

Master of Philosophy in Human Rights Law

Protection Orders in South Africa: The Effectiveness of Implementation and Enforcement
for Victims of Gender-based Violence

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Declaration

Research mini-dissertation/research paper presented for the approval of the Senate in fulfilment of part of the requirements for the MPhil Human Rights Law degree in approved courses and a minor dissertation/research paper. The other part of the requirement for this qualification was the completion of a programme of courses. I hereby declare that I have read and understood the regulations governing the submission of MPhil Human Rights Law dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

Signature:

Date: 14 March 2021

Abstract

This study's focus is aimed at determining the effectiveness of a protection order (PO) in South Africa obtained against gender-based violence (GBV). This legal instrument's function is to protect victims against further violation from the perpetrator. The Domestic Violence Act 116 of 1998 (DVA), grants victims the right to a PO. However, the enormous number of GBV cases in South Africa continues to increase. This alludes to South Africa's lack of adequate implementation and enforcement, in contradiction of its constitutional obligation to protect. The continued prevalence of GBV requires an investigation of whether preventative legal instruments, such as the PO, are fulfilling their purpose and the judicial implications of failure to provide protection.

This study examined the international human rights law obligation South Africa has to promote and fulfil the right to protection against GBV. Extensive existing research confirms that victims of GBV, statistically, are likely to be female. It was vital to examine obligations that South Africa has assumed through regional legal mechanisms, as they similarly guide implementing protective measures against GBV. The national legal framework was revisited and the provisions in the DVA were reassessed to give a clear indication of the PO processes.

The outcome of the study revealed that South Africa's PO process provisions in the DVA, have enabled South Africa to comply with its international, regional and domestic obligation to safeguard victims against GBV. However, there are glaring shortcomings in the implementation of the PO machinery. Law enforcement and prosecuting authority were found to be major contributors to these shortcomings. The research found that several of these essential service providers are challenged with full adherence to the provisions regarding the granting of the PO. These shortcomings have the effect that, in practice, South Africa has failed to comply with its obligations to international and regional human rights treaties and the South African Constitution. This study recommends ways in which POs can be applied more successfully in South Africa. The study suggests revised and strengthened legal processes, and more effectively informed intervention strategies.

Keywords: Gender-based violence, Protection Orders, Domestic Violence, Violence against Women, Victims

Chapter 1

I. INTRODUCTION

(a) Background

Gender-based violence (hereinafter GBV) is recognised as an acute human rights violation,¹ that has affected and continues to harm mostly women.² This deprives them of living their life at their full potential in freedom and tranquillity.³ Notwithstanding that GBV is not a problem for or only facing women however most statistics and victims are women,⁴ with the principal perpetrators being mostly men.⁵ Findings in a WHO-led report revealed that worldwide, in their lifetime, a third of women have been confronted with violence inflicted by an intimate partner,⁶ and in the past year, 18 percent have experienced the nature of such violation.⁷ Several national studies revealed that in their lifetime, 70 percent of females have encountered violations caused by an intimate partner.⁸ Globally, approximately 137 women also lose their lives to a family member or intimate partner every day.⁹

GBV is an international pandemic, it certainly does not discriminate according to society or culture.¹⁰ In 2015, in the United States, a survey was conducted across 27 Universities and its results revealed that the number of individuals that had experienced some kind of sexual

¹ UN High Commissioner for Refugees (hereinafter UNHCR) 'Sexual and Gender Based Violence' available at <https://www.unhcr.org/sexual-and-gender-based-violence.html>, accessed on 27 June 2019.

² The World Bank 'Gender-Based Violence (Violence against Women and Girls)' September 25, 2019, available at <https://www.worldbank.org/en/topic/socialdevelopment/brief/violence-against-women-and-girls>, accessed on 23 November 2019.

³ UNHCR op cit note 1.

⁴ K Anderson & D Umberson 'Gendering Violence: Masculinity and power in men's accounts of Domestic Violence'; S Bloom 'Violence against Women and Girls: A Compendium of Monitoring and Evaluation Indicators'; R Jewkes, K Dunkle, M Nduna & N Jama Shai 'Intimate Partner Violence, Relationship Power Inequity, and Incidence of HIV Infection in Young Women in South Africa: A Cohort Study' in Nonhlanhla Sibanda & Thandi Msibi 'Gender Based Violence in South Africa: A Brief Review' (2016) 4.

⁵ Salome M Chomba 'The universality of human rights: Challenges for Namibia', available at https://www.kas.de/c/document_library/get_file?uuid=b0d03cc0-3ef0-ca14-0b46-a3c92db72ed6&groupId=252038, accessed on 23 December 2019.

⁶ WHO, London School of Hygiene and Tropical Medicine & South African Medical Research Council 'Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence' (2013) 2.

⁷ UN Department of Economic and Social Affairs Statistics 'The world's women 2020: Trends and Statistics' October 2020 available at <https://worlds-women-2020-data-undesa.hub.arcgis.com/>, accessed on 03 February 2021.

⁸ UN Women 'Facts and Figures: Ending violence against women' available at <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> accessed on 23 November 2019.

⁹ UN op cit note 7.

¹⁰ Global Protection Cluster 'Handbook for protection of internally displaced persons' June 2010, available at <https://www.refworld.org/docid/4790cbc02.html>, accessed 23 November 2019, 168.

violation, was about 23 percent of its female undergraduate students.¹¹ Figures vital to mention are in cases reported on campus to the relevant officials, legal aids, or enforcement which only fell between five to 28 percent.¹² This was dependent on the nature of the violence and the popular reason behind this low percentage was that their cases were from experience, lacking consideration of actual severity and emergency.¹³

Similarly, in various countries, below 40 percent of female victims subjected to violence, reported or sought any help.¹⁴ If they did, it was usually with friends or family and less likely official health professionals or law enforcement.¹⁵ Formidable barriers stand in between women who take the initiative of reporting their cases.¹⁶ A few examples involve fear that law enforcement could be unhelpful; fear of recalling the events of the violence through court procedures such as testifying.¹⁷

Further data in a report was gathered, regarding the prevalence of GBV especially linked to intimate partner violence (hereinafter IPV) within 21 global regions. It showed sub-Saharan Africa with the highest number of cases, presenting percentages that are higher than the global average.¹⁸ A prominent sub-Saharan country, which arguably has one of the highest numbers of GBV prevalence globally, is South Africa.¹⁹ Gender Links conducted a study in South Africa and its findings revealed women totalling 36 percent in KwaZulu-Natal province, 45 percent in the Western Cape province, 51 percent in Gauteng province, and 77 percent in Limpopo province, had encountered at least one violation related to GBV.²⁰ The majority of these findings are based on cases that were successfully reported, as the likelihood of most victims voluntarily reporting

¹¹ David Cantor, Bonnie Fisher, Susan Chibnall, et al 'Report on the AAU campus climate survey on sexual assault and sexual misconduct' (2017) 57.

¹² *Ibid* at iv.

¹³ *Ibid*.

¹⁴ United Nations Statistics Division 'The World's Women 2015: Trends and Statistics' at 159 available at https://unstats.un.org/unsd/gender/downloads/WorldsWomen2015_report.pdf accessed on 17 October 2019.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ WHO, London School of Hygiene & Tropical Medicine, & SA Medical Research Council op cit note 6 at 47.

¹⁹ Bafana Khumalo, Sisonke Msimanga, Katie Bollbach 'Too costly to Ignore - the economic impact of gender-based violence in South Africa' available at <https://assets.kpmg/content/dam/kpmg/za/pdf/2017/01/za-Too-costly-to-ignore.pdf> (2014), accessed on 23 June 2019.

²⁰ Gender Links 'Research: Gender in violence 'A reality in South Africa' in Sibanda & Msibi op cite note 4.

GBV cases is less, particularly at police stations, due to some police officials exerting their patriarchal attitudes.²¹

As part of SADC, South Africa is said to have one of the strongest policies and laws that are relevant to fighting GBV.²² Furthermore, it is also a party to, has ratified, and/or signatory to some of the GBV related international and regional declarations. This significantly includes binding treaties that are particularly relevant to GBV and specifically target violence against women (hereinafter VAW). Examples of these are the Beijing Declaration and Platform for Action;²³ Convention on the Elimination of All Forms of Discrimination Against Women;²⁴ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,²⁵ and the SADC Protocol on Gender and Development particularly its Addendum on the Prevention and Eradication of Violence against Women and Children;²⁶ a commitment to eliminate and eradicate GBV.

The South African Constitution also provides a person the right to freedom and security, which includes the right 'to be free from all forms of violence from either public or private sources'.²⁷ Consequently, its strong legal framework is mainly influenced by various international and regional laws. Namely, the Protection from Harassment Act 17 of 2011, The Domestic Violence Act 116 of 1998 (hereinafter DVA), the Maintenance Act 99 of 1998, the Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007²⁸ among the select few. As South Africa's commitment to protecting, through international, regional, and domestic mechanisms, it has made provisions in its DVA that capacitate protection through a protection order (PO).

²¹ Lisa Vetten 'Show me the money': A review of budget allocated towards the implementation of South Africa's Domestic Violence Act' in Sibanda & Msibi op cit note 4.

²² UNODC 'Regional strategy and framework of action for addressing Gender Based Violence 2018 - 2030' (2018) 14.

²³ United Nations 'Beijing Declaration and Platform of Action' (hereinafter BDPfA), available at <https://www.refworld.org/docid/3dde04324.html>, accessed on 19 January 2020.

²⁴ UN General Assembly, 'Convention on the Elimination of All Forms of Discrimination against Women' (hereinafter CEDAW) available at: <https://www.refworld.org/docid/3ae6b3970.html>, accessed on 13 September 2019.

²⁵ African Union 'Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,' (hereinafter Maputo Protocol) available at <https://www.refworld.org/docid/3f4b139d4.html>, accessed on 19 January 2020.

²⁶ Southern African Development Community 'SADC Protocol on Gender and Development' 2008 available at https://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf, accessed on 14 December 2019.

²⁷ Constitution of South Africa 1996, s 12(1)(c).

²⁸ Sibanda & Msibi op cit note 4.

The core argument of this dissertation is that South Africa has human rights obligations to protect women from domestic violence. This emerges strongly from the international and regional treaties that South Africa has ratified and the rights in South Africa's Constitution. The study argues that while South Africa appears to be fulfilling these human rights obligations by providing the PO mechanism in the DVA, this is merely compliant on paper. Evidence shows that the PO machinery has not fulfilled its objective to protect women from domestic violence. The study argues that South Africa has not fulfilled its human rights obligations through its failure to properly enforce the PO machinery in practice.

(b) Definition of Key Terms

GBV is known to be an umbrella term that encompasses acts of violence based on gender roles/stereotypes. For this study, the form(s) of GBV that will be focused on and to a certain extent used as terms interchangeably to GBV are domestic violence, IPV, and violence against women (hereinafter VAW). Therefore, these including other relevant definitions are important, as they form a breakdown of the umbrella term GBV, to help determine the meaning behind them, as they are referred to in the study.

The definition in SADC Protocol on Gender and Development of GBV states it is:

‘All acts perpetuated against women, men, boys and girls on the basis of their sex which causes or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.’²⁹

An interesting and relevant detail added by the neighbouring country Namibia, in its National Gender Policy,³⁰ on to the SADC Protocol definition elaborate that, ‘gender-based violence refers to all forms of violence that happen to women, girls, men, and boys because of the unequal power relations between them’.³¹

The United Nations definition of VAW is:

‘[A]ny act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or in private life.’³²

²⁹ Op cit note 26 art 1(2).

³⁰ Namibian Ministry of Gender Equality and Child Welfare ‘National Gender Policy 2010-2020’ (2010).

³¹ Ibid 30 at 29.

³² UN General Assembly ‘Declaration on Elimination of Violence against Women’, 20 December 1993, A/RES/48/104, available at <https://www.refworld.org/docid/3b00f25d2c.html>, accessed on 3 June 2019.

The definition is further elaborated by stating that VAW is encompassed by, however, does not only place limits to physical, physical abuse and being violated sexually which occurs mostly in the family and community. It is also accompanied by certain traditional rituals that pose as harmful to women: dowry-related abuse, rape within marriage, non-spousal violence, female genital mutilation, and oppressional violence.³³ In an information sheet published by WHO, the IPV definition is,

‘1/c One of the most common forms of violence against women and includes physical, sexual, and emotional abuse and controlling behaviours by an intimate partner.’³⁴

The significant term domestic violence as one form of GBV, that will be frequently used in this study, sees mostly women and children being violated in their domiciles. Its detailed definition will be further elaborated in a later chapter, highlighting how it is outlined in the DVA.

(i) Key concept definitions

The below key concepts are specific to the scope and significance of this study.

Protection order

A PO intends to prevent the alleged perpetrator from further harming the complainant through GBV, by stating in the order what conduct must be refrained from. The complainant is safe if the alleged offender complies with the PO. Any contravening of anything stipulated in the PO may lead to arrest and as soon as it is issued, it is validated as nationally enforceable.³⁵ Another source defined a PO as,

‘1/c "an order of the court, where a magistrate lists the various things that an abuser may and may not do, to stop the abuser from abusing" the victim’.³⁶

³³ Ibid.

³⁴ WHO ‘Understanding and addressing violence against women: Intimate Partner Violence’, available at https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=F6BB3259FF1115043BE86D48244E9733?sequence=1, accessed on 19 October 2019.

³⁵ South African Police Service ‘Applying for protection order’ available at https://www.saps.gov.za/services/protection_order.php, accessed on 8 September 2019.

³⁶ Joy Watson, Lisa Vetten, Penny Parenzee, et al Christi Van der Westhuizen (ed) ‘Eye on the money: Women and government priorities in South Africa’ in Canada: Immigration and refugee board of Canada ‘South Africa: Domestic violence, including legislation, state protection and support services available to victims; ability of women to relocate to Cape Town (2014-May 2015)’ 25 May 2015, available at <https://www.refworld.org/docid/5652e2814.html>, accessed on 27 May 2019.

Victim

The term victim(s) refers to a person or a group who has undergone some form of GBV,³⁷ significantly and relevant for this study, a woman who has been domestically violated by an intimate partner.

Perpetrator

An individual who intentionally inflicts any act of domestic violence on his intimate partner. This can be anyone, however, this is most commonly violence inflicted by a man on a woman, particularly in intimate partner relationships.³⁸

II. PROBLEM STATEMENT/RATIONALE OF THE STUDY

As aforementioned, South Africa's DVA gives each of its respective inhabitants' rights and guidelines on how to apply for a PO. A study made the revelation that complaints are made, and POs are filed for by only a few victims.³⁹ Furthermore, the same study states that the process is quite complex and prolonged and that most victims lack the relevant information and education on the process of applying for a PO.⁴⁰ In further research, it shows that regardless of the high number of POs being applied for and eventually granted, they are only effective if enforced to their full extent.⁴¹

The inadequacy of full enforcement of POs in South Africa has in some tragic instances, resulted in some victims being murdered by intimate partners, despite a PO being in place.⁴² One case that depicts this injustice, is where a victim, a woman who had a PO in place for about a year. She had been recently threatened by the perpetrator, thereafter she reported this to the police, however, shortly after that, while on her way to work, was then brutally murdered by her ex-boyfriend.⁴³ One would think that since the victim had a PO in place, for a prolonged period,

³⁷ UNHCR 'SGBV: Prevention and response - Training Package' (2016) 20.

³⁸ Ibid.

³⁹ Interagency Gender Working Group 'Case study: Violence against women, South Africa' available at https://www.igwg.org/wp-content/uploads/2017/05/CS_ViolenceAgainstWomenSouthAfrica.pdf, accessed on 7 December 2019, 3.

⁴⁰ Ibid.

⁴¹ Kelly Stone & Claudia Lopes *Policing Responses to Domestic Violence: Exploring Reactions by the Police to Women in Need of Shelter* (published Research Paper, Heinrich Böll Stiftung, November 2018) 4.

⁴² Lisa Vetten 'Police accountability and the domestic violence Act 1998' in Ibid.

⁴³ Graeme Hosken 'Stabbed 17 times after cops failed her' *IOL* 26 January 2012.

they would have at least been protected, especially that she had recently reported being threatened by the perpetrator. However, reporting the perpetrator to the authorities could have driven them to commit this brutality as an indication of outrage towards the victim.

Therefore, in this light and recognising other injustices such as the above, this research examines PO challenges while considering South Africa's obligations as part of the fulfilment of its duty and commitment to international, regional, and domestic law against GBV. It further assesses the impact this court order has on victims who have obtained and/or gone through the process of applying for a PO, as a way of providing informed recommendations for process, enforcement, and implementation improvement.

The topic of interest was fundamental and imperative to study because understanding the dynamics behind applying for a PO helps determine its purpose as a preventative protective legal mechanism or its possible disguise as a punitive punishing measure for victims. This further unlocks possible ways in which this systematic intervention can better address and eventually eradicate GBV.

III. RESEARCH QUESTIONS

This paper examines South Africa's state responsibility regarding human rights-related international, regional, and the Constitution to protect IPV specifically for its female residents. This will be achieved by providing answers to the following questions:

- (a) What guidelines/obligations do international, regional, and constitutional law provide South Africa in terms of prevention and protection measures against GBV?
- (b) What provisions are available in the DVA of South Africa for POs and to what extent do they protect victims from further/future domestic violence incidents?
- (c) What are more effective ways in which POs can be better applied as an ultimate prevention and protection method, against GBV in South Africa?

IV. SCOPE & LIMITATION OF THE STUDY

This study focuses on South Africa. It is a sub-Saharan country that contributes to some of the highest GBV incidents globally. South Africa has arguably the highest prevalence of GBV. Additionally, most victims are female, and arguably significant acts of violence related to GBV are experienced within intimate relationships. A protection measure has been provided through

the DVA, which is a PO. This instrument aims to aid in the eradication of domestic violence and most prevalently IPV as a form of GBV.

Therefore, this study examines this fundamental right to protect women through POs in South Africa, as its duty and commitment under international, regional, and domestic law. It further focuses on the possible challenges that are met by applicants of POs and their rights thereof. This dissertation further answers questions related to the standard of services that the victims are entitled to receive, its responsibility towards the provision of these, and significantly its policy in achieving its international, regional, domestic duties and commitments.

The perspectives of the victims are a crucial core principle of the international protection of humankind. However, due to time and resource constraints, this paper limitedly discusses their participation and input through published literature. It mainly relies on legal instruments that South Africa is a signatory to and has ratified, judicial decisions, several works of literature, including gathered data through desktop and documented material.

V. SIGNIFICANCE OF THE STUDY

The staggering numbers of VAW in South Africa and on a larger global scale drive the need to find ways to eradicate it progressively and effectively. Several data exists on GBV, however, it is limited and seldomly covers the impact of a PO, as a major preventative measure against it. Therefore this paper explicates protection measures through exercising various rights enshrined in international and regional human rights law, the South Africa Constitution, and domestic law. Furthermore, this paper examines the effectiveness and impact POs have on victims by answering the research questions. Conclusively, this study contributes to the limited existing literature by offering an added understanding of how South Africa can best safeguard inhabitants, as a state obligation guided by international, regional, and domestic law.

Additionally, it provides recommendations to existing legislation and policies, which South Africa can use to better implement and enforce POs. This paper is differentiated from and is an additional piece of literature on POs being implemented in a much more sustainable manner. Consequently, it is anticipated that the recommendations as put forth by this study will contribute through academic research, provide anti-GBV organisations in South Africa — and relevant institutions — the will-power to enhance its efforts to safeguard the protection of

victims, especially women, by enabling them to realise their rights, regain dignity and feel safer in the environment.

VI. GOAL AND OBJECTIVES

The study aims to:

- To recommend informed change intervention strategies that aim to eradicate GBV in South Africa.

Its objectives are:

- To examine the impact PO processes have on domestic violence victims in South Africa.
- To explore effective ways of PO implementation by reassessing the enforcement roles the justice system plays in South Africa.

V. METHODOLOGY

The study uses primary sources to substantiate its argument by utilising legislation and cases connected to GBV where POs were involved and that exist in South Africa. Consequently, for the secondary sources, the study relies on online accessible academic documents, journals, thesis work, reports, and books.

The next chapter will lay out the law in detail regarding the commitment South Africa has internationally, regionally, and constitutionally to eliminate GBV. This will aid the dissertation in examining what provisions are in place and to what extent has South Africa committed to the obligations laid out in these respective legal frameworks.

Chapter 2

I. HUMAN RIGHTS LEGAL FRAMEWORK FOR VICTIM PROTECTION AGAINST GBV

States have human rights obligations to protect their residence against GBV, including domestic violence. Where states fail to provide adequate protection, the states violate their human rights obligations. This chapter explores South Africa's human rights obligations to protect its residents from GBV, including domestic violence. These obligations arise from international and regional human rights treaties that South Africa has ratified including that of the Bill of Rights in South Africa's Constitution.

(a) International human rights framework

South Africa is a signatory to and/or has ratified international and regional binding treaties. This includes recognition of non-binding Declarations that are particularly relevant to GBV and specifically targeting VAW. These provide guidelines on how state parties are to protect victims of this discrimination. The compliance shown by South Africa to these victim protection guidelines is through the DVA which provides a PO as a significant legal protection mechanism. As highlighted briefly in the previous chapter, South Africa faces challenges when it comes to enforcing and implementing this vital tool. Therefore, this chapter delves into international, regional treaties and Declarations, including South Africa's Constitution and its Bill of Rights. These outline the obligations and guidelines provided under these laws. Progress reports on the challenges and achievements are revisited, to determine how South Africa is applying these guidelines and recommendations. South Africa has made a commitment and is therefore held liable and has due diligence to protect victims of GBV.

(i) Beijing Declaration Platform for Action

In 1995, during the 16th plenary meeting of the fourth world conference on women, the Beijing Declaration Platform for Action (hereinafter BDPfA) was adopted.⁴⁴ It was adopted without

⁴⁴ BDPfA op cit note 23.

dispute by 189 UN Member States,⁴⁵ with South Africa signing it in the same year.⁴⁶ Its objective is to empower women.⁴⁷ As a guideline to the responsibility of states, it further states that,

‘[i]t is the duty of States, ..., to promote and protect all human rights and fundamental freedoms.’⁴⁸

As part of its main Declaration, the BDPfA states that it is determined to:

‘Prevent and eliminate all forms of violence against women and girls’;⁴⁹

‘Promote and protect all human rights of women and girls’⁵⁰

The BDPfA focuses on twelve areas of concern. Human rights and VAW as two out of the twelve relevant concerns to this study.⁵¹ The Declaration comprises of commitments that call upon governments and other relevant parties to act in alleviating these concerns, and the following are relevant to protection against and prevention of GBV:

- ‘Violence against women’;⁵²
- ‘Lack of respect for and inadequate promotion and protection of the human rights of women’;⁵³

Strategic objectives and actions of the BDPfA are laid out to address these critical concerns, specifically that of VAW,⁵⁴ which is relevant to this dissertation. One significant statement in the Declaration, which provides details to the concerns, speaks to member states, and indicates:

‘Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long-standing failure to protect and promote those rights and freedoms in the case of violence against women is a matter of concern to all states and should be addressed.’⁵⁵

Encouragement is placed on member states to alleviate the lives of women by addressing the issue of violence, who as aforementioned, are likely to be susceptible to it. This is further emphasized in the BDPfA, by outlining:

⁴⁵ United Nations ‘Beijing Declaration and Platform for Action - Beijing +5 Political Declaration and Outcome’, available at https://www.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf, accessed on 20 January 2020.

⁴⁶ Republic of South Africa ‘South Africa’s Beijing +20 Report’, available at <http://www.women.gov.za/images/Final-Draft-2-National-Beijing-20-Report--26022015-3.pdf>, accessed on 20 January 2020.

⁴⁷ BDPfA chap II (9).

⁴⁸ Ibid.

⁴⁹ BDPfA annex I (29).

⁵⁰ BDPfA annex I (31).

⁵¹ United Nations op cit note 45.

⁵² BDPfA chap III (44).

⁵³ Ibid.

⁵⁴ BDPfA chap IV (D).

⁵⁵ BDPfA chap IV (D)(112).

‘In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and a consequence of violence against women’⁵⁶

The BDPfA defines VAW and classifies it as an act of GBV.⁵⁷ A further reiteration, that places women as more likely to succumb to violence, hence being victims, is highlighted to state:

‘Violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.’⁵⁸

The Declaration acknowledges incidences of VAW as underreported and hence undetectable.⁵⁹ Further research suggests that in South Africa despite the high prevalence of these violations, numbers are imprecise as numerous cases are unreported.⁶⁰ As a relevant part of this study, the BDPfA further states that even though cases may be reported, ‘there is often a failure to protect victims...’.⁶¹ This study concurs with this, as depicted earlier, there is still an ongoing fight against GBV, which confirms the challenge of protection. This is further emphasized in the detailed description of VAW concerns, which include, ‘women’s lack of access to legal information, aid or protection.’⁶²

Thereafter this statement is succeeded by guidelines in form of actions towards the strategic objective of ‘Take integrated measures to prevent and eliminate violence against women’.⁶³ As part of the UN Member states, South Africa as a government, is called to act upon, however not limited to:

‘(b) Refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation...’⁶⁴

‘(d) ‘Adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence...; take measures to ensure the protection of women subjected to violence, access to just and effective remedies...’⁶⁵

⁵⁶ Ibid.

⁵⁷ BDPfA chap IV (D)(113).

⁵⁸ BDPfA chap IV (D)(117).

⁵⁹ Ibid.

⁶⁰ Rape Crisis Cape Town in South African Human Rights Commission ‘Unpacking the gaps and challenges in addressing gender-based violence in South Africa’ (2018), available at <https://www.sahrc.org.za/home/21/files/SAHRC%20GBV%20Research%20Brief%20Publication.pdf>, accessed on 27 November 2020 at 3.

⁶¹ BDPfA op cit note 58.

⁶² BDPfA chap IV (D)(123).

⁶³ BDPfA chap IV (D.1).

⁶⁴ BDPfA chap IV (D.1)(124)(b).

⁶⁵ BDPfA chap IV (D.1)(124)(d).

‘(e) Work actively to ratify and/or implement international human rights norms and instruments as they relate to violence against women, ...;’⁶⁶

‘(h) Provide women who are subjected to violence with access to the mechanisms of justice and, as provided for by the national legislation, to just and effective remedies for the harm they have suffered and inform women of their rights in seeking redress through such mechanisms;’⁶⁷

‘(i) Enact and enforce legislation against the perpetrators of practices and acts of violence against women, ...;’⁶⁸

‘(j) Formulate and implement, at all appropriate levels, plans of action to eliminate violence against women;’⁶⁹

The abovementioned action strategies are significant to this study as they speak to the guidelines that have been provided to states like South Africa toward victim protection. To hold states accountable towards implementation, the BDPfA has placed institutional arrangements nationally for UN member-states, such as, ‘[g]overnments having the primary responsibility for implementing the Platform for Action.’⁷⁰ To reassert this, the BDPfA, further requests that, ‘[s]tates be encouraged to respond to this challenge by making commitments for action.’⁷¹ South Africa signed the BDPfA in the same year it was adopted and has since then implemented these actions, as a sign of commitment. In its progress report, reviewing 20 years, submitted in 2015, reaffirms its commitment by stating:

‘South Africa is committed to undertake a comprehensive national-level review of the progress made and challenges encountered in implementing the Platform for Action for the achievement of gender equality and empowerment of women’⁷²

Also, in the same progress report, concerning the critical concern of VAW, South Africa, has mentioned the existence of the DVA and places the PO as its principal legal instrument.⁷³ It informs, that victims are provisioned with paramount protection from violation including DV designated courts.⁷⁴ The report briefly mentions the general effectiveness of the legal mechanisms related to sexual offences, by providing cases that have used these policies to influence Landmark Court Decisions.⁷⁵ These may have formed part of the DVA (domestic

⁶⁶ BDPfA chap IV (D.1)(124)(e).

⁶⁷ BDPfA chap IV (D.1)(124)(h).

⁶⁸ BDPfA chap IV (D.1)(124)(i).

⁶⁹ BDPfA chap IV (D.1)(124)(j).

⁷⁰ BDPfA chap V (A)(293).

⁷¹ Ibid.

⁷² Republic of South Africa op cit note 46 at 6.

⁷³ Republic of South Africa op cit note 46 at 27.

⁷⁴ Ibid.

⁷⁵ Republic of South Africa op cit note 46 at 29.

violence as defined by the Act) and the usage of the PO, however, this is not specifically emphasized. Nonetheless, the legislative and policy context indicates that South Africa has made due effort to honour its commitment toward enacting and enforcing legislation for victim protection against GBV.

The 2015 progress report further outlines the achievements that complement the policies formed. Significant achievements related to the DVA, worth mentioning are:

‘82. A Domestic Violence Register has been developed and kept at all police stations in the Client Service Centre, to register all incidents and cases reported on domestic violence. A domestic violence incident form is used to record all incidents of domestic violence whether a case has been opened or not. There is also a form on the notice of rights which is issued to the complainant which stipulates all options and rights that the complainant has in dealing with domestic violence.’⁷⁶

As the PO is the main legal tool in the DVA, it is the opinion of this study, that this register is a contribution to further PO statistics. For instance, when compiling national reports (such as this one currently in discussion) or as accountability of implementation of processes toward obtaining a PO. This is if a PO section is specifically included in the register.

The report specifically includes the achievement of the increased number of PO applications, including the interim and final POs being granted.⁷⁷ The effectiveness of this preventative tool can be measured through the slightly increased number of applications, interim and final POs issued. This suggests that the implementation processes are positively functional, however, on the contrary, this would also confirm the high prevalence of domestic violence cases that still exist. This report formed part of its 20-year review after the BDPfA was adopted.

South Africa has compiled a more recent 25-year progress report, which reviews 2014-2019. In this report, South Africa, admittedly points out that regardless of its progressive and prominent legislation, that aims at enhancing lives, they are faced with challenges.⁷⁸ These challenges are related to insufficient and unsuccessful implementation.⁷⁹ One of them being the DVA which is significant to this study. The report raises the concern that failure to fully

⁷⁶ Republic of South Africa op cit note 46 at 32.

⁷⁷ Ibid.

⁷⁸ Republic of South Africa ‘Beijing +25 South Africa’s report on the progress made on the implementation of the Beijing Platform for Action 2014-2019’, available at https://static.pmg.org.za/190828National_Beijing_25_Report.pdf, accessed on 20 January 2020 at 13.

⁷⁹ Ibid.

implement this Act. This deprives women of the legal right to be at liberty when in public and private settings.⁸⁰

It further mentioned that another significant challenge, towards maintaining gender equality, was linked to:

‘[a]ddressing and eliminating the high levels of violence against women and girls and high levels of gender based violence and femicide;’⁸¹

Despite the challenges faced, the report acknowledges that since its independence, some progress, even though strenuous, has been made concerning gender balance, women's independence, and empowerment.⁸² The progress outlined in the report about VAW sees South Africa's focus aimed at enacting and executing a legal framework towards VAW.⁸³ South Africa hosted the Presidential National Summit toward ending GBV and Femicide, reviewed the National Plan of Action 2013-2018 on Addressing GBV, and instituted a National Strategic Plan aimed at tackling GBV and femicide. These were actions carried out in the past five years on tackling VAW that prioritised enacting and implementation of an anti-GBV legal policy framework.⁸⁴

Progress toward POs in this report is focused on the years between 2014/5-2015/6, which shows a further increase of applications and granting of interim the final POs. This is certainly disconcerting, as, in the 15-year review, the nation has pointed out the PO as its ‘main legal instrument’, yet no progress or details are part of this report. The information shared, is difficult to distinguish from the 20-year progress review. Although South Africa, through these reports, has conveyed its commitment toward the BDPfA strategic objectives outlined in the declaration, its challenges suggest, the nation still has an impending obligation toward eliminating VAW and largely GBV.

(ii) Convention on the Elimination of all Forms of Discrimination against Women

The Convention on the Elimination of all Forms of Discrimination against Women (hereinafter CEDAW) as a human rights treaty, has a vital role in the fight against GBV. Its focus is on women, who, as established in this study, are prominent victims of this issue. The treaty was

⁸⁰ Republic of South Africa op cit note 78 at 143.

⁸¹ Republic of South Africa op cit note 78 at 13.

⁸² Ibid.

⁸³ Republic of South Africa op cit note 78 at 132.

⁸⁴ Ibid.

adopted during the UN 107th plenary meeting in 1979.⁸⁵ It came into force as a global treaty in 1981 and by 1989, close to a hundred states were bound by its provisions.⁸⁶ South Africa proceeded to sign and ratify it on 15 December 1995.⁸⁷ Thereafter, in March 2005 it further consented to the Optional Protocol.⁸⁸

CEDAW's main objective is focused on discrimination against women.⁸⁹ In its first article, the treaty speaks on the forms of discrimination, however, the treaty makes no distinct provision solely focused on VAW.⁹⁰ Hence, the Declaration on the Elimination of Violence Against Women (hereinafter DEVAW) collaborates with CEDAW as a solution remedy toward this exclusion in the treaty.⁹¹ The DEVAW, even though not legally binding as the CEDAW, is relevant to this study, and will be briefly examined in collaboration with this treaty as an instrument that fills in the vital gap of VAW.

The DEVAW maintains extensive vital recognition by the UN General Assembly, as it was adopted in 1993.⁹² It explicitly addresses VAW by providing a detailed definition in Articles 1 and 2.⁹³ The Declaration, in Article 4, suggests member states condemn VAW and recommends them to urgently form legislative policies around eradicating it.⁹⁴

Further provisions, that apply to this dissertation in Article 3, begin by outlining that 'women are entitled to the equal enjoyment and protection of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'⁹⁵ Further emphasis

⁸⁵ CEDAW op cit note 24.

⁸⁶ UN Women, 'Convention on the elimination of all forms of Discrimination against women', available at <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#intro>, accessed on 25 November 2020.

⁸⁷ Centre for Study of Violence and Reconciliation People Opposing Women Abuse, Western Cape Network on Violence against Women 'South African shadow report on the implementation of the Convention on the elimination of all forms of discrimination against women' (2011), available at https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Joint_NGO_Report_for_the_session_SouthAfrica.pdf, accessed on 25 November 2020.

⁸⁸ Ibid.

⁸⁹ CEDAW op cit note 24 at 194.

⁹⁰ Ibid art 1.

⁹¹ United Nations 'Declaration on the Elimination of Violence Against Women'(hereinafter DEVAW), available at <https://undocs.org/en/A/RES/48/104>, accessed on 25 November 2020.

⁹² Nicole Chalira & Leah A Ndimurwimo 'Violence against women: A comparative analysis between Malawi and South Africa' (2018) 2 *SPECJU* 110; KPMG 'Report on diagnostic review of the state response to the violence against women and children', available at <https://genderjustice.org.za/wp-content/uploads/2017/12/Report-Diagnostic-Review-State-Response-VAWC.pdf>, accessed on 28 November 2020 at 35.

⁹³ DEVAW art 1 and 2.

⁹⁴ Ibid Article 4.

⁹⁵ DEVAW art 3.

is highlighted on ‘the right to equal protection under the law’ which encourages member states to follow these as guidelines. Furthermore, in Article 4 :

‘(c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;’⁹⁶

‘(d) [w]omen who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;’⁹⁷

‘(e) Consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing, considering, as appropriate, such cooperation as can be provided by non-governmental organizations, particularly those concerned with the issue of violence against women;’⁹⁸

(i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;’⁹⁹

The DEVAW is quite brief and specific, and the abovementioned measures guide South Africa in the process of eliminating GBV. On contrary, CEDAW is quite comprehensive with its measures of eliminating discrimination against women. The provisions outlined in the treaty that places an obligation on South Africa and speak directly to this study focus are:

‘(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;’¹⁰⁰

‘(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination;’¹⁰¹

‘(e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;’¹⁰²

CEDAW as a binding treaty, in Article 18, further obligates South Africa as a member state, to report to the Secretary-General of the UN on its implementation progress toward the provisions.¹⁰³ This report is deliberated on by the Committee on the Elimination of

⁹⁶ DEVAW art 4 (c).

⁹⁷ DEVAW art 4 (d).

⁹⁸ DEVAW art 4 (e).

⁹⁹ DEVAW art 4 (i).

¹⁰⁰ CEDAW art 2 (b).

¹⁰¹ CEDAW art 2(c).

¹⁰² CEDAW art 2 (e).

¹⁰³ CEDAW art 18 (1).

Discrimination against Women and should consist of a legal framework, policies, and administrative measures utilised through the implementation process.¹⁰⁴ The Committee's functions are extended in the Optional Protocol. The highlighting provisions that are noteworthy to this study are for victims to directly report to them.¹⁰⁵ For instance, the case of *AT v Hungary*¹⁰⁶, which required the Committee to investigate the gross human violation and deliberate on the matter.¹⁰⁷ The victim succumbed to domestic violence from her spouse, however, failed to get protection or safe housing from the Hungarian government.¹⁰⁸ The case was prolonged, and the victim was only heard by the state's courts after three years.¹⁰⁹ The Committee ruled that Hungary had failed to meet its commitments and was in violation of Articles 2, 5, and 16 of CEDAW's provision for the complainant.¹¹⁰ This case's recommendations through its final decision readdressed the CEDAW obligations on Hungary.¹¹¹ Additionally, this was the Committee's first domestic violence case, which referenced member states on maintaining their obligations under international law.¹¹²

Based on Article 21 which states:

‘The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.’¹¹³

This provision has been followed through by the CEDAW and has henceforth provided recommendations that initially focused on VAW and thereafter in a broader spectrum, GBV. General recommendations No. 12, 19 and 35 (hereinafter referred to as GR 12, GR 19, GR 35)

¹⁰⁴ Ibid.

¹⁰⁵ United Nations ‘Optional Protocol to the Convention on the Elimination of All Forms against Women’, available at <https://undocs.org/en/A/RES/54/4>, accessed on 28 November 2020.

¹⁰⁶ *A.T. v. Hungary*, Comm. 2/2003, U.N. Doc. A/60/38, at 27 (2005).

¹⁰⁷ Nicole Chalira & Leah A Ndimurwimo ‘Violence against women: A comparative analysis between Malawi and South Africa’ (2018) 2 *SPECJU* 110.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Fareda Banda ‘Building on a global movement: Violence against women in the African context’ (2008) 8 *African Human Rights Law Journal* at 8.

¹¹¹ LSE Centre for Women, Peace and Security ‘Tackling violence against women: AT v Hungary CEDAW’, available at <https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/at-v-hungary/>, accessed on 28 November 2020.

¹¹² Ibid.

¹¹³ CEDAW art 21(1).

focus on VAW, similarly to the DEVAW¹¹⁴, and reiterate the equality of protection for women under the law.¹¹⁵ The recommendations cement GBV as discrimination against women despite it being overtly omitted from provisions in the Convention.¹¹⁶ To ascertain their main objectives, GR 12, 19, and 35 lists specific recommendations toward member states, as a commitment to the CEDAW. The GR 12 recommendations toward CEDAW state parties, reflecting the purpose of this study are:

- '1. The legislation in force to protect women against the incidence of all kinds of violence in everyday life (including sexual violence, abuses in the family, sexual harassment at the workplace etc.);'¹¹⁷
- '2. Other measures adopted to eradicate this violence;'¹¹⁸
- '3. The existence of support services for women who are the victims of aggression or abuses;'¹¹⁹

Subsequently, in the GR 19:

'(a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;'¹²⁰

'(b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention;'¹²¹

'(t) That States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:- Effective legal measures, including penal sanctions, civil remedies compensatory provisions to protect women against all kinds of violence, including, inter alia, violence and abuse in the family, sexual assault and sexual harassment in the workplace;'¹²²

¹¹⁴ KPMG 'Report on diagnostic review of the state response to the violence against women and children', available at <https://genderjustice.org.za/wp-content/uploads/2017/12/Report-Diagnostic-Review-State-Response-VAWC.pdf>, accessed on 28 November 2020 at 35.

¹¹⁵ Global Health & Human Rights database 'CEDAW General Recommendation No. 19: Violence against Women', available at <https://www.globalhealthrights.org/wp-content/uploads/2013/09/CEDAW-General-Recommendation-No.-19-Violence-against-Women.pdf>, accessed on 26 November 2020.

¹¹⁶ Ibid at 302.

¹¹⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW) 'CEDAW General Recommendation No. 12: Violence against women', available at <https://www.refworld.org/docid/52d927444.html>, accessed on 28 November 2020.

¹¹⁸ Ibid para 2.

¹¹⁹ CEDAW General Recommendation No. 12 op cit note 117 para 3.

¹²⁰ CEDAW General Recommendation No. 19 op cit note 115 para 24 (a).

¹²¹ CEDAW General Recommendation No. 19 op cit note 115 para 24 (b).

¹²² CEDAW General Recommendation No. 19 op cit note 115 para 24 (t).

‘(v) That the reports of States parties should include information on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures.’¹²³

The GR 35 is an extensive update of the GR 19, which is an addition to its guidelines. These two documents complement each other.¹²⁴ The distinction between the GR 35 and the GR 19 is that the former focuses on “gender-based violence against women”. This specific term helps provide cognizance that violence is not an independent, however, communal issue.¹²⁵ Furthermore, the recommendations provided are in alignment with its focus and selected as specific to this study, are rendered as follows:

‘30. Ensure that all legal systems, including plural legal systems, protect victims/survivors of gender-based violence against women and ensure they have access to justice and to an effective remedy...’¹²⁶

‘40. Adopt and implement effective measures to protect and assist women complainants and witnesses of gender-based violence before, during and after legal proceedings, ...

a) Protecting their privacy and safety, ..., including through gender-sensitive court procedures and measures, bearing in mind the victim/survivor’s, witnesses’ and defendant’s due process rights

b) Providing appropriate and accessible protection mechanisms to prevent further or potential violence, without the precondition for victims/survivors to initiate legal actions, ... This should include immediate risk assessment and protection, comprising a wide range of effective measures and, where appropriate, the issuance and monitoring of eviction, protection, restraining or emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance. Protection measures should avoid imposing an undue financial, bureaucratic or personal burden on women victims/survivors.’¹²⁷

‘41. Ensuring all legal proceedings, protection and support measures and services to women's victims/survivors of gender-based violence respect and strengthen their autonomy. They should be accessible to all women, in particular to those affected by intersecting forms of discrimination and take account of any specific needs of their children and other dependent persons.’¹²⁸ They should be available in the whole territory of the State party, and provided irrespective of women’s

¹²³ CEDAW General Recommendation No. 19 op cit note 115 para 24 (v).

¹²⁴ OHCHR ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No.19’, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf, accessed on 28 February 2021.

¹²⁵ Ibid para 9.

¹²⁶ General Recommendation No. 35 op cit note 124 para 30.

¹²⁷ General Recommendation No. 35 op cit note 124 para 40 (a);(b).

¹²⁸ *RPB v the Philippines; Isatou Jallow v Bulgaria; V K v Bulgaria* in General Recommendation No. 35 op cit note 165 para 41.

residence status and their ability or willingness to cooperate in proceedings against the alleged perpetrator.^{129, 130}

Notably, the abovementioned GR 35 recommendations are quite specific to POs which provide South Africa and member states detailed guidelines. This allows South Africa to utilise these as a reference guide toward an effectively functioning prevention measure for victim protection. This recently established document helps identify any possible loopholes in the already existent legislation regarding POs and permits room for improvement.

Echoing the GR 12, 19, 35 recommendations collectively, and fulfilling its commitments towards the treaty and the CEDAW Committee, South Africa has since provided progress reports. Its most recent report was submitted in 2019, on the progress made from 2009-2014 (the report introduction includes a note of regret regarding late submission).¹³¹ Regarding VAW, the report mainly focuses on its achievements to implement various programs, support mechanisms, awareness programs, courts, program strategies, intervention measures toward its obligation to the CEDAW.¹³²

Significant highlights of the report worth mentioning in this study are that SAPS has the assignment to report any misconduct concerning the DVA non-compliance to the Civil Secretariat for Police Act.¹³³ It is their responsibility to keep track of this compliance by conducting consistently scheduled station visits.¹³⁴ This will be established, in the next chapter, that SAPS also has obligations in the DVA, and in a later chapter, law enforcement contributes to the lack of adequate protection of victims. Therefore, this achievement contributes to the accountability that South Africa is relied upon regarding its commitments. A further achievement related to accessing protection services is that every Magistrate and the High court is now considered as an equality court. This allows members of the public unrestricted access to report any grievances related to discrimination and thus receiving equal protection.¹³⁵ Furthermore, access to these court services does not require legal aid and court fees have been waived.¹³⁶

¹²⁹ CEDAW General Recommendation No.33 para 10 in General Recommendation No. 35 op cit note 124 para 41.

¹³⁰ General Recommendation No. 35 op cit note 124 para 41.

¹³¹ United Nations '5th periodic report submitted by South Africa under article 18 of the Convention, due in 2015: Convention on the Elimination of All Forms of Discrimination against Women', available at <https://digitallibrary.un.org/record/3840063?ln=en>, accessed on 28 November 2020.

¹³² Ibid at 11/38-18/38.

¹³³ United Nations op cit note 131 para 60.

¹³⁴ United Nations op cit note 131 para 59.

¹³⁵ United Nations op cit note 131 para 21.

¹³⁶ United Nations op cit note 131 para 22.

Despite this achievement being not specific to domestic violence, it is related to discrimination as provided in the CEDAW. This suggests that victims do not require to access other channels to obtain services, as they are permitted to seek protection directly from the courts.

A further noteworthy achievement in the progress report related to the GR 12 and 19 recommendations, concerning POs, is that applications increased between 2012/2013 to 2013/2014 by 3.56 percent.¹³⁷ DVA as one of the main instruments that fight against the major discrimination in South Africa, GBV, is limitedly discussed in terms of challenges and achievements. Similarly, to the BDPfA report, it lacks detailed information associated with POs as the main legal instrument. It also omits possible challenges that are encountered thus contributing to the violation of victim protection. It seems that the statistics of the quantity of the POs applied and granted, are prioritised as opposed to its effectiveness. CEDAW is a legally binding treaty and having highlighted the challenges with the implementation and enforcement of the PO, this suggests that South Africa is not fully complying with the protection obligations. The GR 35 provides specific guidelines for the PO, and as this report encompasses 2009-2014, it is the hope of this study that with the following report that more quality data is provided regarding the PO provision processes.

The next section will focus on the regional mechanisms that South Africa is affiliated with as part of its commitment to fight against GBV.

(b) Regional human rights framework

In 1981 the African Charter on Human and People's Rights (hereinafter African Charter) was adopted and enforced in 1986.¹³⁸ Thereafter, in 1996 South Africa ratified it.¹³⁹ To uphold the provisions related to VAW, the African Charter has an in-depth regional protocol that addresses women's rights.

The SADC Declaration on Gender and Development (hereinafter SADC Declaration). South Africa signed the SADC Declaration in 1997, along with other SADC member states.¹⁴⁰

¹³⁷ United Nations op cit note 131 para 189.

¹³⁸ United Nations - Treaty Series 'African Charter on Human and People's Rights. Concluded at Nairobi on 27 June 1981', available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201520/volume-1520-I-26363-English.pdf>, accessed on 29 November 2020.

¹³⁹ Republic of South Africa DoJCD 'African Charter on Human and Peoples' Rights', available at <https://www.justice.gov.za/policy/african%20charter/africancharter.htm>, accessed on 29 November 2020.

¹⁴⁰ SADC Gender Development: A Declaration by Heads of State or Government of the SADC, available at https://www.sadc.int/files/7613/5292/8380/Declaration_on_Gender_Development_1997.pdf, accessed on 29 November 2020.

The SADC Declaration highlights that state parties have also signed, acceded to, or has ratified the CEDAW.¹⁴¹ The SADC Declaration has an Addendum focused on VAW. The Addendum focuses on the eradication and prevention of VAW and children.¹⁴²

The above provisions demonstrate further obligations South Africa has, not only internationally, however, also regionally. The next section examines in detail the protocol and the Addendum as a VAW-related legal mechanism in terms of its guidelines to member states, highlighting its progress towards its commitments.

(i) The Addendum on the Prevention and Eradication of Violence against Women and Children The Addendum on the Prevention and Eradication of Violence against Women and Children (hereinafter SADC Addendum) by its commitment to the SADC Declaration, during the SADC Conference held in South Africa in 1998,¹⁴³ through its adoption has placed an obligation on itself as a nation to take “‘urgent measures to prevent and deal with the increasing levels of violence against women and children’”.¹⁴⁴ Also, the Addendum reaffirms its commitment to eliminate VAW¹⁴⁵ and highlights the high rate of cases related to it.¹⁴⁶

As a crucial part of this study, deep concern is placed on existing protection measures against VAW, which have ‘proved inadequate, ineffective and biased against the victims.’¹⁴⁷ Notably, thus far in this study, this is the first mechanism that explicitly calls out this major issue as a contributory factor to GBV. The PO’s role is to protect victims against further violations; however, this concern clearly suggests that many countries are failing to effectively implement and enforce preventive measures.

Thereafter it condemns all forms of VAW before outlining its provisions to be endorsed.¹⁴⁸ The legal section of the SADC Addendum, speaks to legal mechanisms such as the DVA, requiring them to condemn VAW.¹⁴⁹ Ensuring that adequate steps are taken to enact ‘other

¹⁴¹ Ibid para A (ii).

¹⁴² An Addendum to the 1997 Declaration on Gender and Development by SADC Head of State or Government, available at https://www.justice.gov.za/docs/other-docs/1998_SADC%20DeclarationAddendum.pdf, accessed on 29 November 2020.

¹⁴³ Ibid para 2.

¹⁴⁴ SADC Addendum op cit note 142 para 1.

¹⁴⁵ SADC Addendum op cit note 142.

¹⁴⁶ SADC Addendum op cit note 142 para 6.

¹⁴⁷ SADC Addendum op cit note 142 para 7.

¹⁴⁸ SADC Addendum op cit note 142.

¹⁴⁹ SADC Addendum op cit note 142 para 8.

enforcement mechanisms for the prevention¹⁵⁰ and to eliminate VAW.¹⁵¹ Member states are encouraged to adopt legal instruments of protection.¹⁵² Victims and offenders are equally provided for, in that they are entitled to ‘justice and fairness’ through the legal procedures concerning the prevention of VAW.¹⁵³ This is an interesting guideline, that will be revisited in the next chapter when detailing the PO processes, in terms of victim and perpetrator rights. Furthermore, notably, the encouragement of,

‘Adopting such other legislative and administrative measures as may be necessary to ensure the prevention and eradication of all forms of violence against women and children;’¹⁵⁴,

is included in the legal section of the SADC Addendum. The above endorsements and recommendations have instinctively guided South Africa to enact legislation such as the DVA and the legal instrument such as the PO. This indicates that South Africa has adhered to its commitment through using the PO to protect victims from GBV. The concern that the Addendum factors out, address countries like South Africa, which have the appropriate preventative machinery, however, are challenged with efficient and effective enforcement. The SADC Addendum urges for policy guidelines, instruments, and procedures to be regionally assumed thereafter their execution to be closely observed toward enhanced safety of GBV victims.¹⁵⁵ Close monitoring on the implementation would contribute to the accountability of these policies effectively functioning as has been identified, enforcement is a significant challenge. SADC states partook in the drafting of the GBV provisions in the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, to this effect they are fulfilling its commitment.¹⁵⁶ There is no requirement under the SADC Declaration to submit a report regarding the progress of the Addendum and there is no found record that was found by this study on the progress of South Africa. The study will now assess the next regional GBV instrument which is legally binding.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² SADC Addendum op cit note 142 para 9.

¹⁵³ Ibid.

¹⁵⁴ SADC Addendum op cit note 142 para 12.

¹⁵⁵ SADC Addendum op cit note 142 para 25.

¹⁵⁶ Fareda Banda op cit note 110 at 12.

(ii) The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (hereinafter Maputo Protocol) was adopted in Maputo, Mozambique in 2003 and came into force in 2005¹⁵⁷ is specific to the focus of this study. By virtue of ratification of the African Charter as aforementioned, South Africa is bound by this instrument. The preamble in the Maputo Protocol highlights that despite that member states have acceded to the African Charter and relevant international human rights mechanisms, the obligation is to abolish all forms of prejudice, 'women in Africa still continue to be victims of discrimination and harmful practices'.¹⁵⁸ Therefore, the Protocol is an extension of the African Charter whose focal point is African women's rights.

In alignment with other treaties, Article 3 in the Maputo Protocol, requires member states to assume relevant effective protective measures toward all women's right to respect for dignity¹⁵⁹ and protection against all kinds of violence, significantly 'sexual and verbal violence.'¹⁶⁰ Regarding the elimination of harmful practices, state parties are obliged to protect women who are in danger from the practices, including all kinds of prejudice and abuse.¹⁶¹ Notably, these are related to the international mechanisms that have been discussed above.

The Maputo Protocol, like the CEDAW and BDPfA, aims at abolishing discrimination and guaranteeing the protection of women's rights. However, it is set apart to significantly focus on African women. The focus on African women is accompanied by the concerns that directly affect them. Notably, this human rights instrument is the first of its kind to address female genital mutilation and HIV/AIDS concerning women's rights.¹⁶² As GBV encompasses a variety of violations against women, this gap filled by the Protocol, critically ensures that all women are protected in more aspects of any kind of discrimination. Article 4 of the Protocol focuses mainly

¹⁵⁷ African Union 'Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (hereinafter Maputo Protocol)', available at https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf, accessed on 29 November 2020.

¹⁵⁸ Ibid at 5–6.

¹⁵⁹ Maputo Protocol art 3 (1).

¹⁶⁰ Maputo Protocol art 3 (4).

¹⁶¹ Maputo Protocol art 5 (d).

¹⁶² Mukumu Wairimu Irene 'The Maputo Protocol: Evaluating women's rights' available at <https://www.pambazuka.org/gender-minorities/maputo-protocol-evaluating-women%E2%80%99s-rights>, accessed on 29 November 2020.

on women's protection against VAW by centering the 'right to life, integrity, and security'.¹⁶³ Article 4 (1) emphasizes the core principle of the human right to life and entitlement to protection.¹⁶⁴ It further reiterates the prohibition of 'exploitation, cruel, inhuman or degrading punishment and treatment', while Article 4 (2) outlines state obligations toward ensuring the entitlement in s (1) of the article.¹⁶⁵ Imperatively, provision for states to establish and impose laws that forbid VAW,¹⁶⁶ thus protecting victims, is required. In addition, a provision of legislative and administrative measures to the prevention of all kinds of violence¹⁶⁷ is asserted. This demonstrates the crucial commitment that state parties must protect victims through an effective legal framework, such as POs. It is hoped that states make certain of these and the outlined provisions to guarantee victim safety.

As a standard to any treaty, Article 26 (1) obliges state parties to implement the Maputo Protocol provisions within their countries and are required to provide progress reports.¹⁶⁸ South Africa, ratified and is a signatory to this treaty since 2004,¹⁶⁹ with three reservations.¹⁷⁰ It submitted its Maputo Protocol first report, which encompasses 2005–2014 combined with the second periodic report of the African Charter.¹⁷¹

In line with the purposes of this study, South Africa mentions the DVA as part of the legislation that provides maximum victim protection against domestic violence.¹⁷² The report reiterates POs being the main force of this legislation for shielding victims against offenders.¹⁷³ Similar to the international human rights framework previously discussed, this report does not outline any specific PO achievements or challenges regarding the guidelines provided in the Maputo Protocol. The PO is a major protection instrument for victims of domestic violence and

¹⁶³ Maputo Protocol art 4.

¹⁶⁴ Maputo Protocol art 4 (1).

¹⁶⁵ Maputo Protocol art 4 (2).

¹⁶⁶ Maputo Protocol art 4 (2)(a).

¹⁶⁷ Maputo Protocol art 4 (2)(b).

¹⁶⁸ Maputo Protocol art 26 (1).

¹⁶⁹ Republic of South Africa 'Combined second periodic report under The African Charter on Human and People's Rights and initial report under the protocol to the African on the rights of women in Africa', available at https://www.achpr.org/public/Document/file/English/staterep2_southafrica_2003_2014_eng.pdf, accessed on 29 November 2020.

¹⁷⁰ Please see Jamil Ddamulira Mujuzi 'The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations' available at <http://www.ajol.info/index.php/idd/article/download/52893/41494>, accessed on 29 November 2020.

¹⁷¹ Ibid at 142.

¹⁷² Republic of South Africa op cit note 169 at 166.

¹⁷³ Ibid.

considering the major challenges it has regarding application, its shortcomings that are excluded in the progress reports mean that South Africa is not fully complying with the obligations of these treaties.

One achievement mentioned related to South Africa holding law enforcement accountable concerning a PO in place, is highlighted in the African Charter section of the report.¹⁷⁴ Further detail was provided by referencing relevant case law, *Minister of Safety and Security & Others v WH*, where police officials were held liable for failing to arrest a perpetrator who breached a PO and proceeded to rape his wife.¹⁷⁵ This crucial concern will be examined later in this study. The effectiveness of POs is partly compromised by law enforcement failing to adhere to the responsibilities. The downfall of this achievement further proves that the PO in place did not serve its purpose as the victim was violated, which is linked to police negligence. This shows that POs processes are mostly swift on paper, however, its application after being granted is demeaning its effectiveness.

Another acknowledgement of POs is related to another Act, the Protection from Harassment Act 2011, that has been formed in compliance with women's rights. The Maputo Protocol report provides an overview of cases with court decisions that display the effectiveness of the legal framework within South Africa. More information is provided to show progress toward the commitments the nation has made to Maputo Protocol, however, there is no recent report illustrating the current staggering concerns, especially compromising VAW victim protection.

The international and regional human rights mechanisms have provided a map for South Africa, in terms of the implementation process regarding legislation and protection mechanisms. As depicted in each treaty and declaration progress report, South Africa still faces challenges even with achievements toward eradicating GBV. It is crucial to mention that, in each of the progress reports, there is a lack of information regarding POs, and if there is, it is quite limited and outdated. This is linked to the observation that this study has made, that the guidelines in the mechanisms above, do not go in-depth providing specific guidelines with legal protection

¹⁷⁴ Republic of South Africa op cit note 169 at 40.

¹⁷⁵ *Minister of Safety and Security and Others v WH* 2009 (4) SA 213 (E) in Republic of South Africa op cit note 169 at 40.

mechanisms such as POs. This suggests that South Africa has not quite fully complied with the treaty commitments regarding victim protection as the effectiveness of the PO is diminished.

The progress made in eradicating GBV in South Africa, through POs, is acknowledged in some treaties and declarations. However, specific detail, highlighting the challenges and shortcomings would provide the designated treaty Committees and member states the platform and urgency to recommend effective process strategies. In contrast, the international and regional mechanisms should cement these recommendations by sealing the gap of creating informed specific provisions toward legal protection instruments.

(c) Constitutional rights and obligations

South Africa in its Constitution¹⁷⁶ protects and acknowledges most globally accepted human rights, which places its nation under obligation to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.¹⁷⁷ Subsequently, the Bill of Rights binds it on ‘the legislature, executive, judiciary and all organs of the state’¹⁷⁸, and these are applied to all its legislation. South Africa is bound and governed by the Constitution, which is based on provisions that obligate the state to allow ‘[a]ll people its country’¹⁷⁹ the opportunity to fully exercise their rights.

The Bill of Rights further emphasizes consideration of international and foreign law as they form part of the South African legal framework — unless deemed otherwise or inconsistent by the country’s governing laws.¹⁸⁰ For instance, when interpreting the Bill of Rights, a forum, tribunal or court must regard international law,¹⁸¹ where necessary foreign law,¹⁸² in consideration. Consequently, in the general provisions for international law, the court ‘when interpreting legislation, has to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”’.¹⁸³ South Africa has exercised this in the case of *Carmichele v Minister of Safety and Security*.¹⁸⁴ The Constitutional Court according to international law obligates the prevention of any discrimination that is gender-based especially if it is aimed at negatively

¹⁷⁶ Constitution of the Republic of South Africa, 1996 (hereinafter Constitution).

¹⁷⁷ s 7(2).

¹⁷⁸ s 8(1).

¹⁷⁹ s 7(1).

¹⁸⁰ Constitution s 39(3).

¹⁸¹ s 39(1)(b).

¹⁸² s 39(1)(c).

¹⁸³ Constitution s 233 in John Dugard *International Law: A South African Perspective* 4 ed (2011) 348.

¹⁸⁴ *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC).

compromising women to exercise their fundamental rights and freedoms.¹⁸⁵ Furthermore, it states that it has to take suitable and practical measures to prohibit any contravening of those rights.¹⁸⁶ The *Carmichele* is also relevant to this study as the international law used was the CEDAW. As previously discussed, South Africa must adhere to the commitments that have been made with international and regional treaties. This practical application of international law in the *Carmichele* case contributes positively to the compliance of South Africa to its obligation.

The rights enumerated in the Constitution are guided and are similar to that of the international and regional human rights framework. To this GBV focused study, an example of this enumeration is in the *S v Baloyi & Others*¹⁸⁷ case, which sees the Constitutional Court stating and referring to the Constitution which provides:

‘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. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected’.¹⁸⁸

This guidance and similarity form the basis of the previously discussed GBV focused international and regional treaties, which South Africa has included in its Constitution. South Africa’s Constitution as binding law, supports and considers global law in its legal framework.¹⁸⁹ The next chapter elucidates the provisions set out in a specific domestic legal mechanism concerning this study, the DVA. The focus will be on the provisions that set out a commitment to international and regional human rights mechanisms and the Constitution. Furthermore, the chapter will highlight the main legal protection machinery, the PO, focusing on its processes that are in place to achieve victim protection.

¹⁸⁵ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, available at: <https://www.refworld.org/docid/3ae6b3970.html>, in *ibid* para 62.

¹⁸⁶ *Ibid*.

¹⁸⁷ *S v Baloyi & others* 2000 (2) SA 425 (CC).

¹⁸⁸ *Baloyi’s case* *ibid* para 11.

¹⁸⁹ Gadinabokao Keaorata *Shortcomings of the South African Domestic Violence Act 116 of 1998 in comparative perspective* (2016) (Unpublished LLM thesis, University of Pretoria) 14.

Chapter 3

I. DOMESTIC VIOLENCE ACT

As established, South Africa has ratified and is a signatory to several human rights frameworks making it liable to comply with these commitments according to the standards set out in each treaty.¹⁹⁰ South Africa has developed significant pieces of legislation that have been influenced and guided by the international treaties that condemn GBV. This step indicates that South Africa has met the state obligation to protect people from domestic violence. This has been achieved by formulating a related normative and legislative framework. Additionally, a well-functioning legal mechanism is a fundamental necessary component. South Africa has the legal obligation to initiate preventative and protective measures through domestic legislation.¹⁹¹ For instance, the Domestic Violence Act 116 of 1998 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 33 of 2007.¹⁹²

The focus of this dissertation is the DVA as it makes provisions for POs. The DVA was one of the initial anti-GBV legislation passed after a domestic change of South Africa's new government.¹⁹³ In 1998, when the DVA came into operation, approximately 25 percent of women had reported physical violation by a man, in the course of their lifetime.¹⁹⁴ These victims belonged to the provinces of Eastern Cape, Limpopo, and Mpumalanga and 10 percent of them had further informed that they had undergone this mistreatment in the previous year.¹⁹⁵ However, as seen in the previous chapter, in recent years, the numbers are staggering day by day, of reported and unreported cases.

Before the enactment of the DVA, there were no legal mechanisms specifically against domestic violence. Alternative provisions such as a peace order were considered ineffective as they omitted provisions for domestic violence.¹⁹⁶ In 1993, the Prevention of Family Violence Act 113 of 1993 (hereinafter PFVA) the first legal mechanism against domestic violence was

¹⁹⁰ Sibanda & Msibi op cit note 4 at 3.

¹⁹¹ Christina Beninger 'The effectiveness of legislative reform in combating domestic violence: A comparative analysis of laws in Ghana, Namibia and South Africa' (2014) 32 *Netherlands Quarterly of Human Rights* 75 at 86.

¹⁹² Hannah E Britton *Ending Gender-Based Violence* (2020) 18.

¹⁹³ Ibid.

¹⁹⁴ Lisa Vetten 'The ghost of families past: Domestic violence legislation and policy in post-apartheid South Africa' (2014) 28 *Agenda Empowering Women for Gender Equity* 48.

¹⁹⁵ Ibid.

¹⁹⁶ Lilian Artz 'Better safe than sorry, Magistrates views on the Domestic Violence Act' in Doraval Govender 'Is domestic violence being policed in South Africa' (2015) 28 *South African Journal of Criminology* 33.

enacted.¹⁹⁷ Provisions in the Act included granting an interdict concerning violence in the family.¹⁹⁸ This application process allowed the victim or anyone with their best interests on their behalf, to approach a judge or Magistrate to obtain an interdict.¹⁹⁹ The PFVA was exclusive to either spouse (man or woman) or by living together (as married), even if unmarried, both situations can be in the present or past.²⁰⁰

The PFVA, even with its benefits, still had shortcomings such as an omission of the domestic violence legal definition.²⁰¹ Its main purpose was not focused on women's protection; however, the emphasis was placed more on family unity, which minimised the woman's individual right to encompass only their 'gender role'.²⁰² This study notes that the PFVA lacked a detailed description in terms of responsibilities for law enforcement and prosecution authority to render victim protection. This omission may have contributed to the effectual enforcement of the interdict, which is the major role of law enforcers, hence compromising the protection of the victim. These and other shortcomings of the PFVA drove the need for a law that specifically addresses domestic violence. This legal mechanism needed to provide the right to protection through an effective system, for a wider population, particularly when seeking safety against domestic violence.

Considering that the PFVA was limited in its coverage, the elected South African Government in 1994 after the nation's first general election established the DVA in 1998.²⁰³ The preamble states that before the DVA, there were no domestic violence effective remedies.²⁰⁴ Therefore, the ineffectiveness of instruments such as the PFVA needed to be rectified. A notable improvement is that the DVA makes provision for women to obtain legal protection, as individuals which encompasses their gender role, as opposed to being linked to family

¹⁹⁷ Prevention of Family Violence Act 133 of 1993.

¹⁹⁸ Prevention of Family Violence Act s 2.

¹⁹⁹ Prevention of Family Violence Act s 2; J Fedler 'Lawyering domestic violence through the Prevention of Family Violence Act 1993: An evaluation after a year in operation' in Amanda Spies 'Continued state liability for police inaction in assisting victims of domestic violence: A reflection on the implementation of South Africa's domestic violence legislation' (2019) 63 *Journal of African Law* 54.

²⁰⁰ Prevention of Family Violence Act s 1.

²⁰¹ Lisa Vetten op cit note 194 at 50.

²⁰² Ibid.

²⁰³ ANC 'ANC introduces legislation to better the lives of women - Domestic Violence Bill' available on <https://ancparliament.org.za/content/anc-introduces-legislation-better-lives-women-domestic-violence-bill>, accessed on 14 January 2021.

²⁰⁴ Domestic Violence Act 116 of 1998.

integration.²⁰⁵ The DVA's highlight is that it focuses on protection, and this is depicted through the introductory statement: 'To provide for the issuing of protection orders with regard to domestic violence; and for matters connected therewith.'²⁰⁶ This forms the basis of the objective of the DVA as one that prioritises protection. In its preamble, as a way to cement its focus on protection, it states:

'[I]T IS THE PURPOSE of this Act to afford victims of domestic violence the maximum protection from domestic abuse that the law can provide;'²⁰⁷

Another notable development and a remarkable contribution toward South Africa's commitment to international, regional human rights instruments and its Constitution, is that the preamble reiterates to:

'[H]AVING REGARD to the Constitution of South Africa, and in particular, the right to equality, and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligation under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women'²⁰⁸

This is an indication that South Africa, has indeed honoured its obligation to enact a legal protective mechanism against GBV through the DVA. Substantially, the Act protects anyone in a domestic relationship through the application of a PO.²⁰⁹ The above-listed developments from the PFVA to DVA depict enhanced, elaborative, and specified provisions for the protection of victims. The PO is a key legal protection tool pertinent to this study, which forms the core of the discussion in the following section. The focus of the kind of domestic relationship applicable to this dissertation comprises of characteristics, such as:

- being married to each other under any custom, religion or law²¹⁰ and are the same or opposite sex.²¹¹
- currently reside or have previously resided together;²¹²
- currently or were in a relationship that was related to that of marriage, although they could not, or were not, and are not married to each other;²¹³

²⁰⁵ Lisa Vetten *Deserving and underserved women: A case study of South African policy and legislation addressing domestic violence* (unpublished MA in Political Studies thesis, Wits University, 2013) 42.

²⁰⁶ Op cit note 205.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Domestic Violence Act s 4(1).

²¹⁰ s 3(a).

²¹¹ s 1(vii)(b).

²¹² Ibid.

²¹³ Ibid.

- they have or have had or are expecting or have adopted and/or share responsibility for a child;²¹⁴
- Lastly, they are or were engaged, courting or in a customary relationship seen as or intimate, sexual or romantic, regardless of the timeline.²¹⁵

The upcoming sections will outline the PO application process as laid out in the DVA process. It will include the procedures of applying then obtaining a PO, the role of a major stakeholder, and thereafter an analysis of the DVA will conclude the chapter. The purpose is to ascertain the extent to which South Africa has accomplished its duty to protecting victims from GBV.

II. DOMESTIC VIOLENCE ACT: PROTECTION ORDER

The core element of a systematic and structured response to GBV, including the need of implementing effective and efficient prevention, rightful prosecution, and provision of service, is the protection of victims.²¹⁶ This way ensures the victim's safety when their life is threatened. Subsequently, to adequately safeguard them from further violence, it is essential to enforce a way to keep the perpetrator, a physical distance away from them.²¹⁷ The DVA provides this right of protection through obtaining a PO. The PO application procedures and the provisions that accompany this court order will be described and briefly analysed in the sections below.

(a) Application of a protection order

The DVA grants provisions for domestic violence victims to apply for a PO. The definition of domestic violence according to the Act means:

‘physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant’s residence without consent, where the parties do not share the same residence; or any other controlling abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant;’²¹⁸

In Section 4 of the DVA PO application process is outlined. The application can be implemented on behalf of the complainant by one who is interested in their well-being.²¹⁹ This individual could be, for example, a therapist, health service personnel, and member of the family, a lecturer,

²¹⁴ Domestic Violence Act s 1(vii)(c).

²¹⁵ s 1(vii)(e).

²¹⁶ Rosa Logar & Johanna Niemi ‘Emergency barring orders in situations of domestic violence: Article 52 of the Istanbul Convention. A collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence’ (2017) 5.

²¹⁷ Council of Europe ‘Explanatory report to the Council of Europe Convention on preventing and combating violence against women and domestic violence’ (2011) 44.

²¹⁸ Domestic Violence Act s 1(viii)(a)-(j).

²¹⁹ s 4(3).

fellow work colleague, an employer, a religious/traditional leader, or a police officer.²²⁰ This is an essential provision particularly for victims who may be illiterate, underage, lack awareness of the PO procedures or the DVA or are in imminent harm and are without means or capabilities of initiating the process.

The application should be accompanied by written consent from the complainant,²²¹ unless they are mentally unstable, under the legal age, unconscious, intoxicated, or under serious risk of bodily harm.²²² The application can come with supporting affidavits, which have been done by witnesses to the violation.²²³ Thereafter, each application with supporting affidavits, as part of the requirements, ‘must be lodged with the clerk of the court’²²⁴ who then applies and supporting affidavit to the court.²²⁵

For emergency applications, the Act provides for the application to be lodged outside the normal court operating hours or days.²²⁶ That is ‘if the court is satisfied that the complainant may suffer undue hardship if the application is not dealt with immediately’.²²⁷ Domestic violence incidences are not scheduled occurrences, and this measure allows for victims to seek protection in situations of emergency.

(b) Application consideration and criteria for granting of an interim PO

The court must after careful consideration of the evidence provided *prima facie*²²⁸ and as soon as reasonably possible grant an interim PO.²²⁹ The DVA requires that the court, as soon as reasonably possible, consider the application upon receiving it.²³⁰ Amid consideration and coming to a decision, each court may assess various forms of evidence presented orally, through an affidavit, or in addition to the one already existing — as it will form part of the record for the court proceedings.²³¹ The court can issue the interim PO, should they be satisfied with the *prima*

²²⁰ Ibid.

²²¹ Domestic Violence Act s 4(3).

²²² Ibid.

²²³ Domestic Violence Act s 4(6).

²²⁴ s 4(7).

²²⁵ Ibid.

²²⁶ Domestic Violence Act s 4(5).

²²⁷ Ibid.

²²⁸ ‘on first view/instance’ - George Nils Herlitz ‘The meaning of the term “Prima Facie”’(1994) Louisiana Law Review 55 391 at 392.

²²⁹ Domestic Violence Act s 5(2).

²³⁰ s 5(1).

²³¹ Ibid.

facie evidence and even without giving notice to the alleged perpetrator.²³² In this instance, the victim is provided with immediate protection from the alleged perpetrator without having to wait for prolonged processes to be implemented. However, the empirical fact of increased GBV cases raises the question as to whether the protection procedures are being implemented properly.

The Act stipulates that ‘an interim PO must be served on the respondent in a prescribed manner’.²³³ The alleged perpetrator must, thereafter, show cause on a stipulated return date why a final protection order should not be granted against them.²³⁴ The interim PO must also be accompanied by a copy of the application including the evidence that has been considered when being handed over to the alleged perpetrator.²³⁵ The return date should not be less than ten days after the alleged perpetrator was served with the interim PO, with the provision that the return date may be anticipated by the alleged perpetrator upon not under 24 hours’ documented notice to the applicant and the court.²³⁶

The Act further states that the interim PO is not enforceable or valid until it is served to the alleged perpetrator.²³⁷ Furthermore, it is the duty of the clerk of the court, ‘upon service or upon receipt of a return of service’²³⁸ of the interim PO to the alleged perpetrator, to issue a certified copy of interim PO and arrest warrant to the complainant.²³⁹ Each time a PO is granted, it is the court’s responsibility to make an order authorising the issue warrant for the alleged perpetrator²⁴⁰ and ‘suspending the execution of such a warrant subject to compliance with any prohibition, condition, obligation or order imposed’²⁴¹ of the PO. It is the observation of this study, that the Act does not explicitly state whether the interim PO carries as much legislative power as the final PO. The assumption is that it is equally as enforceable, therefore legally protective, as a final PO.

²³² Domestic Violence Act s 5(2)(b).

²³³ s 5(3)(a).

²³⁴ Ibid.

²³⁵ s 5(3)(b).

²³⁶ s 5(5).

²³⁷ s 5(6).

²³⁸ s 5(7).

²³⁹ Ibid.

²⁴⁰ s 8 (1)(a).

²⁴¹ s 8 (1)(b).

(c) Contesting the interim Protection Order

As mentioned above the alleged perpetrator has an opportunity on the stipulated return date to contest the interim PO. If they respond on the return date to contest the issuing of the interim PO, the court has the responsibility to comply and a hearing is held.²⁴² The procedure in the Act states that upon hearing the matter, they must consider the evidence initially provided at the time of application. These additional affidavits or verbal proof, are included as part of the court proceedings.²⁴³

Upon hearing the case on the return date, the court then decides, with the help of sufficient evidence, and sworn statements, in conclusion, to grant a final PO.²⁴⁴ If the alleged perpetrator fails to turn up on the return date, and the court is content with how they were served with the interim PO, including careful consideration of the evidence, the final PO is issued.²⁴⁵ Without the intention of compromising the victim's protection, it is established from the above-mentioned procedures, the Act fairly gives rights to the respondent to plead their case, and for consideration from the court from both parties involved.

(d) Final Protection Order

The DVA states that the original final PO should be served to the perpetrator, following the correct procedures aforementioned, by the clerk of the court.²⁴⁶ The clerk must serve a copy of the final PO, that is certified, including an original warrant of arrest for the complainant.²⁴⁷ In addition, the clerk of the court should further forward a certified copy of the final PO and arrest warrant to the police station that the complainant prefers.²⁴⁸ The arrest warrant remains in force for the duration of the PO, until it is cancelled after execution, or set aside.²⁴⁹ The clerk of the court has the responsibility to provide another or additional warrant to the complainant, especially if they have stated in an affidavit that it is necessary for their safety and if the current one has been damaged, misplaced, cancelled, or called off.²⁵⁰ Notably, the court may not decline

²⁴² Domestic Violence Act s 6(2)(a) and (b).

²⁴³ Ibid.

²⁴⁴ Domestic Violence Act s 6(4).

²⁴⁵ s 6(1)(b).

²⁴⁶ s 6(5)(a).

²⁴⁷ s 6(5)(b).

²⁴⁸ s 6(6).

²⁴⁹ s 8(2).

²⁵⁰ s 8(3).

to issue a PO or to impose any condition or make any order which it is competent to impose according to the DVA, based on the fact that other legal remedies are available to the victim.²⁵¹

The conditions of the PO may include certain prohibitions and forbiddances for the perpetrator, which include perpetrating or engaging someone to enact any act of domestic violence;²⁵² from accessing their shared accommodation (the court may enforce this prohibition, on condition that it serves the interests of the victim) including a specific section of it, and the victim's accommodation. The perpetrator is further forbidden from the victim's place of work or committing any act that is specifically laid out in the PO.²⁵³ Considering, the above provisions, and distinctly noting the broad spectrum of the acts of domestic violence, the PO and the arrest warrant, assure the victim of paramount protection. Furthermore, if the court deems it reasonably necessary for the complainant's safety, protection, health, and wellbeing, additional conditions may be included in the PO.²⁵⁴

These additional conditions may include confiscating any weapon or dangerous armour that may be in possession or in the control of the perpetrator.²⁵⁵ A noteworthy point is that Section 9 incorporates specific provisions, should the court have satisfying sufficient evidence on certain conditions why they should be confiscated.²⁵⁶ The most significant condition is if the victim at endangered life-threatening risk, should the alleged perpetrator be in possession or control of these weapons.²⁵⁷ This example of an additional condition that could be added to the PO according to their circumstantial need or risk of harm.

This study notes that under this section of standard PO prohibitions, the specific conditions regarding the perpetrator potentially meeting the complainant — for example, being in 'proximity' of the victim's or shared or victim's relative residence, place of work, school, worship, temporary accommodation such as a safe house (a place of safety or where the complainant might be temporarily residing). The subsection explicitly provides for 'entering' these places. The 'proximity' is therefore provisioned for in Section 1 (xii)(a)²⁵⁸ concerning

²⁵¹ s 7 (7).

²⁵² Please see note 218 for domestic violence definition according to the DVA.

²⁵³ Domestic Violence Act s 7(1)(a)-(h).

²⁵⁴ s 7(2).

²⁵⁵ s 7(2)(a).

²⁵⁶ s 9 (1).

²⁵⁷ s 9 (1)(a).

²⁵⁸ s 1 (xii)(a) 'repeatedly watching or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;'

harassment and the ‘stalking’²⁵⁹ as part of the domestic violence definition. In this regard, this dissertation acknowledges that the PO adequately encompasses a wide coverage to ensure victim protection regardless of their whereabouts. Furthermore, the PO is binding throughout the nation.²⁶⁰ This is certainly in favour of the victim as this allows protection no matter where they are. The PO being enforceable throughout South Africa means that protection is not only bound to one location and the victim can be ‘flexible’ in terms of movement or relocation.

Following the shared accommodation prohibition, the respondent may still be required by the court to honour any financial responsibilities concerning both party’s needs, e.g., rent or housing-bond payments.²⁶¹ Often victims are faced with the challenge of leaving the perpetrator, as they are financially dependent on them.²⁶² Consequently, this provision serves as a positive contribution to the victim’s security, should they be dependent on the perpetrator.

Furthermore, the Act makes provisions for the complainant’s residence address to be excluded from the PO, unless necessary.²⁶³ The court may make further provisions that the address is kept completely anonymous if seen as a risk to the security and protection of the complainant.²⁶⁴ This is advantageous for victims who have been placed in an alternative residence.

(e) Breach and criminal offences against the PO

The DVA provides that if the respondent goes against the PO according to the conditions, provisions, and obligations it sets out and commits any act of domestic violence, is liable to a fine or imprisonment.²⁶⁵ The Act does not place a value on the fine, however, the time frame of imprisonment should not be anything more than five years and they can be liable for both as well.²⁶⁶

²⁵⁹ s 1 (xxiii) “stalking” means repeatedly following, pursuing, or accosting the complainant;’.

²⁶⁰ s 12 (3).

²⁶¹ s 7(3).

²⁶² Andre Damons ‘GBV: Men need to challenge these insidious forms of violence’ *UFS News* 14 July 2020, available at <https://www.ufs.ac.za/templates/news-archive-item/campus-news/2020/july/gbv-men-need-to-challenge-these-insidious-forms-of-violence>, accessed on 24 February 2021.

²⁶³ Domestic Violence Act s 7(5)(a).

²⁶⁴ s 7(5)(b).

²⁶⁵ s 17.

²⁶⁶ s 17(a).

(g) Law and police enforcement duties

In terms of enforcement of the DVA, SAPS has set obligations, to ensure the victim is protected from the perpetrator through the PO. SAPS have the responsibility to assist and inform the victim of their rights. Should there be a domestic violence incident, any member of the SAPS must at the scene, or when the incident is reported²⁶⁷ assist the victim as may be necessary to the circumstances in the situation.²⁶⁸ For instance, assisting or arranging for the victim to obtain medical treatment or suitable shelter. Should it be reasonably possible to do so, the SAPS member must hand a written notice that includes information to the victim and explains the contents of it.²⁶⁹ In the explanation, which should be in the victim's official language of choice²⁷⁰ the police officer needs to include information on remedies at their disposal i.e., to ensure their safety and wellbeing by applying for a PO or their right to lay a criminal charge, should this be applicable.²⁷¹ The police officer should make it clear to the victim, that laying a criminal charge is not a requirement for applying for a PO.²⁷² A noteworthy provision is that the police may without a warrant arrest the alleged perpetrator at the domestic violation scene of the incident, should they under reasonable grounds suspect them for having committed an offence that could be linked to domestic violence against the victim.²⁷³

SAPS member duties also involve ensuring that the PO provisions are adhered to. After the alleged perpetrator is served with the PO, it is the police officers' responsibility to act upon any report from the victim should non-compliant with the PO. For instance, a SAPS official may arrest the alleged perpetrator should they contravene any conditions in the PO, should the official under reasonable grounds suspect that the victim may succumb to imminent harm, as a repercussion of the contravention.²⁷⁴ The complainant may hand over the arrest warrant including the affidavit, if the respondent has violated any of the conditions and/or provisions in the PO, to the police.²⁷⁵ Thereafter, it is the responsibility of the police to inform the victim of

²⁶⁷ s 2.

²⁶⁸ s 2(a).

²⁶⁹ s 2(a)-(c). Please also see: Regulations under the Domestic Violence Act, 1998 in GN 1311 GG 20601 of 5 November 1999 reg 3(a)(i).

²⁷⁰ s 2(b).

²⁷¹ s 2(c). Op cit note 269 reg 3(a)(ii).

²⁷² Op cit note 269 reg 3(a)(ii).

²⁷³ Domestic Violence Act s 3.

²⁷⁴ s 8(4)(b).

²⁷⁵ s 8(4)(a).

their right to open a case and lay a charge against the perpetrator.²⁷⁶ Should it be necessary, the police should provide the victim information on the processes of such a procedure.²⁷⁷ Awareness is an integral part of protection. As aforementioned, some, if not most victims lack information on the PO application processes, and their rights after obtaining one.

According to section 8(5) of the DVA, the terms regarding deliberation on whether the victim may succumb to imminent harm, the SAPS member must take into account:

- ‘(a) the risk to the safety, health or wellbeing of the complainant.
- (b) the seriousness of the conduct comprising an alleged breach of the protection order; and
- (c) the length of time since the alleged breach occurred’²⁷⁸

This deliberation under reasonable grounds and considering the above criteria, is arguably important, as ensuring the victim’s safety and protection is thoroughly assessed through the guidelines. In fairness of the Act, the alleged perpetrator's rights are protected through these guidelines and through the Constitution, which forbids arbitrary arrest.²⁷⁹ Should they have inadequate grounds to make an arrest, and the victim is not considered to be in imminent harm, the police officers have to provide a notice in written form.²⁸⁰ The purpose of the notice is so that the perpetrator makes an appearance in court, on the stipulated date and time, on charge allegations of contravening the PO.²⁸¹ Once more, the rights of each individual are protected. Through the court trial, to assure the victim’s safety, as a way to prove that the conditions of the PO have indeed been contravened by the perpetrator which may have not been suspected by the police. The same protection of rights applies for the alleged perpetrator, who without infringing his rights, is provisioned for a fair trial as stipulated in the Constitution.²⁸² However, in practice, as shall be exposed in the next chapter, that the implementation of such regulations has been known to have loopholes. This is regarding the determination of imminent harm of the victim and the need to or need not to arrest the alleged perpetrator, which could be possibly undermined. It is the opinion of this study, that the reasonable grounds and the suspicion of imminent danger can be better determined if the police officer is fully aware of the DVA regulations. However, as has been previously denoted in the factual background and challenges,

²⁷⁶ s 8(6).

²⁷⁷ Ibid.

²⁷⁸ s 8(5).

²⁷⁹ Constitution s 12(1)(a).

²⁸⁰ Domestic Violence Act s 8(4)(c).

²⁸¹ s 8(4)(c)(ii).

²⁸² Constitution s 12(1)(a) and s 35(3).

there is a lack of awareness and efficient implementation of these processes in the Act, in the enforcement sector.

According to section 9, a SAPS member through an order given by the court has to confiscate any dangerous weapons or arms that are under the control or in possession of the perpetrator.²⁸³ As aforementioned, this is under stipulated conditions,²⁸⁴ for the protection of the complainant. This confiscated arm or weapon must be handed over to a SAPS official.²⁸⁵ The respondent can only repossess the weapons through a court order directive.²⁸⁶ It can be argued that while this provision related to weapon confiscation enhances the affected victim's safety as provided under the conditions in the Act, however, in practice nothing guarantees the alleged perpetrator to alternatively access other weaponry. This oversight may compromise, the victim's safety, as the possible alternatives are not warranted.

South Africa's Commissioner of the SAPS is liable to issue national guidelines and specifications, per the SAPS Act.²⁸⁷ Therefore, SAPS members are compelled to adhere to these obligations in the DVA.²⁸⁸ Non-adherence to these obligations, undermines the effectiveness of the PO, as has been established. The police and courts have a primary role of enforcing the provisions of the DVA.

III ASSESSMENT OF THE DOMESTIC VIOLENCE ACT

The above information provides a detailed overview of the rights, processes, duties, legal obligations, and responsibilities behind the PO procedures. The dissertation acknowledges the above processes and agrees that the systems in place contribute immensely to the fight against GBV.

The main highlights of the DVA, include the domestic violence definition as it encompasses a wide scope of acts that are considered as human rights violations; the improvement from PFVA to the DVA that also covers a wider scope of the domestic relationship; the main legal instrument, the PO, that aims to prevent and protect against further/future violation incidences; the comprehensive detailed step-by-step process for PO

²⁸³ Domestic Violence Act s 9(1).

²⁸⁴ 'the respondent has threatened or expressed the intention to kill or injure...any person in a domestic relationship, whether or not by means of such arm or dangerous weapon;'

²⁸⁵ s 9(2).

²⁸⁶ s 9(3)(b).

²⁸⁷ s 18(3).

²⁸⁸ Ibid.

application; the duties and responsibilities of enforcers of this law are provisioned according to the roles; and the provisioned protection rights for largely the victim and even the alleged perpetrator.

The well-articulated DVA aims to protect victims of GBV. This legislative mechanism is an indication of South Africa's compliance with the international, regional human rights framework and in terms of the Constitution. However, as statistics suggest, there are clear flaws that accompany enforcing and implementing the PO. These loopholes contribute to several incidences that have put victims at risk of further violation by the perpetrator. Enforcers, more significantly the police, have a critical role in implementing POs, as has been established in the DVA. Victims often seek help from them as the first point of contact, when reporting an assault.²⁸⁹ Their involvement as provisioned in the Act ascertains enhanced victim protection before and after the PO. The guidelines in terms of their responsibilities and obligations are provided in detail which makes them an integral part of the implementation of the PO. Despite this positive attribution, the PO fails to be effectively enforced as the staggering number of GBV cases suggest. The downfall is that, as the Act indicates, the PO plays a major role in protecting the victim, however, this can only be complemented and achieved by adequate implementation. In practice, courts, unfortunately, contribute to these shortcomings, despite their major role in PO application, granting, and enforcement process in the DVA. Their main involvement in the PO procedural process, their roles as documented in the DVA are laid out in detail and present as straightforward for the victim to obtain maximum protection. However, as is determined by this study, they are a factor in the inefficient implementation of the PO. Furthermore, as will be determined in the next chapter, the criminal justice system's failure to follow the guidelines of the Act contributes negatively to the fight against GBV. Therefore, in conclusion to this chapter, the Act and its PO procedures attribute to the positive compliance of South Africa to international, regional human rights framework and the Constitution. However, this positive attribution is mainly abstract and remarkably lacks in practice.

The following section provides a comprehensive evidence-based discussion as to the reason this dissertation considers the PO implementation and enforcement in South Africa as a contributing factor to the ineffective practical rendering of protection for GBV victims.

²⁸⁹ Lauren Tracey-Temba 'Police and courts must do more to reduce gender-based violence' *Daily Maverick* 13 July 2020.

Chapter 4

I. PROTECTION ORDER: CHALLENGES IN PRACTICE

GBV in the form of domestic violence remains prevalent to date and has become a matter of national emergency in South Africa.²⁹⁰ The major contribution to this prevalence is the ineffective enforcement of a legal framework whose goal is to protect victims from domestic violence. This chapter will examine the shortcomings related to the implementation of the PO processes. These shortcomings will explain why this study perceives the DVA PO processes as functional only in theory however, in practice have failed to deliver on the purpose to protect victims of domestic violence.

(a) Legal Framework

The DVA outlines effective provisions that aim to protect the victim from further domestic violence incidents. Nevertheless, this dissertation finds that there are loopholes that can deprive the victim of exercising their right to obtain a PO and ultimately eliminate GBV. South Africa arguably fails to recognise domestic violence as an unlawful act in its own right. However, as defined by the DVA, domestic violence is encompassed by various acts which are recognised and categorised as criminal offences in their own right.²⁹¹ This study questions if this omission of emphasis, undermines the enforcement of the Act whose objective is to protect against domestic abuse and eradicate domestic violence. The Act places the term ‘domestic violence’ to ‘mean’ multiple acts.²⁹² However, these are already crimes in common law. Notwithstanding, that these acts can occur in a domestic relationship as well, it being classified as a criminal offence places weight on the Act that is specific to domestic violence. Otherwise, the other Acts, such as the Harassment and Criminal Offences Act that already recognise these acts as offences in their own right, could equally make a provision for those in a domestic relationship. The PO in the Harassment Act could also especially provision that of the DVA. In this regard, despite state obligation to international law, a designated Act to domestic violence has been formed to largely

²⁹⁰ SABC ‘More than 87 000 GBV complaints received during lockdown’ *SABC News* 3 April 2020, available at <https://www.sabcnews.com/sabcnews/more-than-87-000-gbv-complaints-received-during-lockdown/>, accessed on 09 January 2021; Krista Mahr ‘South Africans rally against gender-based violence’ *AP News* 4 September 2019 available at <https://apnews.com/b608d54b0d414c238cf320a8dc138ed5>, accessed on 30 January 2020.

²⁹¹ Lisa Vetten ‘Domestic violence in South Africa’ 2014 at 6, available at <https://www.files.ethz.ch/isn/185884/PolBrief71.pdf> accessed on 16 January 2020; Christina Beninger op cit note 191 at 98.

²⁹² Please see note 218.

eradicate GBV as gross human right misconduct. Therefore, it is the opinion of this study that domestic violence should be classified as a criminal act in its own accord. According to Govender, the police should recognise domestic violence as a crime along with other crimes because of its nature. The author further states that should it be treated as of importance, then the police would be combating, preventing, and investigating issues related to it, as they do with other related crimes.²⁹³ This dissertation agrees with this author, that the result would be that the DVA and its provisions, would be implemented and enforced as of equal importance as with other gross human rights violation crimes.

A loophole that had been noted in this study is that, upon considering the application to issue an interim PO,²⁹⁴ there is no stipulated time frame as to when and how long the victim should wait for the consideration to be resolved. The provision states ‘as soon as reasonably possible’²⁹⁵ which does not place any clear urgency or definite period to obtain protection. Understanding that some Magistrates’ courts suffer from heavy caseloads, as will be elaborated later in this chapter, without this specific or approximate time frame, no accountability is held on the court's PO applications that are delayed or prolonged. In addition, the Act does not provide an alternative relief, should the process take longer than anticipated, which exposes the victim to the risk of perpetration.

Despite the provisions in the Act that have been set out for victim protection, the victims themselves are met with barriers. These barriers are faced when applying for or when a PO is in place. Parenzee, Artz, and Moulton are of the opinion that issues surrounding domestic violence are met with a ‘[c]omplex legal system that alone is “flawed, under sourced and plagued with inequalities”’.²⁹⁶ These challenges will be outlined in detail, with a particular focus on the justice system.

(b) Criminal Justice System

(i) Police enforcement

The DVA makes clear provisions for the police to effectively protect domestic violence victims. However, Barkley highlights, that they have contributed to the lack of sufficient support, as they

²⁹³ Govender op cit note 196.

²⁹⁴ Domestic Violence Act s 5(1).

²⁹⁵ Ibid.

²⁹⁶ Penny Parenzee, Lillian Artz & Kelly Moulton ‘Monitoring the implementation of the Domestic Violence Act: first research report’ in Amanda Spies op cit note 199 at 74.

have failed to adhere to the obligations as outlined in the DVA.²⁹⁷ A study by Stone and Lopes provided evidence of this by reviewing 382 police stations across South Africa. The findings revealed that police responses in precincts of Gauteng, Western Cape, and Mpumalanga lacked awareness and lack empathy for domestic violence victims.²⁹⁸ For instance, during public hearings conducted by parliament, related to the enacting of the DVA, multiple encounters were brought forward by the civil society organisations. These shortcomings included general non-compliance with the DVA, withholding serving domestic violence perpetrators with the POs, or neglecting to arrest them following the violation of any of its outlined conditions.²⁹⁹

Subsequently, another recent study explored police viewpoints and encounters related to domestic violence cases. Three of the study participants, Community Service Centre police station commanders, disclosed that to elude administration procedures involved in processing domestic violence cases, they would convince victims to return home and reconcile with the perpetrator.³⁰⁰ As the first point of contact, the procedure for victim protection against domestic violence incidences is most likely, to begin with reporting the violation to the police.³⁰¹ The police are inclined to assist the victim or the reporter despite their jurisdiction or the longevity of the assault.³⁰² The administering of services from the point of initial contact with the victim has been found to have multiple loopholes. A newspaper article written by a local criminal lawyer and academic is of the opinion that the criminal justice system does not fully provide adequate support, particularly at the initial stage of reporting.³⁰³ After accompanying victims who had been initially turned away, this lawyer had first-hand experience of how cases are handled on the ground.³⁰⁴ Through this experience, it was revealed that, in addition to lack of awareness and training, there were patriarchal-related attitudes and misunderstandings of power.³⁰⁵ An example

²⁹⁷ Samantha Barkley 'A crisis of violence against women: Has South Africa fulfilled its obligations in terms of the Convention on Elimination of All Forms of Discrimination against Women?' (2020) 1 *Acta Juridica* 165 at 188.

²⁹⁸ Kelly Stone & Claudia Lopes 'Policing response to domestic violence: Exploring reactions by police to women in need of shelter' (2018) 20.

²⁹⁹ K Abrahams & C Levendale 'Strategic report on public hearings on the implementation of domestic violence act for portfolio committee on women, youth, children and persons with disabilities', available at <https://static.pmg.org.za/docs/2009/091118strareport.pdf>, accessed on 12 February 2021.

³⁰⁰ Rita Retief & Sulina Green 'Some challenges in policing domestic violence' (2015) 51 *Social Work/Maatskaplike Werk* 136-37.

³⁰¹ SAPS 'Reporting of Sexual Offences' available at https://www.saps.gov.za/services/report_sexual_offence.php, accessed on 20 December 2020.

³⁰² Ibid.

³⁰³ Jameelah Omar 'Violence against women: law is not the solution' *Daily Maverick* 6 September 2019.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

of a lack of knowledge from police officials has been experienced by some victims when they tried to report domestic violations at a Cape Town police station. They were turned away because they did not possess a PO. Before administering any assistance, including imminent danger, they are said to have demanded a PO.³⁰⁶ This neglect poses a major barrier to victims, whose first point of contact, as with other crimes, is the police. Some victims, because of prior neglect and ignorance, contact the police as their last resort.³⁰⁷ It is further reported that there were grievances toward certain police stations in Cape Town that had informed complainants that they can only receive assistance with a PO in place.³⁰⁸ As the DVA definition is a sum of crimes that are considered criminal offences in their own right, in this instance, the police officers failed to deal with the criminal complaint first. Thereafter, they failed to make the victim aware of their rights as prescribed in the DVA i.e. PO. This arguably contradicts other laws, which provide rights for victims to seek assistance and protection. Despite other laws, the DVA, in Section 3 states:

‘A peace officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.’³⁰⁹

This failure in practice can be linked to the lack of awareness and adequate implementation of the DVA among police officials. Should these rights be executed efficiently, the police must honour the constitutional rights of both parties involved. Another barrier was experienced related to a warrant of arrest issued with the PO. Upon reporting the domestic violation, some victims have been informed that since the warrant has expired, they were unable to do anything to the perpetrator.³¹⁰ As outlined in the previous chapter, the Act provides that the arrest warrant is cancelled after execution,³¹¹ and if the victims still require protection they need to approach the court to obtain another warrant.³¹² Based on this provision, it is the opinion of the study, that the

³⁰⁶ Jenni Evans ‘Magistrate raises alarm over police station about protection orders’ *News24* 24 August 2018, available at <https://www.news24.com/SouthAfrica/News/magistrate-raises-alarm-over-police-confusion-about-protection-orders-20180824>, accessed on 18 January 2020.

³⁰⁷ Phumeza Dlepu & Emeka E Obioha ‘Dealing with citizens’ domestic violence complaints at police station level: A survey of residents’ expectation in Mthatha, South Africa’ (2020) 33 *African Journal of Criminology & Victimology* 117; Heidi Mogstad, Dominique Dryding & Olivia Fiorotto ‘Policing the private: Social barriers to the effective policing of domestic violence’ (2016) 56 *SA Crime Quarterly* 10.

³⁰⁸ Evans op cit note 306.

³⁰⁹ Please see note 273.

³¹⁰ Evans op cit note 306.

³¹¹ Please see note 249.

³¹² Please see note 250.

victim could have been unaware of this option or met with unforeseen obstacles, regarding obtaining a new arrest warrant. In this case, the police could have informed of this option or proceeded as with Section 3 of the DVA.

In other instances, when the victim mentioned that they had a PO, the police officers were seemingly unable to distinguish between an interim and final PO. As a result, some officers claimed that they can only assist if they only had a final PO.³¹³ As observed in the previous chapter, the DVA does not explicitly state whether the interim PO is ‘the same’ in terms of enforcement. However, by virtue of it being a legal document, that is a temporary measure that has prohibitions and conditions forbidding the domestic violation toward the victim, this should have been leverage enough for them to at least be assisted. The difference the interim has with the final order is that the alleged perpetrator appears on the return date to state why the PO should ‘not be finalised’ or ‘exist at all’ during a court hearing. This is another challenge linked to the police lacking awareness of PO procedures and failing to enforce them effectively.

Further research findings through the experience of an author, state the police do not recognise domestic violence as a criminal offense. They fail to keep precise data surrounding these types of crimes and do not have specific codes that distinguish them from other offences. This results in domestic violence being inaccurately recorded or being categorised under other crimes.³¹⁴ Several domestic violation unlawful acts are recorded as ‘assault or assault with the intention to cause grievous bodily harm’.³¹⁵ As previously argued, crimes according to the domestic violence definition in the DVA, in practice are mistaken as other offences as there is not a clear benchmark that classifies it as a criminal act. This arguably contributes to the reporting system regarding domestic violence cases that are inaccurate. Therefore, this study observes that international and regional progress reports as has been previously discussed, lack information to assess or identify challenges with implementing POs, as the main legal instrument that protects against GBV. As a result, despite the lack of general DVA awareness, these underreported cases contribute to the unknown prevalence of GBV hence its severity and victim protection as a state obligation is undermined.

³¹³ Ibid.

³¹⁴ Govender op cit note 196.

³¹⁵ Mercy Machisa ‘South Africa: Domestic violence must be included in crime stats’ in Govender op cit note 196.

The DVA as aforementioned makes provisions outlining the responsibilities of SAPS members that are focused on providing effective protection for victims of domestic abuse. However, research shows that they have placed no urgency in intervening in domestic abuse incidences, coupled with expressed negative sentiments and attitudes because the violation is seen as a private matter.³¹⁶ As a result, victims are demoralized to even approach the police and some opt to withdraw cases just avoid further victimisation.³¹⁷ It is the opinion of Spies that police neglecting to assist victims, is linked to the perception that is shaped by stereotypical ideologies of not involving themselves in private affairs.³¹⁸ Therefore, traditional attitudes among police members regarding privacy in domestic disputes contribute to the deprivation of adequate victim protection.

In dire cases, where a PO was in place, however, the alleged perpetrator was contravening it by repeatedly assaulting the victim and the police.³¹⁹ In 2018, a victim had a PO in place, against her intimate partner. The perpetrator contravened the PO on several occasions in that year and the victim received no assistance from the police even though she reported this. At the beginning of the following year, the perpetrator assaulted the victim after he broke into her residence. Only then did the police respond and her partner was brought into custody and was charged with assault and attempted rape.³²⁰ In eight months, the alleged perpetrator had bail approved and was released. The case was dismissed as the investigator and the docket were unavailable in court. The victim advocated for the case to be reinstated, which was, however, dismissed again due to the missing docket. The victim was adamant to have the case reopened and reported the oversight of the previous incomplete investigation to the police and was assigned another investigator. According to the victim, even with the new investigator, she still has not received any concrete assistance. She further reported at the time, that the accused, continues to violate PO and the police still neglect to help her.³²¹ In a similar case, another victim with a PO against her ex-partner because he violated her on two occasions. He was charged,

³¹⁶ SAHRC ‘Unpacking the gaps and challenges in gender-based violence’ available at <https://www.sahrc.org.za/home/21/files/SAHRC%20GBV%20Research%20Brief%20Publication.pdf>, accessed on 29 November 2020; Christina Beninger op cit note 191 at 106.

³¹⁷ SAHRC op cit note 316 at 13.

³¹⁸ Amanda Spies op cit note 199 at 62.

³¹⁹ Shani Reddy ‘Missing dockets and incomplete investigations Western Cape GBV cases’ *Maverick Citizen* 25 November 2020.

³²⁰ *Ibid.*

³²¹ *Ibid.*

however, the case was delayed two years until it got to court. The abuser continued contravening the PO during this delayed process. She would report this to the police however she would not get any assistance.³²² The sentiments from the victim were ““No one cares about a protection order. It is basically a useless piece of paper that no one takes seriously””.³²³

This is certainly disconcerting and alarming as such unfortunate cases are questioned as to why correct procedures are not followed yet the DVA as provisioned in section 8(4)(b)³²⁴ requires the police to respond and assist victims, with the purpose of protection, however, some victims are subjected to further violence or much more futile circumstances.³²⁵ The above two cases, also indicate how reluctant and neglectful the police were despite the victims having a PO in place for a prolonged time.

Subsequently, studies show that victims who have turned to the police for assistance, in terms of reporting domestic violence or the procedures to apply for PO, have been turned or inadequately supported.³²⁶ Evidence is outlined, in the case of *Minister of Safety and Security v Venter and Others*³²⁷, where the complainants were subjected to gross human violation even after multiple times of seeking assistance from the police before the incident, and each time was either turned away or the matter was not treated with urgency. The victims, a couple, were seeking assistance for protection from the ex-husband of the woman. The perpetrator was unhappy with their relationship, was constantly calling, sending harassing, abusing text messages to the woman while threatening to kill them.³²⁸ On this occasion, her partner went to the police to seek help on how they can stop the perpetrator from coming to their home, however, was informed that he would only get assistance if the accused attempted to enter the residence.³²⁹ During the same period, both victims approached the Magistrate’s court to enquire about applying for a PO. Thereafter they were advised to open a case and acquire a case number, before proceeding with the matter.³³⁰ This study notes the neglect to inform as according to the DVA. The police could

³²² Ibid.

³²³ Ibid.

³²⁴ Please see note 274.

³²⁵ Sibanda & Msibi op cit note 4 at 14.

³²⁶ Lisa Vetten ‘Police accountability and the Domestic Violence Act 1998’ (2017) 59 *South Africa Crime Quarterly* 7 at 10.

³²⁷ *Minister of Safety and Security v Venter & Others* 2011 (2) SACR 67 (SCA).

³²⁸ Supra note 327 para 4.

³²⁹ *Venter’s case* supra note 327 para 5.

³³⁰ *Venter’s case* supra note 327 para 6.

have informed the victims of their rights according to the Act. Thereafter, the victims following another threatening incident from the perpetrator prepared a statement and sorted help from the police. In the statement, they were clear about not requiring an investigation against the perpetrator, only that they needed him to stay away from their residence. Even then the police did not assist him.³³¹ The perpetrator continued to threaten and enter their residence, with no permission and collected their children who he shared with the ex-wife. The lack of support from the police continued. Even though the perpetrator threatened to kill the children and commit suicide, if she went back to the police; the victims still proceeded with opening a case against him.³³² Nonetheless, the victims returned to the police for help who were sceptical and reluctant to help. They went to the extent of calling their lawyer to help convince the police of the urgency of the matter, for them to act. After their reluctant action, a case was opened.³³³ Thereafter, the victim called the police to follow up on the case however nothing had been done. This led up to events where the perpetrator, once again entered the victims' residence while the ex-wife was alone with their child. He assaulted and raped his ex-wife after damaging their property and threatening to kill her partner.³³⁴ The perpetrator only managed to shoot and injure his ex-wife's partner in the arm when he later arrived at the scene.³³⁵

Although the victims did not pursue the PO as advised by the court, the police's failure to adhere to its DVA duties was considered greater misconduct.³³⁶ This was reiterated as part of the court ruling, by stating that, 'it is plain that the negligence of the appellant is far greater than that of the respondents. The SAPS had clear guidelines in the Act and the Instructions which they failed to adhere to.'³³⁷

As established in the previous chapter under the responsibilities of law enforcement, SAPS members must inform victims of the rights as provisioned in the DVA.³³⁸ Additionally, they must assist enforce these rights where necessary.³³⁹ As part of the court's ruling, it was noted that:

³³¹ *Venter's case supra note 327 para 8.*

³³² *Venter's case supra note 327 para 9.*

³³³ *Venter's case supra note 327 para 10.*

³³⁴ *Venter's case supra note 327 para 12 & 13.*

³³⁵ *Venter's case supra note 327 para 16.*

³³⁶ *Venter's case supra note 327 para 33.*

³³⁷ *Venter's case supra note 327 para 34.*

³³⁸ *Venter's case supra note 327 para 18; Please see note 268-272.*

³³⁹ Please see note 268-272.

‘The extensive protection available under the Act would be meaningless if those responsible for enforcing it, namely SAPS members, fail to render the assistance required of them under the Act and the Instructions. The legislature clearly identified the need for a bold, new strategy to meet the rampant threat of ever increasing incidences of domestic violence. Its efforts would come to nought if the police, as first point of contact in giving effect to these rights and remedies, remain distant and aloof to them, as the facts of this case appear to suggest’.³⁴⁰

The suggests that legislation is dysfunctional and is met by unreliable and negligent police officials. More evidence, portraying police negligence, is in the case of *Minister of Safety and Security & Others v W*.³⁴¹ The victim in possession of a PO and later an arrest warrant, contacted the police when the perpetrator, her husband, was in their place of residence, which was a breach of the conditions in the interdict.³⁴² According to the victim, she had suffered prolonged abuse, in the form of rape from the perpetrator, to the extent that she even had ‘re-issued, ..., by getting it re-stamped about three weeks before...’.³⁴³ She further detailed she showed them the arrest warrant and PO and they proceeded to enter the house with her to interact with the perpetrator. After the encounter, only the perpetrator’s side of the matter was acknowledged. Thereafter, the police left the residence without removing the perpetrator or taking her to a place of safety, with the promise that they would return.³⁴⁴ Without fulfilling their promise to return, following these events, she was raped by the perpetrator.³⁴⁵ In the court appeal, the police, however, mentioned that they were not shown the PO and arrest warrant. They claimed that when they arrived at the residence, the victim informed them that they had settled their dispute with the perpetrator however she wanted to leave the premises.³⁴⁶ After which, both parties had agreed that their differences were completely settled, the police left and gave the victim contact details should it render necessary.³⁴⁷ The trial judge had to consider these two contradictory versions of the events that transpired. The consideration toward the final ruling was based on evaluating the oral evidence of both parties, taking into account the weaknesses of each party's witnesses.³⁴⁸ For which the ruling considered the victim’s (who was the respondent in the appeal) version of

³⁴⁰ *Venter*’s case supra note 327 para 27.

³⁴¹ *Minister of Safety and Security & Others v W* 2009 (4) SA 213 (E).

³⁴² Supra note 341 para 4.

³⁴³ Ibid.

³⁴⁴ *W*’s case supra note 341 para 5.

³⁴⁵ *W*’s case supra note 341 para 2.

³⁴⁶ *W*’s case supra note 341 para 6.

³⁴⁷ Ibid.

³⁴⁸ *W*’s case supra note 341 para 10.

events to be more credible than the appellant's (SAPS).³⁴⁹ The court substantiated this by also stating, that,

‘1/c the appellants’ argument fails on the facts. It goes without saying that if the police had arrested him on the Saturday afternoon, and if he had been kept in custody thereafter, he could not possibly have raped the respondent on the Tuesday night.’³⁵⁰

In the final ruling the judge, it was stated the rape would have not transpired if they had followed procedure, by acknowledging the PO as required in the DVA. To that effect, the appeal was dismissed.³⁵¹ Incidences like these expose police negligence and consequently factor into the domestic violence rising statistics in South Africa.

In contrast, it is also vital to acknowledge that not all domestic violence incidents fail to render protection or suffer negligence in the hands of police officers when a PO with conditions and provisions is present. In *Khanyile v The Minister of Safety and Security & Another*³⁵², a police officer was presented with an arrest warrant by a victim who reported that the perpetrator had violated them and breached the conditions of the PO they had in place.³⁵³ This arrest warrant was not accompanied by an affidavit or copy of the interim PO, however, the police officer proceeded to pursue the perpetrator and arrest him.³⁵⁴ This case was brought before the court by the perpetrator, to contest unlawful arrest. He argued that no statement was made by the victim before the arrest and the warrant was presented without the relevant annexures.³⁵⁵ The arrest was initiated according to the provision in section 8(1)(a) of the DVA.³⁵⁶ To the officer's defence, he acted swiftly, as per the details in the warrant, and mentioned that he had reason to believe that the victim was in danger.³⁵⁷ Moreover, he mentioned that he would prefer to deal with the administration after assisting the victim, as he was aware that there was a concern that police officers prolong the process to act, as a result, victims suffer abuse.³⁵⁸ His defence is backed by s

³⁴⁹ Ibid.

³⁵⁰ W's case supra note 341 para 16.

³⁵¹ W's case supra note 341 para 17; para 18.

³⁵² *Khanyile v The Minister of Safety and Security & Another* 2012 (2) SACR 238 (KZD).

³⁵³ Supra note 352 para 9.

³⁵⁴ Ibid.

³⁵⁵ *Khanyile's* case supra note 352 para 2.

³⁵⁶ Domestic Violence Act s 8 (1)(a).

³⁵⁷ *Khanyile's* case supra note 352 para 18.

³⁵⁸ *Khanyile's* case supra note 352 para 19.

8 (4)(b)³⁵⁹ and s 8 (5)³⁶⁰ however contravenes s 8(4)(a)³⁶¹ of the DVA (please refer to the previous chapter).

This study commends the SAPS member for treating the matter with utmost urgency and his testimony backs this up by placing victims in the forefront, as police are reprimanded for not responding effectively. Furthermore, the court validated his statement by concurring with the reasoning behind his actions. The court further reiterated that despite having a PO many victims are subjected to domestic violence acts and this is linked to the reluctant response from the police.³⁶² In the opinion of this study, that a prompt and urgent response should be a standard measure for victims seeking protection against domestic violence. In contrast, the study does acknowledge that the alleged perpetrator's rights were infringed according to Section 12 of the Constitution. Additionally, the SAPS member failing to follow procedure with the arrest warrant and the additional documentation needed at the time, suggests a lack of training among police officials on the DVA. The court ruling highlighted this by stating:

‘It is of great concern that despite the lapse of time since the promulgation of the Act in December 1999, the police officers who are tasked with the implementation of the significant and drastic penal provision of the Act viz warrants of arrest, have not received training in the execution of warrants issued in terms of the Act.’

Another example of lack of training is revealed in the case of *Lebaka v The Minister of Safety and Security & Another*³⁶³ where the alleged perpetrator was arrested for breaching a PO against them.³⁶⁴ Before arresting the perpetrator, they found him sleeping in the residence where he was prohibited from entering according to the PO prohibitions and conditions.³⁶⁵ The police stated to have placed an arrest without a warrant provided and authorised in sections 3 of the DVA and section 40(1)(a), 40(1)(b), and 40(1)(q) of the Criminal Procedure Act.³⁶⁶ As he was found sleeping, the arrest was done according to the provisions in the Acts, claiming the alleged perpetrator as having committed an offence dismissed. The police were unable to justify the

³⁵⁹ Domestic Violence Act s 8 (4)(b).

³⁶⁰ s 8 (5).

³⁶¹ s 8 (4)(a).

³⁶² *Khanyile's* case supra note 352 para 37.

³⁶³ *Lebaka v The Minister of Safety and Security & Another* [2008] ZAECHC 18.

³⁶⁴ Supra note 363 para 3.

³⁶⁵ Ibid.

³⁶⁶ Domestic Violence Act s 3; Criminal Procedure Act 51 of 1977 s40 40(1)(a), 40(1)(b) and 40(1)(q); *Lebaka's* case supra note 363 para 8.

arrest.³⁶⁷ In addition, the alleged perpetrator, also informed that he was unaware of the interim PO, as it was not served to him.³⁶⁸ As stated in the ruling, the alleged perpetrator was unaware of the PO, therefore, could have not breaching it. This is justified by the DVA in section 5(6), which deems the PO unenforceable and to have no effect until served to the respondent.³⁶⁹ Thus far, it is noted that there is a lack of procedure from the SAPS members regarding non-adherence to the DVA.

It is critical that all procedural systems and processes work in unison regarding the PO and enacting the provisions that are in the DVA. These cases above and those not mentioned and go unreported, clearly show that there is a lack of awareness and education of POs despite that there is a clear provision in the DVA. This responsibility does not only lie on the police officials, however, equally on administrative and prosecution authority.

(ii) The Magistrate court

A major component of the PO application process is the court, where victims often rely on to get protection against domestic violence. As aforementioned, it has been found that the courts contribute to the difficulties around the PO process and lack of victim protection. It is the opinion of some Magistrate courts that the DVA is burdensome. Domestic violence cases are not the only key function of Magistrate courts, and this is coupled with experiencing high caseloads and overcrowded courts.³⁷⁰ They express that it becomes challenging to make certain that the application PO processes operate effectively as there is a lack of required resources to execute as the DVA has provided.³⁷¹ Further evidence shows that even though these are legitimate concerns from the Magistrates' court's point of view, there are perspectives from victims.

Systematic issues related to incompetence from the court, have contributed to victims not finalising the PO process. Findings in a study revealed that the issuance of POs were not done promptly if at all, despite the victim's emergency circumstance or their effort to try to obtain them.³⁷² According to some applicants in the same study, after submitting forms, they would

³⁶⁷ *Lebaka's case supra note 363 para 17.*

³⁶⁸ *Lebaka's case supra note 363 para 5.*

³⁶⁹ Domestic Violence Act s 5 (6); *Lebaka's case supra note 363 para 14.*

³⁷⁰ Lillian Artz 'Better safe than sorry: Magistrate's views on the Domestic Violence Act' in Neo Morei 'Domestic violence in South Africa: Women and children under siege' (2014) 5 *Mediterranean Journal of Social Sciences* 937.

³⁷¹ *Ibid.*

³⁷² Lillian Artz 'Fear or Failure: Why victims of domestic violence retract from the criminal justice process' (2011) 37 *SA Crime Quarterly* 8.

make several follow-up requests through phone calls and visits to the courts. However, some found that applications that their cases were simply ‘struck from court roll’.³⁷³ Some core examples include the PO never being served, followed by applicants not trusting the system, then by the respondent not complying or escaping from the police, or applicants not obtaining a PO copy from the court and never receiving information to return to court for the hearing.³⁷⁴

This includes parliamentary report reviews and investigations done that found that the courts have contributed to the failure of the PO effective enforcement.³⁷⁵ The findings projected how applicants are subjected to secondary victimisation³⁷⁶ through a lack of confidential report structures for complainants. Victims are also subjected to prolonged redundant delays to obtain a PO as the court staff had complex unstipulated operating hours, hence their unavailability.³⁷⁷ In some courts, the personnel lacks training, staff-shortage, complicated court processes for victims.³⁷⁸ Luwaya and Omar reiterate this by stating that the victims experience insufficient organisational support due to the shortcomings by not only police to adequately investigate sexual violation cases, however, also by the National Prosecuting Authority's decisions to prioritising cases that are likely to lead to a conviction, which in turn deprives victims of their right to services toward legal protection.³⁷⁹

In section 4 of the DVA, the clerk of the courts are obliged to inform the victims of the provisions in the Act regarding protection.³⁸⁰ As research has found, this duty is often not executed by clerks as victims were provided with insufficient information on the processes of PO

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Lisa Vetten, Teresa Le, Alexandra Leisegang et al ‘The right & the real: A shadow report analysing selected government departments’ implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act’, available at <https://shukumisa.org.za/wp-content/uploads/2017/09/The-Right-and-The-Real.pdf>, accessed on 04 December 2020.

³⁷⁶ ‘Secondary victimization has been defined as negative social or societal reaction in consequence of the primary victimization and is experienced as further violation of legitimate rights or entitlements by the victim’, Leo Montada ‘Injustice in harm and loss’ in Uli Orth ‘Secondary victimization of crime victims by criminal proceedings’ 15 (2002) *Social Justice Research* 313 at 314; Nolundi Luwaya & Jameelah Omar ‘Working against violence against women: How far we have come?’ (2020) 1 *Acta Juridica* 11.

³⁷⁷ Vetten et al op cit note 375 at 2.

³⁷⁸ Ibid; Jenni Evans op cit note 333; The Centre for the Study of Violence and Reconciliation ‘Gender-based violence (GBV) in South Africa: A brief review’, available at <http://www.csvr.org.za/pdf/Gender%20Based%20Violence%20in%20South%20Africa%20-%20A%20Brief%20Review.pdf>, accessed on 22 December 2020.

³⁷⁹ Luwaya & Omar op cit note 376.

³⁸⁰ Domestic Violence Act s 4(2).

application.³⁸¹ This negatively impacts the victims' rights in the DVA and moreover compromises their protection from further violation. Out of the nine courts that were part of these research findings, two courts did not instruct the applicants that the interim PO was to be taken to the police, to be served to the respondent, or were they informed how the respondent would be made aware of the order against them.³⁸² This raises the question that in s 5 (3)(a)³⁸³ and 5(3)(b)³⁸⁴ of the DVA as it does not explicitly state who should serve the respondent with the interim PO. However, in s 5 (4), it is assumed to be the duty of the clerk of court as they are directed by the court to issue certified copies of the PO application and the supporting affidavits.³⁸⁵ Furthermore, this is further reiterated in s 6 (5) that the clerk must cause the order to serve the alleged perpetrator, including the complainant (certified copies and arrest warrant).³⁸⁶ In s 6 (6), the clerk must send these certified copies to the police station of the victim's preference.³⁸⁷ Section 13 (1) clearly states that the 'service of any document in terms of the Act must forthwith be effected in the prescribed manner by the clerk of the court, the sheriff or peace officer,...'.³⁸⁸

In this regard, it is the opinion of this study that the findings in the research have found that the clerks of the courts are contradicting what is laid out in the DVA as part of their obligations. They have to cause POs and supporting documents to be handed over to the applicant, the police, and thereafter served to the alleged perpetrator. If the courts are requiring applicants to serve respondents (in cases where information is omitted on who should serve the perpetrator) with these POs, as in *Lebaka's* case, who was unaware of a PO against him; this runs the great risk of retaliation from the perpetrator toward the victim resulting in a further violation. Also, with the inadequate information that some of these courts provide, victims are not guaranteed protection, particularly if the significant procedures to serve the perpetrators with interim or final POs, are excluded. Similarly, if they are requiring victims to take these copies to

³⁸¹ Claudia Lopes, Dianne Massawe & Mpiwa Mangwiro 'Criminal justice responses to domestic violence: Assessing the implementation of the domestic violence act in Gauteng', available at <https://za.boell.org/sites/default/files/uploads/2013/10/criminaljusticeresponses-assessingimplementationofdvaingauteng.pdf>, accessed on 04 December 2020.

³⁸² *Ibid* at 57.

³⁸³ Domestic Violence Act s 5(3)(a).

³⁸⁴ s 5(3)(b).

³⁸⁵ s 5(4).

³⁸⁶ s 6(5).

³⁸⁷ Domestic Violence Act s 6(6).

³⁸⁸ s 13(1).

the police, who in the previous section as identified, seem to lack information on the PO processes of the DVA, there is a lack of assurance that the respondent will be served in the prescribed manner.

Further evidence experienced by victims in the Western Cape shows courts that delayed issuing a PO to a victim who had been violated twice before. The court only issued the PO in five days.³⁸⁹ Before the two incidents, the victim had contacted the police, where she was assisted by laying a harassment charge and on the second encounter was denied help as she was informed that she needed a PO.³⁹⁰ The legal counsel on the case had been requested by a safe house to assist the victim to help obtain a PO as she had been turned away by the Magistrate's court. After arranging that the woman lives with a relative while helping her obtain a PO, she was at risk at the perpetrator was aware of her whereabouts.³⁹¹ The legal counsel stated that there were no after-hours contact details for this Cape Town court hence proceeded with the application urgently through the High Court. This process took five days until the PO was finally obtained.³⁹² This victim is one of many, who have been subjected to this disservice from the criminal justice system. As aforementioned they eventually obtained assistance, through the organisations that are aware of channels to swiftly access. This is concerning for victims who have no access or are unaware of these services. Moreover, as this should be a direct standard service to the victim, this can be perceived as a 'special service' only awarded to those affiliated with organisations.

Lopes and Massawe found that some courts fail to inform the applicants that the application receipt to a final PO does not guarantee a final hearing and neither are they informed that when an alleged perpetrator breaches a PO, they are liable for arrest.³⁹³ As aforementioned, some victims are faced with secondary victimisation. This research has also found that in some courts in Gauteng, applicants were treated with disrespect by being shouted at. In two other courts, the personnel were peevish, impolite, and were addressed in an unfriendly hostile manner during the application process.³⁹⁴ Regarding unsuccessful PO applications, some victims were not advised on the reason for the decline. Declined applications, means that the victim is

³⁸⁹ Steve Kretzmann 'Women in danger let down by courts' *Daily Maverick* 26 June 2020.

³⁹⁰ Ibid.

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Lopes, Massawe & Mangwiro op cit note 381 at 57.

³⁹⁴ Ibid.

deprived of protection (in cases where it is crucial), and providing no information may mean that they are possibly out of options of where to seek relief.³⁹⁵

This manner of service provision leads victims to lose trust and even avoid reporting domestic violence if they risk further ill-treatment from where they seek protection. The two major enforcement components in the DVA, as established are the Magistrate courts (including the personnel i.e., clerk of the court) and the SAPS members. As evidence has shown, it is either they work in disharmony or within their sectors inefficient, and insufficient services are provided to victims of GBV. These legal enforcers must work to the best of their ability to help eradicate the ongoing issue of GBV in South Africa. However, as this study has found, they are a contributory factor to this epidemic. The PO is a well-functioning legal mechanism that promises victim safety and protection. However, in practice, it has failed to fulfil its objective and South Africa has thus, therefore, been unsuccessful with fully complying with its lawfully binding commitment. For POs to work effectively to their full capacity to protect victims, these obligations in the DVA need to be implemented and adhered to by each responsible component.

The next chapter provides recommendations to each sector, toward the goal of providing adequate and substantial protection for victims against GBV.

³⁹⁵ Ibid.

Chapter 5

I. CONCLUSION AND RECOMMENDATIONS

The ongoing battle of GBV, as a gross human violation in South Africa, has claimed many women's lives in the past few years. As a nation that has commendable legislation in terms of human rights framework, it is challenged by the staggering numbers that have weakened its society. Women no longer feel safe in public places of service, as the perpetrator is often revealed as the local supermarket attendant, the neighbourhood bus driver, or the pastor at the local church. The same perpetrator is most likely the commonly known – intimate partner – at home. For victims to feel safe in a hostile community, it is human instinct to seek protection against the offender. South Africa has formulated a legal protection mechanism for victims of domestic violence through its DVA. This Act forms part of South Africa's promise to adhere to commitments, obligations, and recommendations as provided in the international, regional human rights framework and its Constitution. The main legal tool is the PO as provided, which serves to protect victims from further violation. The DVA caters to people who are in a domestic relationship and as research shows, most domestic violence incidences occur in the household.

The guidelines in the international and regional human rights framework have required member states to protect victims, significantly women, against GBV. In order, for member states to stay accountable to these adherences some of the legal framework Committees have required progress reports. This study has noted that South Africa has provided these however, information regarding the PO procedures, challenges, and achievements is limited or omitted. As this study has analysed, the DVA grants victims' provisions that ultimately assure protection. This achievement is assured through the effective enforcement of its provisions by designated stakeholders in the DVA. Generally, this study finds that the DVA has adequate measures to assure victim protection against domestic violence and South Africa has managed to comply with its promise of formulating relevant legislation to eradicate GBV. However, as this dissertation has argued, and further reiterates, South Africa has failed to fully comply with its commitment to international and regional human rights framework and the Constitution. This is due to the dire shortcomings related to the implementation and enforcement of the DVA's main legal instrument, the PO, and its procedures as provided in the Act.

The main contributors to these shortcomings and challenges are the law enforcement and prosecuting authorities. As the study reveals, often the police authorities are ill-trained, neglectful, and lack empathy toward victims of domestic violence. The study was focused on the PO and the cases have shown that even possessing a legal instrument accompanied by an arrest warrant, does not guarantee protection or the least assistance from further violation. Traditional attitudes coupled with the stereotypical judgement that resulted in secondary victimisation have also contributed to the lack of adherence to the Act. Clear responsibilities have been set out in the DVA for police to adhere to, however, these are often misunderstood or ignored when handling domestic violence incidences. Some police officers are simply unaware of the DVA procedures. As the main public go-to protectors, this is concerning as most victims seek guidance and safety from them as their first point of contact. The standard duty to inform is overlooked which results in victims being exposed to further violence or severe futile danger in the hands of the perpetrator.

Therefore, it is the recommendation of this study for the police:

- To improve their knowledge on the DVA through thorough and regular training/workshops which are facilitated through standardised, relevant, and simple material i.e., culturally sensitive, gender-neutral, language diverse inclusive.
- To easily access information/procedures on domestic violence i.e. DVA queries especially when in doubt and/or needing clarification. This can be implemented through forms of simple language and diversely translated instruction documents, leaflets, regular internal newsletter/training.
- To conduct domestic violence case police assessment reports that identify challenges and knowledge gaps.
- To ensure that Domestic Violence Registers are kept up to date and detail domestic violence crimes specifically. The register should also include information on POs.

The third chapter of this study further outlines the police responsibilities when a victim reports an incident related to a domestic violation to the police. It is the opinion of this study that it provides a generic approach in assisting the victim in terms of the DVA provisions. A best practice approach can be adopted from the domestic violence legislation of a fellow sub-Saharan country, Mauritius.³⁹⁶ Amongst other actions, the Act mandates the police officer to provide the victim with

³⁹⁶ Protection from Domestic Violence Act 6 of 1997.

an explanation on their rights to protection against domestic violence; assist the victim to apply for a complaint against the violation; with the victim's consent file a PO on their behalf.³⁹⁷ These provisions, in comparison to that of the DVA, assure the victim's safety from the initial contact with the police and it is the view of this study, that the police are therefore required to be substantially informed regarding the Act's processes.

This study further finds that the courts have also contributed to the ineffectiveness of the implementation of POs. As has been highlighted that the courts have a vital role in the PO application process. The outcome of the procedures as provided in the Act is determined by the Magistrate court. However, the challenges of accomplishing the goal toward effective victim protection include the court's competency. This study has found that the applicants were subjected to extended waiting periods for service or the outcome of the POs. Clerks of the courts failed to inform applicants of the necessary information after the PO application. Victims were subjected to a lack of privacy during the application process (secondary victimisation) and some court staff lacked training and were under-resourced. Some court's operating hours were unclear which led to constant unavailability and they were generally understaffed.

Therefore, the study recommends the following:

- Uniformity in operating hours and improved court service in terms of staff availability and occupancy.
- A revisitation of training/workshops on the DVA including their roles and duties. Ensuring periodical monitoring and assessment.
- Formulate a court procedural system that informs applicants of unforeseen delays, the status of an application, or relevant information for the PO procedures. The study recommends, an SMS or Email system that updates applicants as required.
- Incorporate partnerships with GBV victim protection units, domestic violence service centres, and public organisations that can assist with educating victims on the PO process. For instance, social workers could assist with the PO process, by liaising or accompanying them to Magistrate courts.
- Establish a survey platform where applicants could rate and give feedback on the assistance rendered at the Magistrate court.

³⁹⁷ s 11 (3)(a);(e);(4).

- Implement and/or improve awareness and educational forums, campaigns, and materials to inform the general public on their rights through the PO process in the DVA. These initiatives are recommended to be gender-neutral, multi-lingual, and culturally sensitive.
- In light of the current COVID-19 regulations, the Magistrate courts and/or urgent cases, such as the interim PO, could implement an online support system e.g. SMS call-back service, telephonic/online application; Skype, Zoom, etc. This would potentially cater to individuals who need to commute, need after-hour support, or are observing social-distancing regulations, etc, or as a convenience service.

Further best practices can be adopted from the domestic violence legislation of Zimbabwe and Namibia, regarding the duties of the clerk of the court.³⁹⁸ For instance in both countries similarly to South Africa, the clerk of the court must outline the provisions available.³⁹⁹ Namibia is further mandated to assist with the application whereas, in South Africa, the requirement only arises when the victim is not represented by legal counsel.⁴⁰⁰ In Namibia and Zimbabwe, the clerks are further required to submit the applications as quickly as reasonably possible,⁴⁰¹ Zimbabwe further details on the submission to be implemented within 48 hours.⁴⁰² This study recommends these best practices from Namibia and Zimbabwe as a standard, as the clerks of the courts are more likely to be well informed of the significant requirements of the PO process, as opposed to a legal representative. Furthermore, the urgency of the application submission, renders a prompt response to the protection of the victim, specifically in urgent matters. A further recommendation for the Act would be for the DVA to make a clearer provision regarding the serving of the PO. As depicted previously, the Act seems to place responsibility on the clerk of the court however, in practice it seems some courts are placing the ‘burden’ on the victims, yet to a certain extent, the police could be involved in this serving. Zimbabwe makes it explicitly clear in their Act that any police officer serves the interim PO accompanied with an arrest warrant; and the finalised PO, that should be served no later than 48 hours of it being granted.⁴⁰³

This study also generally recommends as guided by the human rights framework:

³⁹⁸ Domestic Violence Act [Chapter 5:16] Act 14 of 2006; Combating of Domestic Violence Act 4 of 2003.

³⁹⁹ Domestic Violence Act [Chapter 5:16] s 7 (4); Combating of Domestic Violence Act s 6 (4).

⁴⁰⁰ Combating of Domestic Violence Act s 6 (4).

⁴⁰¹ s 6 (6); Domestic Violence Act [Chapter 5:16] s 7 (5).

⁴⁰² Domestic Violence Act [Chapter 5:16] s 7 (5).

⁴⁰³ s 9 (6); s 10 (5).

- “[P]roviding appropriate and accessible protection mechanisms to prevent further or potential violence, without the precondition for victims/survivors to initiate legal actions, ... This should include immediate risk assessment and protection, comprising a wide range of effective measures and, where appropriate, the issuance and monitoring of eviction, protection, restraining or emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance. Protection measures should avoid imposing an undue financial, bureaucratic or personal burden on women victims/survivors”⁴⁰⁴
- Ensure that women victims of GBV’s access to every legal procedure, protection service, and safety support structure respects and enhances their autonomy.⁴⁰⁵
 - ‘[E]nsuring accessible, effective and responsive police, prosecutorial, health, social welfare and other services, and establishing specialised units to redress cases of violence against women’⁴⁰⁶
 - ‘[P]roviding accessible, affordable and specialised legal services, including legal aid, to ensure the just and speedy resolution of matters regarding violence against women’⁴⁰⁷

In conclusion, as the goal of this study aimed to provide informed change intervention strategies to better implement and enforce POs. It is hoped that these study recommendations and the findings positively influence the process change toward the eradication of GBV in South Africa.

⁴⁰⁴ General Recommendation No. 35 op cit note 124 para 40(b).

⁴⁰⁵ General Recommendation No. 35 Ibid op cit note 124 para 41.

⁴⁰⁶ SADC Addendum op cit note 142 para 17.

⁴⁰⁷ SADC Addendum op cit note 142 para 18.

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