” Helene Combrinck, *Positive State Duties to Protect Women from Violence: Recent South African Developments*, 20 HUM. RTS. Q. 666, 674 (1998) (citing and quoting CEDAW, *supra* note 8, arts. 1-2, 4).

<sup>90</sup> After ratifying CEDAW in 1995, South Africa produced its first report in 1998. COMM’N FOR GENDER EQUAL., REPORT TO THE CEDAW COMMITTEE ON SOUTH AFRICA’S IMPLEMENTATION OF CEDAW 1998-2008, at 9 (2010). Each state party to CEDAW is required to submit a report every four years. See *CEDAW and Beijing +20 Report to UN by South Africa: Briefing by Commission for Gender Equality*, PARLIAMENTARY MONITORING GRP. (Mar. 3, 2015), <https://pmg.org.za/committee-meeting/20098/> (“A summary of South Africa’s reporting history to the UN was provided where it showed that the South African government had failed to submit a report to the UN in 2001 and 2005.”) A second report, which should have been submitted in 1999, was only tendered a decade later, in 2009. COMM’N FOR GENDER EQUAL., *supra*. According to the U.N., this second report provided little evidence of implementation of CEDAW’s requirements over the prior 10 years. See *CEDAW and Beijing +20 Report to UN by South Africa, supra*.

<sup>91</sup> For an analysis of the effect of human rights violations on health, see Sofia Gruskin et al., *History, Principles, and Practice of Health and Human Rights*, 370 LANCET 449 (2007). On the critical role that health care systems play in responding to violence against women, see generally Claudia García-Moreno et al., *The Health-Systems Response to Violence Against Women*, 385 LANCET 1567 (2014).

<sup>92</sup> Not only women are subject to IPV in South Africa or elsewhere. Vulnerable groups of men also confront a public health system equally ill-equipped to respond to their injuries and a social context, which facilitates violence as a means of conflict resolution. In protection order applications reviewed by Vetten, though the majority were female, South African men lodged 14.8%-29.5% of applications in two locations studied. See LISA VETTEN, DOMESTIC VIOLENCE IN SOUTH AFRICA, INST. FOR SEC. STUDIES POLICY BRIEF 71, at 3 (2014), <http://www.issafrica.org/publications/policy-brief/domestic-violence-in-south-africa> [hereinafter ISS POLICY BRIEF 71].

<sup>93</sup> For national U.S. data on intimate partner violence by women against men, see Ann L. Coker et al., *Physical and Mental Health Effects of Intimate Partner Violence for Men and Women*, 23 AM. J. PREVENTIVE MED. 260, 260-68 (2002). For a review of studies on IPV in men who have sex with men, see Catherine Finneran & Rob Stephenson, *Intimate Partner Violence Among Men who Have Sex with Men: A Systematic Review*, 14 TRAUMA, VIOLENCE & ABUSE 168 (2013).

### III. THE FACTUAL PREDICATE SUPPORTING RECOGNITION OF INTIMATE PARTNER VIOLENCE AS AN IMPAIRMENT OF FUNDAMENTAL RIGHTS TO HEALTH CARE AND BODILY INTEGRITY

#### *A. Prevalence, Magnitude, and Deleterious Consequences of Intimate Partner Violence in South Africa*

On Valentine's Day in 2013, a chilling drama emblematic of the most extreme outcome of intimate partner violence—death, or intimate femicide—gripped viewers around the world.<sup>94</sup> South African Olympian, Oscar Pistorius—the double amputee known as the “blade runner” for his sleek prosthetic limbs—was charged with murdering his partner, Reeve Steenkamp, a model and law school graduate.<sup>95</sup> Ms. Steenkamp was shot four times while locked inside the bathroom of their shared home. Pistorius was later convicted of culpable homicide.<sup>96</sup> While South Africa has earned a justifiably dubious reputation for high rates of murder and homicide,<sup>97</sup> *State v. Pistorius* shed new light on the frequency of intimate partner violence. (This designation, IPV, had, historically, fallen within the broader denotation of another legal term of art in South Africa: domestic violence.<sup>98</sup> However, a distinction, between the two discrete phenomena must be maintained.) The case underscored IPV's consequences, and demonstrated the inadequacy of the legal regime, law enforcement, and policy development with respect to this subset of violence against women in South Africa.<sup>99</sup>

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<sup>94</sup> See David Dolan, *Blade Runner Pistorius Charged with Murdering Girlfriend*, REUTERS (Feb. 15, 2013, 9:18 AM), <http://www.reuters.com/article/2013/02/14/us-safrica-pistorius-idUSBRE91D0AE20130214>. “Femicide,” notes the World Health Organization, is “generally understood to involve intentional murder of women because they are women . . . .” WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN, FEMICIDE 1 (2012). WHO states that “[w]hile our understanding of femicide is limited, we know that a large proportion of femicides are of women in violent relationships, and are committed by current or former partners.” *Id.* The fact that Steenkamp died at the hands of her partner on the eve of a day associated with romance and love did not and should not go unnoticed.

<sup>95</sup> Dolan, *supra* note 94.

<sup>96</sup> *State v. Pistorius* [2014] ZAGPPHC 793 (HC) (S. Afr.).

<sup>97</sup> Burden of disease studies have estimated that South Africa's homicide rate is seven times the global average. Rosana Norman et al., *Interpersonal Violence: An Important Risk Factor for Disease and Injury in South Africa*, POPULATION HEALTH METRICS (2010); <http://www.pophealthmetrics.com/content/8/1/32>.

<sup>98</sup> For a history of the evolution of these terms, see *CESCR on Domestic Violence*, *supra* note 76. The terms “domestic violence” and “intimate partner violence” are, occasionally, used interchangeably, in spite of critical differences. Our belief that IPV is not meaningfully addressed by extant domestic violence legislation in South African law drives this article. See Domestic Violence Act 116 of 1998 (S. Afr.). Two critical differences must be taken into account. IPV encompasses psychological violence (verbal abuse, threats and coercion). Domestic violence, in contrast, has historically been largely limited to instances of physical violence. In addition, “domestic violence” traditionally referred to persons who were married. The term IPV recognizes violence between individuals who are unmarried, co-habiting, dating or in other forms of partnership. See Rachel Jewkes, *Intimate Partner Violence: Causes and Prevention*, 359 LANCET 1423, 1423-27 (2002) for definitions and measurement of IPV as they are used in research studies. For example, physical violence is typically indicated in studies but sexual abuse and particularly psychological abuse are not always indicated. *Id.* at 1423.

<sup>99</sup> For the health effects of IPV, see Jacquelyn C. Campbell, *Health Consequences of Intimate*



One-third of adult women around the world experience IPV.<sup>100</sup> IPV is largely impervious to education, income or geographic location. It is, however, more frequent and more severe in women of lower socio-economic groups who enjoy the least protection from such abuse.<sup>101</sup> As a risk factor, IPV ranks fifteenth, in terms of years of healthy life lost or premature death.<sup>102</sup> This statistic reflects the magnitude of negative health effects for women: in particular, IPV may increase the likelihood of HIV acquisition.<sup>103</sup> Let's first separate out the deleterious consequences of HIV and IPV. HIV prevalence in South African women from age 20 to 34 ranges from 17.4% to 36%.<sup>104</sup> Not surprisingly, given the high levels of sexual abuse that manifest as IPV,<sup>105</sup> HIV and IPV have ineluctably pernicious interactions. Irrefutable evidence of IPV's deleterious consequences led the World Health Organization ("WHO") to recognize IPV as a global public health problem.<sup>106</sup> The latest available data indicate IPV prevalence remains highest in the WHO regions of Africa, South-East Asia and the Eastern Mediterranean. In these regions, 37% of ever-partnered women have reported physical or sexual IPV in their lifetimes.<sup>107</sup> Ethnographic studies further depict IPV as an "almost" universal phenomenon.<sup>108</sup> The anomalies indicate that the

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*Partner Violence*, 359 LANCET 1331, 1331-36 (2002). For research on intimate partner femicide or homicide and policy implications, see Jacquelyn C. Campbell et al., *Intimate Partner Homicide: Review and Implications of Research and Policy*, 8 TRAUMA, VIOLENCE, & ABUSE 246 (2007).

<sup>100</sup> CLAUDIA GARCÍA-MORENO ET AL., WORLD HEALTH ORG., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE 16 (2013), <http://www.popline.org/node/572931> [hereinafter WHO'S ESTIMATES OF VIOLENCE AGAINST WOMEN].

<sup>101</sup> See Jewkes, *Intimate Partner Violence: Causes and Prevention*, *supra* note 98, at 1424.

<sup>102</sup> INST. FOR HEALTH METRICS AND EVALUATION, *supra* note 16.

<sup>103</sup> OLIVE SHISANA ET AL., SOUTH AFRICAN NATIONAL HIV PREVALENCE, INCIDENCE AND BEHAVIOUR SURVEY, 2012, at xxiv (2014). Systematic reviews have found intimate partner violence to be a risk factor for HIV acquisition in women. Research indicates HIV and intimate partner violence can be bidirectional and synergistic, e.g., partner as well as non-partner violence (rape) can precede HIV transmission. Alternatively, women's disclosure of their HIV status to partners can lead to IPV. For a recent systematic review of HIV and IPV linkages, see Ying Li et al., *Intimate Partner Violence and HIV Infection Among Women: A Systematic Review and Meta-Analysis*, 17 J. INT'L AIDS SOC'Y 1 (2014). For research on these links in South Africa specifically, see Rachel Jewkes et al., *Factors Associated with HIV Sero-Status in Young Rural South African Women: Connections Between Intimate Partner Violence and HIV*, 35 INT'L J. EPIDEMIOLOGY 1461 (2006). For recent research, see Courtenay Sprague et al., "They Can't Report Abuse, They Can't Move Out. They Are at the Mercy of These Men": *Exploring Connections Between Intimate Partner Violence, Gender and HIV in South African Clinical Settings*, 17 CULTURE, HEALTH & SEXUALITY 1 (2015).

<sup>104</sup> SHISANA ET AL., *supra* note 103.

<sup>105</sup> Hoque et al., *Prevalence and Experience of Domestic Violence Among Rural Pregnant Women in KwaZulu-Natal, South Africa*, 24 S. AFR. J. INFECTIOUS DISEASES 34, 36 (2009).

<sup>106</sup> WHO'S ESTIMATES OF VIOLENCE AGAINST WOMEN, *supra* note 100.

<sup>107</sup> *Id.* at 16. WHO stated that "[w]hen studied systematically, as was done with this report, it becomes clear that violence against women is a global public health problem that affects approximately one third of women globally." *Id.* at 1. However, psychological abuse was not reported in the WHO's global report.

<sup>108</sup> Some of these studies, conducted in the 1980s and 1990s, are identified by Heise. See Lori Heise et al., *Violence Against Women: A Neglected Public Health Issue in Less Developed Countries*, 39 SOC. SCI. & MED. 1165, 1166-69 (1994).

right kinds of political, social, economic, cultural, and legal environments can eliminate or minimize violence against women (and men).<sup>109</sup> The variation in IPV prevalence from country to country reflects different degrees of gender hierarchy, the presence or the absence of practices that advance or hinder the development of women, and social constructions of gender.<sup>110 111 112 113</sup>

In spite of national or regional differences in estimates of IPV in a given sub-population, a striking universality informs our understanding of IPV: how women experience partner abuse. Meyersfeld crisply captures this uniformity: “Every day, throughout the world, women are subjected to extreme acts of physical violence, which take place within the beguiling safety of domesticity. The violence is severe, painful, humiliating, and debilitating.”<sup>114</sup> The frequency of IPV across settings

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<sup>109</sup> As indicated earlier, men also experience intimate partner violence in heterosexual and same-sex relationships. See *supra* notes 92-93 and accompanying text. Studies indicate that sex-specific differences exist in physically aggressive behaviours. See David M. Buss & Joshua D. Duntley, *The Evolution of Intimate Partner Violence*, 16 *AGGRESSION & VIOLENT BEHAVIOUR* 411, 413-16 (2011). For example, men are more likely than women to use “extreme forms of violence” including “sexual coercion, sexual assault, choking, strangling, and other forms of severe assault.” *Id.* Women, in contrast, typically use such forms of violence as “pushing, shoving, scratching, kicking, biting, and punching.” *Id.* For additional research on this subject, see John Archer, *Sex Differences in Physically Aggressive Acts Between Heterosexual Partners: A Meta-Analytic Review*, 7 *AGGRESSION & VIOLENT BEHAVIOUR* 313 (2002); Michelle Carney et al., *Women who Perpetuate Intimate Partner Violence: A Review of the Literature with Recommendations for Treatment*, 12 *AGGRESSION & VIOLENT BEHAVIOUR* 108 (2007); Marich Tanha et al., *Sex Differences in Intimate Partner Violence and the Use of Coercive Control as a Motivational Factor for Intimate Partner Violence*, 25 *J. INTERPERSONAL VIOLENCE* 1836 (2010). For systematic analysis of gender, power and society, see generally R.W. CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS* 91-139, 259-80 (1st ed. 1987). For research on adverse gender norms, gender-based violence and risk of HIV acquisition in South Africa, see Anna Strebel et al., *Social Constructions of Gender Roles, Gender-Based Violence and HIV/AIDS in Two Communities of the Western Cape, South Africa*, 3 *J. SOC. ASPECTS HIV/AIDS* 516, 517-27 (2006).

<sup>110</sup> For gender as a social construct and its influence on ill health, see JUDITH LORBER, *GENDER AND THE SOCIAL CONSTRUCTION OF ILLNESS* 5-42 (1997).

<sup>111</sup> As Medrado and Lyra write, “[i]f the problem of violence on the part of men against women is to be seen from a gender perspective, male socialization and sociability and what it means to be a man in modern societies must also be studied.” Benedito Medrado & Jorge Lyra, *Men, Masculinities and Gender Violence*, U.N. Division for the Advancement of Women (DAW), at 2, U.N. Doc. EGM/Men-Boys-GE/2003/OP.3 (Oct. 17, 2003).

<sup>112</sup> Changing social constructions of gender reflect mutable societal norms. Biological distinctions, however, reflect a more deeply entrenched view of the “inherent weaknesses” of the female body. Mattar highlights women’s supposed “fragility” as follows, “[w]omen appear[] to be . . . more . . . vulnerable—physically, morally and intellectually.” Laura D. Mattar, *Legal Recognition of Sexual Rights: A Comparative Analysis with Reproductive Rights*, 5 *SUR INT’L J. HUM. RTS.* 60, 65 (2008). By contrast, men were, and often still are regarded as the guardians of the public sphere—a domain from which women have largely been excluded, “[m]en . . . [are] entrusted with all the other functions necessary for human reproduction, namely social, political, cultural and economic activities.” *Id.* at 66. Bemoaning this same reality in the 1950s, De Beauvoir wrote: “She is a female—this word is sufficient to define her. In the mouth of a man the epithet female has the sound of an insult, yet he is proud if someone says of him: ‘He is male!’ The term female is derogatory.” SIMONE DE BEAUVOIR, *THE SECOND SEX* 41 (Constance Borde & Sheila Malovany-Chevallier trans., 1989) (ebook).

<sup>113</sup> There are some differences by country. IPV prevalence was highest in the South-East Asia Region. See WHO CLINICAL & POLICY GUIDELINES, *supra* note 1; Jewkes, *Intimate Partner Violence: Causes and Prevention*, *supra* note 98. See generally Floretta Boonzaier, *Women Abuse in South Africa: A Brief Contextual Analysis*, 15 *FEMINISM & PSYCHOL.* 99 (2005).

<sup>114</sup> Bonita Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 *ALB. L. REV.* 371, 371 (2003).

gives rise to questions about the nature of this phenomenon and appropriate responses.<sup>115</sup> Meyersfeld poses the essential questions about IPV that must be posed. She offers two enlightening answers that point to the wholesale lack of understanding about this entrenched social problem:

Why do women all over the world suffer the same type of violence at the hands of their intimate partners and endure the same feelings of helplessness and isolation when looking to the state for protection? Why does it continue, in the same form, with the same degree of pain, without respite? There are two reasons. The first is the vulnerability women experience as a result of institutionalized discrimination. The second is due to a misunderstanding of how domestic violence manifests itself. Some forms are so severe that, if left unattended, they result in death. These are two of the several factors which have escalated domestic violence into a global pandemic.<sup>116</sup>

Studies, as already indicated, estimate that IPV prevalence in South Africa mirrors global IPV prevalence<sup>117</sup>—at 31%. However, other South African health facility-based studies have reported higher IPV prevalence in pregnant women—55%,<sup>118</sup> with significant under-reporting across a broad spectrum of female population groups.<sup>119</sup> Domestic violence legislation in South Africa started to take shape in 1994.<sup>120</sup> At the same time, despite growing evidence of increasing IPV, violence against women in low and middle-income countries (“LMICs”) such as South Africa was viewed as a “neglected public health problem.”<sup>121 122</sup>

<sup>115</sup> Researchers in the social-medical sciences will be quick to note that studying IPV poses significant challenges. It lacks a biological basis, which generally characterize disease. IPV emanates from the social, cultural and economic context. See Jewkes, *Intimate Partner Violence: Causes and Prevention*, *supra* note 98. The socially constructed nature of gender norms facilitating IPV led to debates within clinical settings among health professionals about “screening,” since IPV is not a disease and screening is used for the detection of diseases. For further discussion surrounding this debate, see Rachel Jewkes, *Intimate Partner Violence, the End of Routine Screening*, 382 LANCET 190, 190 (2013). See also Sprague et al., *Response of Nurses in Johannesburg to IPV*, *supra* note 11, at 4-23. On the intersection of the social and bio-medical, see generally Nancy Krieger, *Theories for Social Epidemiology in the 21st Century: An Ecosocial Perspective*, 30 INT’L J. EPIDEMIOLOGY 668, 668-73 (2001).

<sup>116</sup> Meyersfeld, *Domestic Violence, Health and International Law*, *supra* note 73, at 62.

<sup>117</sup> Gass et al., *supra* note 2, at 582; Dunkle et al., *supra* note 2, at 230.

<sup>118</sup> See Dunkle et al., *supra* note 2, at 230; Jewkes, *Intimate Partner Violence: Causes and Prevention*, *supra* note 98, at 1461.

<sup>119</sup> See Mathews et al., “So now I’m the Man,” *supra* note 18; Hoque et al., *supra* note 105, at 35-36.

<sup>120</sup> For an excellent account of the historical roots of violence in South Africa, and how it contributes to ill health and health related challenges, especially within the public health system, see Hoosen Coovadia et al., *The Health and Health System of South Africa: Historical Roots of Current Public Health Challenges*, 374 LANCET 817 (2009).

<sup>121</sup> Heise et al., *supra* note 108.

<sup>122</sup> To begin filling the gap in the evidence base, the South African Medical Research Council created a ground-breaking Gender and Health Research Unit in 2001. *About SAMRC’s Gender and Health Research Unit*, S. AFR. MED. RES. COUNCIL, <http://www.mrc.ac.za/gender/gender.htm> (last visited Nov. 7, 2015). Under Professor Rachel Jewkes’ leadership, the unit has collected robust evidence on partner and non-partner violence in South Africa. *Id.* For research and data, see *Resource*

To address the gap in the knowledge base, HRW prepared *Violence Against Women in South Africa: State Response to Domestic Violence and Rape* in 1995.<sup>123</sup> Yet at the outset, the authors of the HRW report emphasized a significant problem for a democracy committed to the protection of all its citizens: “There are no reliable statistics on the numbers of violent attacks on women in South Africa.”<sup>124</sup>

After interviewing survivors of domestic violence and rape in Durban, Cape Town, and Johannesburg, and consolidating other research studies undertaken in South Africa, the report documented the manifold forms of physical, sexual, and psychological violence South African women experience by partners on a daily basis.

The types of abuse which South African women face in the home . . . include verbal abuse, in which they are humiliated and degraded verbally by their partners; emotional abuse, in which they are threatened, for example with violence, economic deprivation or with the withholding of access to their children.<sup>125 126</sup>

The HRW report also identified the physical injuries South African women sustain and the health complications and disorders that result. It is a catalogue of violations worth repeating. The most common injuries encompass:

[F]ractures of the head, limbs, sternum and ribs, followed by scalp and facial lacerations as well as penetrating chest wounds involving the lungs. In addition to the physical injuries sustained from such abuse, battered women often develop somatic symptoms such as headaches, backaches, fatigue, abdominal and pelvic pain, recurrent vaginal infections, sleep and eating disorders, sexual dysfunctions and other signs of moderate or severe depression. In the worst cases, violence against women by their partners results in death.<sup>127</sup>

IPV injuries typically recur.<sup>128</sup> Moreover, the consequences of these assaults contribute significantly to the country’s overall burden of illness, injury, and disease, and, in the absence of intervention, contribute significantly to female mortality or intimate femicide rates.<sup>129</sup>

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*Materials, SAMRC’s Gender and Health Research Unit, S. AFR. MED. RES. COUNCIL, <http://www.mrc.a.c.za/gender/publications.htm> (last visited Nov. 7, 2015).*

<sup>123</sup> See HUMAN RIGHTS WATCH, *supra* note 4.

<sup>124</sup> *Id.* at 44.

<sup>125</sup> *Id.* at 49.

<sup>126</sup> *Id.* The report highlighted research results from a 1993 study conducted in Alexandra Township. *Id.* The authors found that “physical injuries had been inflicted on women by a variety of means, from fists to weapons such as knives, bricks, the traditional knobkerrie (knob-ended stick), bottles, hammers, axes and screwdrivers.” *Id.*

<sup>127</sup> *Id.* at 44.

<sup>128</sup> See García-Moreno, *Dilemmas and Opportunities*, *supra* note 19.

<sup>129</sup> Failing intervention, women may subsequently commit suicide or may be killed by their partners. For data on mortality attributed to IPV in South Africa, see Naeemah Abrahams et al., *Mortality of Women from Intimate Partner Violence in South Africa: A National Epidemiological Study*, 24 VIOLENCE & VICTIMS 546, 546 (2009). Partners may also commit suicide after committing homicide

HRW found a clear and consistent pattern of intimate partner violence among South African women. That is, IPV was “generalized” or widespread among *all* women.<sup>130</sup> <sup>131</sup> HRW stressed that intimate partner violence against South African women was endemic.<sup>132</sup> Yet women routinely failed to report abuse by partners to legal authorities.<sup>133</sup> They instead relied on support from small informal networks of friends and family.<sup>134</sup> Women failed to seek legal remedies due to an array of complex factors.<sup>135</sup> These considerations ranged from “distrust of the legal and law enforcement system, economic dependence, fear of retaliation, shame, self-blame,” to love.<sup>136</sup> The authors observed that “traditional values prevailing in all sectors of South African society reinforce the attitude that ‘wife-beating’ is a private affair, and that to complain to the police is therefore to exhibit disloyalty and invite ostracism.”<sup>137</sup> In 1995, the South African Medical Research Council (“MRC”) released findings on intimate femicide revealing the starkest of conclusions: a woman is killed every six hours by an intimate partner in South Africa.<sup>138</sup>

### *B. The Development of the Law on Domestic Violence*

The African National Congress recognized the magnitude of the problem of domestic violence against women early on in its halcyon days of governance.<sup>139</sup> In

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or murder. Mathews found that 19.4% of 1,349 perpetrators of intimate femicide in South Africa committed suicide within a week of those acts. See Shanaaz Mathews et al., *Intimate Femicide—Suicide in South Africa: A Cross-Sectional Study*, 86 BULLETIN WORLD HEALTH ORG. 552, 552-55 (2008). For a detailed analysis of economic costs associated with IPV, see DEP’T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 27-33, 40-42 (2003), <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>. That report concludes, “[t]he costs of intimate partner rape, physical assault, and stalking exceed \$5.8 billion each year, nearly \$4.1 billion of which is for direct medical and mental health care services. . . . The largest component of IPV-related costs is health care, which accounts for more than two-thirds of the total costs.” *Id.* at 2.

<sup>130</sup> HUMAN RIGHTS WATCH, *supra* note 4, at 49 (emphasis added).

<sup>131</sup> Of importance, this finding differed from the HRW’s research findings on rape. HRW found that South African women raped by non-partners were among the poorest and most marginalized. The authors wrote: “Unlike the victims of domestic abuse, recorded victims of rape are concentrated among particular groups of women: the poor and disadvantaged.” *Id.* at 52.

<sup>132</sup> *Id.* at 126.

<sup>133</sup> *Id.* at 47.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* This is a continuing theme in research in South Africa and other contexts, globally. See Abigail Harrison, *Hidden Love: Sexual Ideologies and Relationship Ideals Among Rural South African Adolescents in the Context of HIV/AIDS*, 10 CULTURE, HEALTH & SEXUALITY 175, 175-89 (2008). See also MARK HUNTER, LOVE IN THE TIME OF AIDS: INEQUALITY, GENDER AND RIGHTS IN SOUTH AFRICA 1-59 (2010); Rachel Jewkes & Rachel Morrell, *Sexuality and the Limits of Agency Among South African Teenage Women: Theorising Femininities and Their Connections to HIV Risk Practices*, 74 SOC. SCI. & MED. 1729, 1737 (2012).

<sup>137</sup> HUMAN RIGHTS WATCH, *supra* note 4, at 47.

<sup>138</sup> SHANAAZ MATHEWS ET AL., “EVERY SIX HOURS A WOMAN IS KILLED BY HER INTIMATE PARTNER”: A NATIONAL STUDY OF FEMALE HOMICIDE IN SOUTH AFRICA, MRC POLICY BRIEF NO. 5, at 1 (2004), <http://www.mrc.ac.za/policybriefs/woman.pdf> [hereinafter MRC POLICY BRIEF NO. 5].

<sup>139</sup> Lisa Vetten, *Violence Against Women: Good Practices in Combating and Eliminating Violence*

1997, the state created new categories of crimes of violence against women and children.<sup>140</sup> These new laws established mandatory minimum sentences and specific bail conditions for offenders of certain types of rape.<sup>141</sup> By 1999, South Africa's female homicide rate was *six times the global average*.<sup>142</sup> Half of the homicides were committed by spouses and long-term or life-time male partners.<sup>143</sup>

Domestic violence legislation began to shape in 1993. It initially took the form of the Prevention of Family Violence Act 133 of 1993 ("PFVA").<sup>145</sup> The PFVA was roundly criticized for being limited to married persons and heterosexual partnerships.<sup>146</sup> Under the aegis of the SALC, the state passed the much improved Domestic Violence Act 116 of 1998 ("DVA").<sup>147</sup> At the same time, the SALC recognized that while legal remedies could secure some degree of traction on this problem, it acknowledged that the law cannot be employed as a "panacea for the ills of such a complex social phenomenon as domestic violence."<sup>148</sup> The SALC returned to this acknowledgment in its conclusion:

It is clear that the law does not hold an exclusive position in either the response to, or the prevention of, domestic violence. The law cannot play its part in a meaningful way in isolation from the larger community of services. The whole society must be involved in helping to reduce the problem, because directly or indirectly it affects the quality of life of the whole society.<sup>149</sup>

By the late 1990s, international responses to domestic violence could be grouped into two distinct yet mutually reinforcing categories.<sup>150</sup> The first category of responses focused on ensuring that perpetrators were held responsible through criminal sanctions.<sup>151</sup> The second category focused on ensuring that women subjected to domestic violence received sufficient support and services from the

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*Against Women*, U.N. DIV. FOR THE ADVANCEMENT OF WOMEN 2 (May 2005); <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/vetten.vaw.pdf>.

<sup>140</sup> See Criminal Law Amendment Act 105 of 1997 (S. Afr.); Criminal Procedure Second Amendment Act 85 of 1997 (S. Afr.).

<sup>141</sup> Criminal Law Amendment Act 105 of 1997 § 51 (S. Afr.); Criminal Procedure Second Amendment Act 85 of 1997 §§ 51, 59.4, 60, 64, 68, 75, sched. 6 (S. Afr.).

<sup>142</sup> See ISS POLICY BRIEF 71, *supra* note 92. "In 1999, South Africa's female homicide rate was six times the global average, with half of these deaths caused by intimate male partners." *Id.* at 3.

<sup>143</sup> *Id.* at 2.

<sup>144</sup> See MRC POLICY BRIEF NO. 5, *supra* note 138.

<sup>145</sup> Prevention of Family Violence Act 133 of 1993 (S. Afr.).

<sup>146</sup> *Id.* § 1(1)-1(2); see, e.g., S. AFR. LAW COMM'N, *supra* note 76, para. 5.2.39, at 55.

<sup>147</sup> Domestic Violence Act 116 of 1998 (S. Afr.); see S. AFR. LAW COMM'N, *supra* note 76, at iii, para. 2.6, at 5-6.

<sup>148</sup> *Id.* para. 1.4, at 2.

<sup>149</sup> *Id.* para. 8.2, at 235.

<sup>150</sup> *CESCR on Domestic Violence*, *supra* note 76.

<sup>151</sup> Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, NAT'L INST. OF JUSTICE 9-10 (Jan. 1996), <https://www.ncjrs.gov/pdffiles/crimdom.pdf>.

state.<sup>152</sup> This second category reflects the widely accepted view that domestic violence is a polycentric problem.<sup>153</sup> The SALC understood this central point: “The successful implementation of domestic violence legislation is contingent upon, firstly, the development of appropriate training programmes for all state role players and, secondly, the allocation of adequate financial and other resources.”<sup>154</sup>

Despite the improvements manifest in the DVA, the failure to develop appropriate training programmes and to allocate adequate financial and other resources quickly became apparent.<sup>155</sup> Meyersfeld notes that women’s susceptibility to IPV flows from deeply entrenched traditional role divisions between men and women accorded by their sex:

Women suffer domestic violence and are unable to escape it, in part because of this gender-based differentiation. The distinction between the public and the private sphere historically has correlated with the role differentiation between genders—the public sphere has been male dominated and women are generally expected to operate in the private sphere . . . . [Domestic violence] . . . is a manifestation of social views, perceptions, priorities and customs.<sup>156</sup>

Given this deeply entrenched gender bias in a highly patriarchal society, the DVA’s “broad definition of ‘domestic violence’ . . . was [viewed as] a triumph,” writes Meyersfeld.<sup>157</sup> The DVA was, as a whole, initially lauded by women’s rights’ advocates.<sup>158</sup> And yet, the SALC’s report repeatedly reiterated its concern over the state’s commitment to provide the requisite funding to implement the

<sup>152</sup> *Id.*; see Lisa Vetten, “Show Me the Money”: A Review of Budgets Allocated Towards the Implementation of the Domestic Violence Act (No. 116 of 1998), 32 POLITIKON 277, 277 (2005).

<sup>153</sup> CESCR on Domestic Violence, *supra* note 76.

<sup>154</sup> S. AFR. LAW COMM’N, *supra* note 76, para. 8.3, at 235.

<sup>155</sup> ISS POLICY BRIEF 71, *supra* note 92; Vetten, *Violence Against Women*, *supra* note 139.

<sup>156</sup> Meyersfeld, *Domestic Violence, Health and International Law*, *supra* note 73, at 66. Deeply embedded gender hierarchies exist for a majority of South African women and play a critical role in domestic violence and HIV transmission, as referenced earlier. For research on masculinities and gender attitudes in South Africa, see Audrey Pettifor et al., “If I Buy the Kellogg’s then He Should [Buy] the Milk”: Young Women’s Perspectives on Relationship Dynamics, Gender Power and HIV Risk in Johannesburg, South Africa, 14 CULTURE, HEALTH & SEXUALITY 477, 477-85 (2012). See also Rachel Jewkes et al., *Rape Perpetration by Young, Rural South African Men: Prevalence, Patterns and Risk Factors*, 63 SOC. SCI. & MED. 2949, 2952-60 (2006); Seth C. Kalichman et al., *Gender Attitudes, Sexual Violence, and HIV/AIDS Risk Among Men and Women in Cape Town, South Africa*, 42 J. SEX RES. 299, 302-05 (2005); Rachel Jewkes et al., *Gender Inequitable Masculinity and Sexual Entitlement in Rape Perpetration in South Africa: Findings of a Cross-Sectional Study* (Dec. 28, 2011), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0029590>. For a discussion of clinical and social research on HIV risk and sexual violence, see Jennifer F. Klot & Judith D. Auerbach, *Sexual Violence and HIV Transmission: Summary Proceedings of a Scientific Research Planning Meeting*, 69 AM. J. REPROD. IMMUNOLOGY 5 (2013).

<sup>157</sup> Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, *supra* note 114, at 389.

<sup>158</sup> Mogale writes that “[t]he act was initially welcomed with applause by women’s movement groups and women activists as its aim was to protect and combat violence against women and women saw this as their means to have violence combated and even prevented.” Ramadimetja S. Mogale et al., *Violence Against Women in South Africa: Policy Position and Recommendations*, 18 VIOLENCE AGAINST WOMEN 580, 581 (2012).

Act.<sup>159</sup> This lack of funding would ultimately result in the absence of an adequate, broad-based response to domestic violence.<sup>160</sup>

### *C. The Current State of the Law and Policy on Domestic Violence*

The implementation of the Domestic Violence Act has been heavily criticized in studies and reports by government bodies and independent researchers.<sup>161</sup> Several deficits stand out.

First, there is the absence of adequate national record-keeping and data collection.<sup>162</sup> Research by Vetten and her colleagues indicate the depth of the problem.<sup>163</sup> In a 2006/2007 survey of three courts, one police station and one hospital in Mpumalanga province, the researchers studied the services used by women who reported domestic abuse at the police station.<sup>164</sup> They found that six months of entries were missing from the police station's domestic violence register and up to 56% of information was missing on protection orders.<sup>165</sup> More generally, different institutions capture different types of information. This lack of consistency and communication makes the evaluation of domestic violence, in terms of the operationalization of the DVA, extremely difficult.

Second, where monitoring could actually take place, noncompliance with the DVA is rife.<sup>166</sup> As Parenzee and her colleagues note: "In the practical implementation of the Domestic Violence Act, the police are the most important role-players. Most of the provisions of the Act involve the South African Police Service ("SAPS") in one way or another."<sup>167</sup> The police must discharge a large number of critical duties:

Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably

<sup>159</sup> S. AFR. LAW COMM'N, *supra* note 76.

<sup>160</sup> Vetten, "Show Me the Money," *supra* note 152. MP Susanne Vos, during Parliament's discussion of the pending Domestic Violence Act, demanded, "[s]how me the money that the Justice Department can use to really make a difference to the lives of millions of women and their children in this country." *Id.* at 277.

<sup>161</sup> See PENNY PARENZEE ET AL., MONITORING THE IMPLEMENTATION OF THE DOMESTIC VIOLENCE ACT: FIRST RESEARCH REPORT 2000-2001, at 76-81 (2001). See generally GENDER ADVOCACY PROGRAMME S. AFR., MAKING THE ACT WORK: A RESEARCH STUDY INTO THE BUDGET ALLOCATIONS FOR THE IMPLEMENTATION OF THE DOMESTIC VIOLENCE ACT 1-47 (1999); LILLIAN ARTZ ET AL., BETTER SAFE THAN SORRY: MAGISTRATES' VIEWS ON THE DOMESTIC VIOLENCE ACT 1-6 (2004). For more on allocations for gender-related issues, see generally Debbie Budlender et al., *South Africa: Expanding into Diverse Initiatives*, in GENDER BUDGETS MAKE MORE CENTS: COUNTRY STUDIES AND GOOD PRACTICE 152 (2002); Shareen Usdin et al., *The Value of Advocacy in Promoting Social Change: Implementing The New Domestic Violence Act in South Africa*, 8 REPROD. HEALTH MATTERS 55 (2000).

<sup>162</sup> TLAC RESEARCH BRIEF NO. 1, *supra* note 20, at 2.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* Vetten and her colleagues write: "Notably, six months' worth of entries was missing from the police domestic violence register while in some instances, up to 56% of information was missing from the applications for protection orders." *Id.*

<sup>166</sup> See Boonzaier, *supra* note 113.

<sup>167</sup> PARENZEE ET AL., *supra* note 161, at 11.



possible, or when the incident of domestic violence is reported—(a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment . . . .<sup>168</sup>

However, the police—as well as other branches of the security services and “would-be” accountable state role players—generally fail to take complaints seriously. They demonstrate a lack of willingness to intervene in disputes. Worse still, they engage in IPV-comparable acts that reenact the physical and psychological harm sustained by women.<sup>169</sup>

In a recent study of IPV in South Africa, one research participant—a nurse who treats female patients who experience IPV—stated that “[w]omen go to report to the police and they [police] tell them [the women] ‘Go back [home], it’s a family issue, and talk about it.’ They tell them ‘please be obedient to your man.’”<sup>170</sup> One nurse emphasized women’s lack of options concerning partner abuse: “The women feel they have nowhere to [run] . . . so they sit and accept the abuse.”<sup>171</sup> Similarly, another nurse remarked,

I think the fact that there is not a lot being done shows that it [violence against women] isn’t being taken seriously . . . I don’t think they [the police] see it as very important. They don’t take it seriously . . . It is not seen as a priority . . . The police think that they are above the law . . . training would really help. Training them on intimate partner violence and how they should respond.<sup>172</sup>

Still another health provider offered the following bracing critique of standard practices:

[The government should] strengthen the laws to hold perpetrators accountable, it sends out the wrong message if they are released. Then the women can feel empowered to report the violence. Otherwise they [women] don’t see the point. I don’t know if the police also perpetrate violence because when you report it they just laugh. I don’t know how the government should address this—because they make you look stupid and make you feel as if you are fighting a losing battle [when you report IPV].<sup>173</sup>

This justified anticipation of bad behavior is not limited to police officers. Parenzee and her colleagues found comparable levels of insolence to be widespread amongst other state actors charged with discharging core elements of the DVA:

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<sup>168</sup> Domestic Violence Act 116 of 1998 § 2(a) (S. Afr.).

<sup>169</sup> PARENZEE ET AL., *supra* note 161.

<sup>170</sup> Sprague et al., *Response of Nurses in Johannesburg to IPV*, *supra* note 11, at 17.

<sup>171</sup> Sprague et al., “*They Can’t Report Abuse, They Can’t Move Out. They Are at the Mercy of These Men*,” *supra* note 103, at 6.

<sup>172</sup> Sprague et al., *Response of Nurses in Johannesburg to IPV*, *supra* note 11, at 17-18.

<sup>173</sup> *Id.* at 18.

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 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.<sup>174</sup>

A 2009 study reviewed factors that had led to the SAPS noncompliance with the DVA.<sup>175</sup> Subsequent to the study’s revelation of the SAPS’ poor record, the ICD began to monitor the police.<sup>176</sup> The ICD, Parliament and the Auditor-General have all, separately, cited the lack of police adherence to the roles and the responsibilities delineated in the Act.<sup>177</sup> From 2001 to 2008, 1,121 complaints were laid against the police.<sup>178</sup> These complaints ranged from failure to open criminal cases, assist the harmed persons with finding appropriate medical treatment or shelter, seize dangerous weapons from the abuser, and, finally, to the failure to arrest the abuser (52.5% of total complaints).<sup>179</sup> No change in conviction rates for intimate femicide occurred between 1999 and 2009.<sup>180</sup> If protection orders and other actions are meant to safeguard the complainant from further harm, then recent intimate femicide rates indicate that this intended consequence of the DVA has not been realized.<sup>181</sup>

The penultimate nail in the DVA’s coffin is made manifest by the national government’s express disdain for the Act. In 2001, the Police Commissioner, Jackie Selebi, added to his infamy by remarking that the DVA was “made for a country like Sweden, not South Africa.”<sup>182</sup> Worse still, the institutional law

<sup>174</sup> PARENZEE ET AL., *supra* note 161, at 83.

<sup>175</sup> INDEPENDENT COMPLAINTS DIRECTORATE OF REPUBLIC OF S. AFR., A STUDY OF THE FACTORS CONTRIBUTING TO SAPS NON-COMPLIANCE WITH THE DOMESTIC VIOLENCE ACT 20-40 (2009) [hereinafter SAPS NON-COMPLIANCE WITH DVA].

<sup>176</sup> ISS POLICY BRIEF 71, *supra* note 92, at 4. Every six months, the SAPS National Commissioner must submit to Parliament reports with an outline of all complaints against police officers. *Id.*

<sup>177</sup> *Id.* at 5-6.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 5.

<sup>180</sup> *Id.*

<sup>181</sup> See Mathews et al., *Intimate Femicide-Suicide in South Africa*, *supra* note 129.

<sup>182</sup> Vetten, *Violence Against Women*, *supra* note 139, at 7. Sweden, along with other European Union countries, took part in a survey published in 2014 that asked 42,000 women about their experiences of physical, sexual and psychological violence. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, VIOLENCE AGAINST WOMEN: AN EU-WIDE SURVEY 3 (2014). The report concluded that “[w]hat emerges is a picture of extensive abuse that affects many women’s lives, but is systematically under-reported to the authorities. For example, one in 10 women has experienced some form of sexual violence since the age of 15, and one in 20 has been raped.” *Id.* The original Swedish study, cited in the European Union report, indicated that 35% of female respondents in a national postal survey had experienced physical or sexual violence by a current or prior partner after the age of fifteen. *Id.* at 24. See EVA LUNDGREN ET AL., CAPTURED QUEEN: MEN’S VIOLENCE AGAINST WOMEN IN

enforcement requirements to make good on the promise of the DVA suffer from persistent under-budgeting.<sup>183</sup> The state has not, according to MP Susan de Vos' request in Parliament, shown us the money.<sup>184</sup>

Vetten and her colleagues, after conducting a detailed analysis of labyrinthine budget allocations and expenditures, conclude:

The Act was thus passed at a time where legislation was not routinely costed beforehand and is being implemented in the context of an under-resourced and under-capacitated criminal justice system. Enforcing the DVA is therefore but one of a number of activities competing for members of the criminal justice system's time and attention.<sup>185</sup>

Staff shortages—especially with respect to court clerks—and the concomitant delays in serving protection orders place every woman's safety at even greater risk.<sup>186</sup> The attendant additional costs of travel, childcare and loss of income created by delays are expenditures most South African women simply cannot afford, particularly rural women who have access to the fewest legal services and financial resources.<sup>187</sup>

South Africa's DVA, lauded for its progressive, responsive approach and its supposed alignment with FC sections 27 and 12, as well as CEDAW, has failed to fulfill its promise. The Constitutional Court conveyed quite powerfully the parlous state of domestic violence law and its execution in *State v. Baloyi*:

The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic behaviour are normalised rather than combated.<sup>188</sup>

The same proposition would appear to hold, and could perhaps be put far more strongly, when we consider the absence of adequate law, policy or institutions that should prevent IPV and attend, appropriately, to women who experience IPV.

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"EQUAL" SWEDEN—A PREVALENCE STUDY 7-10 (2002), <http://www.unecce.org/fileadmin/DAM/stats/gender/VAW2/surveys/Sweden/publication.pdf>.

<sup>183</sup> Vetten, "Show Me the Money," *supra* note 152, at 280.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Clerks of the court constitute a critical entry point into, and barrier within, the justice system. *Id.* at 285. Clerks are obliged to help complainants complete forms, which may not be translated into all eleven official languages in South Africa. *Id.* Clerks are required to assist women who may not be fully literate and who often experience fear, distress, anger and stigmatization when reporting IPV. *Id.*

<sup>187</sup> PARENZEE ET AL., *supra* note 161, at 14.

<sup>188</sup> *State v. Baloyi* 2000 (2) SA 425 (CC) at para. 12 (S. Afr.) (internal citations omitted).

IV. HOW SOUTH AFRICA'S PUBLIC HEALTH SYSTEM FAILS TO RESPOND TO  
INTIMATE PARTNER VIOLENCE

Current research indicates that South African women who experience IPV-associated injuries seek care from the public health system more frequently than women who are not abused.<sup>189</sup> The highly cyclical nature of IPV accounts for this difference. IPV is not, generally speaking, a once off event. It recurs.<sup>190</sup> In Vetten's study of 942 IPV cases in 2009, 28.6% of women reported that their partners had threatened them with death.<sup>191</sup> Yet only 4.1% obtained a divorce<sup>192</sup> and only one in three obtained a protection order.<sup>193</sup> Of this sample, 89% were unemployed and, therefore, economically dependent on their partners.<sup>194</sup> They could not leave, even if they wanted to do so.<sup>195</sup> As a result, women who were at obvious risk of further injury, illness and death have continued to make use of public health services.<sup>196</sup> Research indicates they sought solace from health professionals because they possessed little confidence that the police would intervene on their behalf.<sup>197</sup>

Recent studies that describe the role nurses play in addressing intimate partner violence reveal that nurses perceive their female patients to be at great risk of further harm, severe illness, debilitating injury, and death. A nurse in a public hospital in Johannesburg stated: "I had a lady [a patient] who, the boyfriend was trying to rape her . . . [so] she jumped out the window. And she broke her legs."<sup>198</sup> A nurse in a different public hospital in Johannesburg described one patient's experience of violence at the hands of her husband: "[T]he doctor show[ed] us a picture [a scan] of a woman [patient] . . . [and] they made [a] cesarean section to take out the dead baby inside. The man put a screwdriver in the woman's vagina. . . . The uterus was also perforated."<sup>199</sup> One nurse reflected upon her own experience of IPV: "[I]t was so difficult. I would sit on the pain . . . and keep quiet with it. My only option was to think of killing myself. . . . I was admitted [to a hospital] for depression."<sup>200</sup>

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<sup>189</sup> Gass et al., *supra* note 2, at 582-83.

<sup>190</sup> García-Moreno, *Dilemmas and Opportunities*, *supra* note 19, at 1509 ("Without intervention, the violence usually escalates in frequency and severity resulting in repeat visits to the healthcare system.").

<sup>191</sup> TLAC RESEARCH BRIEF NO. 1, *supra* note 20, at 5.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 6.

<sup>194</sup> *Id.* at 4.

<sup>195</sup> See Mathews et al., "So now I'm the Man," *supra* note 18.

<sup>196</sup> See Gass et al., *supra* note 2, at 582-85.

<sup>197</sup> See WHO CLINICAL & POLICY GUIDELINES, *supra* note 1; Sprague et al., *Response of Nurses in Johannesburg to IPV*, *supra* note 11.

<sup>198</sup> Sprague et al., *Response of Nurses in Johannesburg to IPV*, *supra* note 11, at 14.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 17.

That women seek assistance from health professionals, rather than law enforcement officials, is a global phenomenon.<sup>201</sup> Yet, for many years, researchers, states, and international non-governmental organizations failed to recognize the correlation between IPV and (a) an increased burden of disease, (b) lost productivity, and (c) diminished overall social development.<sup>202</sup>

Finally, in 2002, WHO released its *World Report on Violence and Health*.<sup>203</sup> This detailed account patiently expatiated and categorized the health effects of violence. Krug and his colleagues stressed that “the health consequences of violence are far broader than death and injuries. Victims of violence are at risk of psychological and behavioural problems, including depression, alcohol abuse, anxiety, suicidal behaviour, and reproductive health problems, such as sexually transmitted diseases, unwanted pregnancies, and sexual dysfunction.”<sup>204</sup>

The WHO report authors emphasized the public health sector must be “directly concerned with violence not only because of its huge effect on health and health services, but also because of the significant contributions that . . . public health workers can achieve in reducing its consequences.”<sup>205</sup> The costs, when health providers fail to intervene in clinical settings to prevent further harm to women, have been analyzed elsewhere.<sup>206 207</sup> The takeaway? Violence prevention

<sup>201</sup> See Thomas Songer et al., *Core Competencies for Injury and Violence Prevention*, 99 AM. J. PUB. HEALTH 600, 600-03 (2009). For more on health care utilization and poorer health outcomes for women who experience IPV, see generally Karuna Chibber & Suneeta Krishnan, *Confronting Intimate Partner Violence: A Global Health Care Priority*, 78 MOUNT SINAI J. MED. 449 (2011).

<sup>202</sup> See Krug et al., *supra* note 21; NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 69; SEN, DEVELOPMENT AS FREEDOM, *supra* note 69; Campbell, *supra* note 99.

<sup>203</sup> Krug et al., *supra* note 21, at 1085.

<sup>204</sup> *Id.* at 1085. The authors consistently note the paucity of data on violence: “Global and national data are very scarce. However, the widespread nature of violence is clear. . . . In 48 population-based studies from around the world, between 10% and 69% of women reported having been physically assaulted by an intimate partner during their lifetime.” *Id.*

<sup>205</sup> *Id.* at 1083.

<sup>206</sup> See Sharps et al., *supra* note 81.

<sup>207</sup> Screening, or “asking,” women about violence in health care settings has been part of an ongoing subject of debate for many years. See Gene Feder et al., *How Far Does Screening Women for Domestic (Partner) Violence in Different Health-Care Settings Meet Criteria for a Screening Programme?: Systematic Reviews of Nine UK National Screening Committee Criteria*, 13 HEALTH TECH. ASSESSMENT, at xi-xiii, 29-76 (2009); Peggy Nygren et al., *Screening Women and Elderly Adults for Family and Intimate Partner Violence: A Review of the Evidence for the U.S. Preventive Services Task Force*, 140 ANNALS INTERNAL MED. 387, 387-94 (2004). This debate achieved some resolution in 2013 when the WHO and the U.S. both made clinical and policy recommendations. The U.S. opted for universal screening, whether or not there were signs or symptoms of abuse. See Virginia A. Moyer, *Screening for Intimate Partner Violence and Abuse of Elderly and Vulnerable Adults: U.S. Preventive Services Task Force Recommendation Statement*, 158 ANNALS INTERNAL MED. 478, 478 (2013). The WHO made recommendations based on income setting, available evidence and perceived resources. WHO CLINICAL & POLICY GUIDELINES *supra* note 1. Jewkes contends, “IPV and its health consequences should be prevented and addressed in health services.” See Jewkes, *Intimate Partner Violence, the End of Routine Screening*, *supra* note 115, at 190. However, she maintains that screening and routine interventions are insufficient. *Id.* She writes, “[y]et the task of crafting an appropriate health sector response to IPV remains, and further research is needed to show how best to define such a response.” *Id.* For concerns over harm to women once they leave health care settings, see Ann Taket et al., *Should Health Professionals Screen All Women for Domestic Violence?*, PLOS MED.

and adequate health care treatment must form essential planks of any viable national IPV programme.<sup>208</sup>

In 2013, the WHO expressly recognized the dual role played by public health professionals who confront the manifold ills associated with IPV.<sup>209</sup> Consistent with this dual role, the WHO made the following two observations. First, any plan to diminish IPV must recognize that public health professionals constitute the first line of defense. In recognizing the primacy of place of public health professionals, the WHO noted that “[a] health-care provider is often the first contact for survivors of intimate partner violence or sexual assault.”<sup>210 211</sup> Second, “the health sector . . . [must be] part of a robust multi-sectoral approach that engages governments and civil society, on the local, national and international level.”<sup>212</sup> The WHO justified greater emphasis on the health sector by stressing the positive manner in which health professionals are perceived by patients: “Women living with partner violence identify health-care providers as the professionals whom they would most trust with the disclosure of abuse.”<sup>213</sup>

All to the good. However, the WHO was still obliged to consider feasibility and related concerns in low-income and middle-income countries such as South Africa. The WHO concluded that universal screening for violence against women could not be required of LMICs due to a potential lack of resources.<sup>214</sup> The WHO also felt obliged to note the paucity of evidence regarding IPV in LMICs.<sup>215</sup> However, these two concessions were carefully cabined. The WHO unequivocally (a) recommended that *all* countries develop “local policies and protocols defining roles and responsibilities” of health professionals,<sup>216</sup> (b) recommended that health professionals receive training in the appropriate manner for treating IPV; and (c) advised that health-related professional education curricula embrace treatment for IPV.<sup>217</sup> This push, with commensurate reservations, sounds strikingly like the South African Constitutional Court’s approach to FC section 27 and the right of access to health care services.

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(Oct. 19, 2004), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0010004>.

<sup>208</sup> Press Release, *Violence Against Women: A “Global Health Problem of Epidemic Proportions”*: *New Clinical and Policy Guidelines Launched to Guide Health Sector Response*, WORLD HEALTH ORG. (June 20, 2013), [http://www.who.int/mediacentre/news/releases/2013/violence\\_against\\_women\\_20130620/en/](http://www.who.int/mediacentre/news/releases/2013/violence_against_women_20130620/en/) [hereinafter 2013 Press Release of WHO].

<sup>209</sup> WHO CLINICAL & POLICY GUIDELINES, *supra* note 1.

<sup>210</sup> *Id.* at 10.

<sup>211</sup> At the launch of that report, the Director General of the WHO, Margaret Chan, stated “[t]hese findings send a powerful message that violence against women is a global health problem of epidemic proportions.” 2013 Press Release of WHO, *supra* note 208. See also Gass et al., *supra* note 2.

<sup>212</sup> *Seven Governments Adopt Statement on Violence Against Women and Girls at 66th World Health Assembly*, WORLD HEALTH ORG., [http://www.who.int/violence\\_injury\\_prevention/media/news/2013/21\\_05/en/](http://www.who.int/violence_injury_prevention/media/news/2013/21_05/en/) (last visited Dec. 22, 2015).

<sup>213</sup> 2013 Press Release of WHO, *supra* note 208.

<sup>214</sup> WHO CLINICAL & POLICY GUIDELINES, *supra* note 1, at 2, 14.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 6.

The \$64,000 question has two-parts. Has South Africa met the WHO's reasonable expectations? Has the state satisfied the Constitutional Court's own relatively relaxed desiderata for FC section 27?

Policy and law certainly exist.<sup>218</sup> However, the DVA's substantial shortcomings with respect to treatment and sustained engagement of IPV have been described above in detail. So, while South Africa has made some attempt to align itself with international best practice, the extant legal and policy regime has been roundly criticized (from within by the ICD and from without by the Auditor-General) and found to be ineffective—to the extent it works at all.<sup>219</sup>

As matters currently stand, the DVA requires the police to identify appropriate health care, counselling, and shelter for women subject to IPV.<sup>220</sup> However, the Act contains no such corresponding set of obligations for the Department of Health (“DOH”) and the Department of Social Development (“DSD”).<sup>221 222</sup>

Such a lacuna in the law might be thought to reflect the overwhelming demands placed upon staff in a public health system beset by infrastructural, operational and human resource constraints. South Africa's public health system has, as some pundits contend, been derailed by the interacting epidemics of HIV and tuberculosis.<sup>223</sup> That argument does not make it out of the station. “Why?” you ask.

South Africa's security services are overwhelmed by crime, generally, and violent crime, in particular.<sup>224</sup> As with health care, those persons who can afford private security pay for *both* private security and public security (through taxes). The problem, as we have already shown, lies elsewhere. While the police are necessary to enforce (however grudgingly) temporary and permanent restraining orders issued by Magistrates' Courts against abusive intimate partners, the Auditor-General has shown that the police are not sufficiently well-trained to assist in such delicate matters as health care, counselling and shelter for women who experience IPV.<sup>225</sup> But, even that is not the real problem. Women are simply loath to report

<sup>218</sup> Domestic Violence Act 116 of 1998 (S. Afr.).

<sup>219</sup> See SAPS NON-COMPLIANCE WITH DVA, *supra* note 175. See also TLAC RESEARCH BRIEF NO. 1, *supra* note 20; ISS POLICY BRIEF 71, *supra* note 92; Vetten, *Violence Against Women*, *supra* note 139; Vetten, “*Show Me the Money*,” *supra* note 152.

<sup>220</sup> Domestic Violence Act 116 of 1998 (S. Afr.). See ISS POLICY BRIEF 71, *supra* note 92, at 4.

<sup>221</sup> See Vetten, *Violence Against Women*, *supra* note 139, at 4-5.

<sup>222</sup> Other researchers have made similar observations. PARENZEE writes: “One of the omissions in the DVA is its failure to place similar (or any, for that matter) obligations on health sector personnel to assist victims of domestic violence. Health services often represent the point of first and only contact for women with public sector service.” PARENZEE ET AL., *supra* note 161, at 79.

<sup>223</sup> See Coovadia et al., *supra* note 120; Courtenay Sprague, Matthew F. Chersich & Vivian Black, *Health System Weaknesses Constrain Access to PMTCT and Maternal HIV Services in South Africa: A Qualitative Enquiry*, AIDS RES. & THERAPY (Mar. 3, 2011), <http://www.aidsrestherapy.com/content/8/1/10>.

<sup>224</sup> See Woolman, *Security Services*, *supra* note 73, ch. 23B, at 23B-14.

<sup>225</sup> The Auditor-General's report on police service delivery concluded that existing practices in a

instances of IPV to the police. The police have a well-documented and inauspicious record of reversing their role as protectors of the vulnerable. They have become, in too many instances, perpetrators of graft and sexual assault.<sup>226</sup> If the DVA were to be amended properly, then it would be obliged to assign the responsibility for identifying appropriate health care, counselling and shelter for women who experience IPV to those persons best placed and most likely to provide effective assistance. The DVA does not do so. In terms of the South African Constitutional Court's own jurisprudence, the DVA does not come close to passing constitutional muster as a well-conceived, appropriately funded, comprehensive, or coordinated plan to address IPV.

We cannot say that nothing has been done. Some initial roundtable discussions have taken place. A task force has recommended training in domestic and sexual violence for health care providers.<sup>227</sup> That is as far as the state has gone. Talk. Despite these conversations, no DOH policy guidelines for health care providers to address IPV, or accompanying clinical protocols for the treatment of IPV, exist.<sup>228</sup> Indeed, the roundtable report rather damningly concluded that "[v]iolence against women is one of the most pervasive ills . . . yet there has been little focus on defining the health sector's role in addressing domestic violence."<sup>229</sup>

In the absence of adequate law or policy, one cohort of individuals has stepped into the breach: nurses in South Africa's public health facilities. As we have already seen, several recent studies demonstrate that South African nurses recognize IPV as an endemic problem amongst their female patients.<sup>230</sup> On their own, without direction, some nurses have addressed IPV through counseling,

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broad array of areas fell short of the standards required by the Constitution. See AUDITOR-GENERAL OF S. AFR., RP 22/2009, REPORT OF THE AUDITOR-GENERAL ON A PERFORMANCE AUDIT OF SERVICE DELIVERY AT POLICE STATIONS AND 10111 CALL CENTERS AT THE SOUTH AFRICAN POLICE SERVICE 2 (2009). The shortfalls ranged from the lack of an approved policy for sector policing to inadequate training and inadequate recording of cases of domestic violence. *Id.*

<sup>226</sup> See Vanessa Barolsky, Glenister *at the Coalface: Are the Police Part of an Effective Independent Security Service?*, 5 CONST. CT. REV. 377, 391-95 (2014).

<sup>227</sup> TLAC BIENNIAL REVIEW (2008-2009), *supra* note 68.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 18. The roundtable was held on August 11-12, 2008 at Wits Medical School in Parktown (Johannesburg). *Id.* Joyner and Mash write that "[d]espite extensive evidence on the magnitude of intimate partner violence (IPV) as a public health problem . . . insubstantial progress has been made in the development and implementation of sufficiently comprehensive health services." Joyner & Mash, *supra* note 11, at 1.

<sup>230</sup> One study found that "[n]urses' actions were motivated by fear for patients' survival, perceived professional obligations, patients' expectations of receiving treatment, personal experiences of IPV, and weak police responses to IPV." Sprague et al., *Response of Nurses in Johannesburg to IPV*, *supra* note 11, at 2. That said, women's agency and institutional agency in marginalised settings is poorly understood, particularly in relation to health care systems. See generally Julia Kim & Mmatshilo Motsei, "Women Enjoy Punishment": *Attitudes and Experiences of Gender-Based Violence Among PHC Nurses in Rural South Africa*, 54 SOC. SCI. & MED. 1243 (2002); Courtenay Sprague et al., *When Nurses Are Also Patients: Intimate Partner Violence and the Health System as an Enabler of Women's Health and Agency in Johannesburg*, GLOB. PUB. HEALTH (Apr. 1, 2015), <http://www.tandfonline.com/doi/abs/10.1080/17441692.2015.1027248>.



ascertaining abuse and referral.<sup>231</sup> While commendable, it is not clear what nurses and other health professionals can do on an *ad hoc* basis. Genuine progress requires a well-conceived and coordinated set of policies supported by the National Department of Health. In addition, these policies, and the personnel required to oversee IPV care, must receive the funding necessary to provide genuine protection and redress for female patients who experience IPV. In a system already stretched, it is difficult to imagine that nurses and other health professionals can effectively treat and offer information, prevention and support services to women who experience IPV, given: (a) the absence of clinical IPV guidelines; (b) the lack of requisite protocols; (c) the inadequate funding needed for training health personnel about IPV in clinical settings; and (d) the want of a comprehensive and coordinated plan to address the IPV crisis.<sup>232</sup> At the moment, nurses and health professionals can do no more than place a Band-Aid over a gaping wound.

V. HOW THE BASIC LAW, CEDAW AND THE ABSENCE OF A PLAN TO PROTECT WOMEN WHO EXPERIENCE INTIMATE PARTNER VIOLENCE SUPPORT SEVERAL FINDINGS OF CONSTITUTIONAL INFIRMITY

Here's where the rubber hits the road. We reprise, as is necessary, the manner in which the law fails wholesale to engage IPV, as well as the incontestable factual predicate on IPV prevalence, in order to demonstrate that the South African government has not adequately discharged its constitutional obligations.

On the law. South Africa's socio-economic rights jurisprudence under FC sections 26 and 27,<sup>233</sup> the constitutional development of delict (torts) regarding the state's liability for impairment of bodily integrity in terms of FC section 12<sup>234</sup> and CEDAW's<sup>235</sup> commitment to the elimination of intimate partner violence provide the legal edifice for our argument.

On the facts. We have noted the extraordinarily high prevalence of IPV (up to 55% in pregnant women in some studies)<sup>236</sup> and its correlation with the astonishingly high prevalence of HIV in women of reproductive age (up to 36% HIV prevalence in women aged 30–34).<sup>237</sup> We have demonstrated the abject failure of the DVA to direct women who experience IPV to persons best placed and most likely to provide effective assistance. We have taken cognizance of the

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<sup>231</sup> Navindhra Naidoo, Stephen E. Knight & Lorna J. Martin, *Conspicuous by Its Absence: Domestic Violence Intervention in South African Pre-Hospital Emergency Care*, 11 AFR. SAFETY PROMOTION J. 76, 76 (2013); Joyner & Mash, *supra* note 11, at 1; Kim & Motsei, *supra* note 230, at 1243.

<sup>232</sup> See Garcia-Moreno et al., *The Health-Systems Response*, *supra* note 91, at 1567. See also WHO CLINICAL & POLICY GUIDELINES, *supra* note 1, at 1-9.

<sup>233</sup> S. AFR. CONST., 1996, §§ 26-27.

<sup>234</sup> *Id.* at § 12.

<sup>235</sup> CEDAW, *supra* note 8.

<sup>236</sup> See Gass et al., *supra* note 2 (data on general IPV prevalence); Dunkle et al., *supra* note 2 (data on IPV prevalence in pregnant women).

<sup>237</sup> SHISANA ET AL., *supra* note 103, at xxiv.

WHO's unequivocal recommendation that all countries develop "local policies and protocols defining roles and responsibilities" of trained health professionals with respect to IPV.<sup>238</sup> South Africa's palpable failure to do so has been openly acknowledged by intergovernmental analysis undertaken in a report by the ICD.<sup>239</sup> That report, and the body of evidence provided above, confirms our contention that no semblance of an adequate policy exists to treat IPV, within the law, or within a comprehensive and coordinated programme. Women who experience IPV have been left, at best, to the ad hoc ministrations of nurses and other willing public health professionals.

Neither FC section 27, nor FC section 12, CEDAW, and uncontroversial readings of *Glenister*,<sup>240</sup> require South Africa to solve, immediately, all problems associated with IPV. They do light the path. Let us begin with FC section 27. If we track the multi-pronged test<sup>241</sup> for assessment of the constitutionality, or constitutional infirmity, of law, policy or conduct (as laid out above), then we are forced to conclude:

1. The state has failed to discharge its duty to progressively realise the right to access to health care because no reasonable plan exists to address IPV.
2. Even if some law—such as the DVA<sup>242</sup>—exists, it fails to qualify as a comprehensive and coordinated programme that engages all relevant spheres of government and organs of state that must contend with IPV.
3. No law or policy ensures that "appropriate financial and human resources are available" for the most minimal health care for women who experience IPV.
4. Since no law, policy or plan exists that will facilitate "the realisation of the right" to access to health care for women who experience IPV, therefore no law, policy or plan can be said to be reasonable in terms of "both conception and implementation."
5. If HIV prevalence in women of 17.4-36%<sup>243</sup> and 31%-55%<sup>244</sup> prevalence of physical, psychological, or sexual violence in women is not a "crisis" as repeatedly defined by the Constitutional Court,<sup>245</sup> then it is hard to know what counts as a "crisis."

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<sup>238</sup> Sprague et al., *Response of Nurses in Johannesburg to IPV*, *supra* note 11, at 5 (internal quotation marks omitted).

<sup>239</sup> SAPS NON-COMPLIANCE WITH DVA, *supra* note 175, at 23. The report notes that SAPS failure to effect a warrant for an arrest constituted 69.7% of complainants' reasons for contacting the ICD. *Id.*

<sup>240</sup> *Glenister v. President of the Republic of South Africa* 2011 (3) SA 347 (CC) (S. Afr.).

<sup>241</sup> *See supra* Part I, at 39-41.

<sup>242</sup> Domestic Violence Act 116 of 1998 (S. Afr.).

<sup>243</sup> SHISANA ET AL., *supra* note 103.

<sup>244</sup> Gass et al., *supra* note 2, at 582; Dunkle et al., *supra* note 2, at 230.

<sup>245</sup> *See supra* text accompanying note 9.

6. If the DVA limits resources to the police, and makes no reference to role of the DOH or DSD, then it is difficult to say how the law responds to the urgent needs of women who experience IPV.

And what is the bite of FC section 12 (read with FC section 10's<sup>246</sup> right to dignity)? Recall the hard-hitting two-fold holding of the *Carmichele*<sup>247</sup> Court. First, the imminent threat of physical, psychological or sexual violence all South African women face daily, and the manner in which it undermines their autonomy, must inform our understanding of the state's obligations to women in terms of the right to dignity and the right to freedom and security of the person.<sup>248</sup> Second, not only does the absence of policy or law with regard to IPV—whether sexual, physical or psychological—constitute a *prima facie* violation of the *positive* duties imposed upon the state to protect the right to bodily integrity found within FC section 12, the *Carmichele* Court then categorically states that such violence vitiates the enjoyment of all the other rights and freedoms enshrined in the Constitution.

That last notion takes us directly to the first part of our reading of FC section 7(2) in *Glenister*. The *Glenister* Court held that the state could not make good on its obligations under FC section 7(2)—to fulfil, to promote, to respect, and to protect South Africa's denizens in terms of the substantive provisions of the Bill of Rights—without an effective, independent security service.<sup>249</sup> The same line of analysis holds true here. The state cannot make good on its obligations under FC section 7(2)—to respect, protect, promote, and fulfill the rights of women who experience IPV—without adequate provision of the requisite *access* to health services, social services, and security services necessary to enjoy the rest of their fundamental rights.

*Glenister* connects FC section 7(2)'s obligations to promote a democratic society (predicated upon the fundamental rights enshrined in FC chapter 2)<sup>250</sup> to South Africa's international obligations (under the United Nations Convention against Corruption).<sup>251</sup> It does so by acknowledging that the just and fair social order to which the South African Constitution aspires will not come into existence unless it takes adequate steps, in terms of constitutional provisions and international law, to eliminate rampant corruption within the state and complicit corruption within the broader society. (State and civil society must tango, they must be in sync, for a constitutional democracy to function as designed.) A state and a society warped by patronage, cronyist, and clientelist arrangements of power and distributions of wealth cannot possibly deliver on the manifold promises made

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<sup>246</sup> S. AFR. CONST., 1996, § 10.

<sup>247</sup> *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) (S. Afr.).

<sup>248</sup> *Id.* at para. 62 (internal citations omitted).

<sup>249</sup> S. AFR. CONST., 1996, § 7(2); Woolman, *Security Services*, *supra* note 73, ch. 23B, at 23B-2.

<sup>250</sup> S. AFR. CONST., 1996, ch. 2 (Bill of Rights).

<sup>251</sup> UNCAC, *supra* note 85.

in the Bill of Rights.<sup>252</sup> Call South Africa what it currently is: a patrimonial state in the Weberian sense.<sup>253</sup> We make a similar argument here. We tie the state's FC section 7(2)'s obligations to promote a democratic society (through fundamental rights such as FC section 9's right to sex and gender equality)<sup>254</sup> to South Africa's international obligations under CEDAW.<sup>255</sup> As we have already noted, the Committee on the Elimination of Discrimination against Women considered South Africa's first report and replied with a scathing indictment of this country's deeply entrenched and systematically unaddressed discrimination against women, as well as the state's failure to do much, if anything, to address persistent domestic and sexual violence in South Africa.<sup>256</sup>

South Africa has neither promulgated legislation nor undertaken temporary special measures to combat IPV through its public health system. Again, save talk of an egalitarian pluralist polity for a time in which men and women are genuinely equal. For now, the high prevalence of IPV and its often pernicious synergistic interactions with HIV places us at a moment in this country's history redolent of a time in American history when Martin Luther King could only say, "I have a dream." So do we. We dream of a South Africa that determines the fate of its citizens by the content of their character, and not the nature of their sex.

#### CONCLUSION

FC section 27, or FC section 12, or FC section 7(2)—and perhaps even CEDAW—might, on their own, be sufficient to support a finding that South Africa has failed to discharge its positive obligations under the Constitution. The concatenation of the above norms which the state continues to contravene leaves little room for doubt. The South African government, already found wanting by the ICD, must now be put on terms by parties who seek adequate remedies from our courts (and other law and policy makers). At a minimum (and that would constitute a significant advance), our courts must require that the state create a

<sup>252</sup> S. AFR. CONST., 1996, ch. 2 (Bill of Rights).

<sup>253</sup> Christian Coons & Michael Weber, *Introduction: Paternalism—Issues and Trends*, in PATERNALISM 2-24 (Christian Coons & Michael Weber eds., 2013).

<sup>254</sup> S. AFR. CONST., 1996, § 9.

<sup>255</sup> See Michelle Govender, *Domestic Violence: Is South Africa Meeting Its Obligations in Terms of the Women's Convention?*, 19 S. AFR. J. HUM. RTS. 663, 663-67 (2003). In 1998, South Africa submitted its initial report on CEDAW, which was summarized in the Report of the Committee on the Elimination of Discrimination against Women to the U.N. General Assembly: "100. The Committee considered the initial report of South Africa (CEDAW/C/ZAF/1) at its 387th, 388th and 393rd meetings, on 24 and 29 June 1998 (see CEDAW/C/SR.387, 388 and 393). 101. . . . The representative noted that the struggle to improve the status of women in South African society paralleled the country's efforts to reconstruct a society out of the legacy of the oppressive apartheid regime. 102. The representative informed the Committee that the new constitution . . . guaranteed equality between men and women and prohibited discrimination on the basis of, *inter alia*, sex, pregnancy and marital status. Gender equality and provisions for affirmative action had also been constitutionally entrenched." Rep. of the Comm. on the Elimination of Discrimination against Women on Its Eighteenth and Nineteenth Sessions, pt. II, ch. 4, ¶¶ 100-02, Supp. No. 38, U.N. Doc. A/53/38/Rev.1 (Aug. 21, 1998).

<sup>256</sup> *Id.*

coordinated and comprehensive plan to address IPV (an endemic health crisis) that is feasible—technically and financially—and tends to those women who experience recurring IPV and find themselves in the most urgent need.

We already have a sense of the shape of such a plan. Nurses in public health facilities already operate as the *de facto* front line in the war against IPV. They have, over time, developed a range of interventions that consists of intake assessment, protection, recommendation, treatment, and referrals to appropriate agencies after women leave hospitals.<sup>257</sup> An orderly, comprehensive, coordinated, constitutionally-mandated, and well-executed plan, these individual interventions cannot be said to be. These responses, which vary from public health setting to public health setting, are motivated by: (a) a sense of professional obligation; (b) personal experience; (c) the desperate needs of patients; and (d) the legal and the social vacuum created by the state itself.<sup>258</sup> Rare is the public health facility that will meet all the needs of women who experience IPV. That many nurses, on their own, respond in an empathetic and professional manner only underscores the need for a coherent, well-conceived set of public health laws, policies and protocols designed to address and to eradicate IPV. Until such a time as the state turns its attention to this problem in a concrete manner, it quite plainly stands in breach of a significant array of constitutional provisions and international obligations.

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<sup>257</sup> Sprague et al., *Response of Nurses in Johannesburg to IPV*, *supra* note 11.

<sup>258</sup> *See id.*; Joyner & Mash, *supra* note 11; HATCHER ET AL., *supra* note 11, at 1; Kim & Motsei, *supra* note 230, at 1243.

